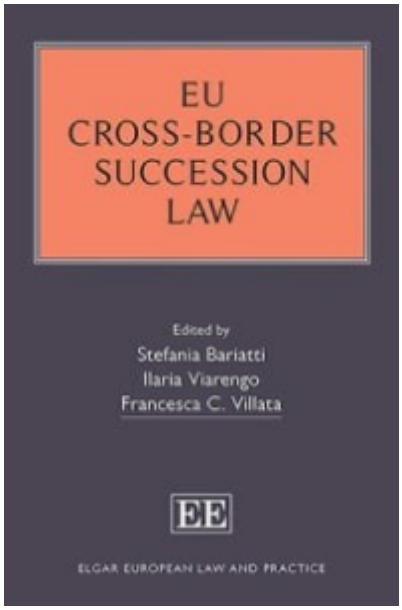
Just released: ‘EU Cross-Border Succession Law’ (Bariatti, Viarengo and Villata, eds)



EU Cross-Border Succession Law, edited by Stefania Bariatti, Ilaria Viarengo and Francesca C. Villata, was just released. Providing a comprehensive and dedicated analysis of the EU law on cross-border successions and benefitting from the insight of internationally renowned scholars, this volume is a welcome addition to the already thriving ‘Elgar European Law and Practice series’.

The abstract reads as follows:

With cross-border successions becoming increasingly common in the context of the European Union, this timely volume offers a systematic practical analysis of how cross-border successions should be treated, including an examination of which courts may establish jurisdiction over succession disputes and which law governs such disputes. Studying cross-border successions in the context of estate planning and in the opening and liquidation of a succession, the volume examines the specificities of the European Certificate of Succession, contextualising it within its interface with the national laws and practices of EU Member States.

Key Features:

- Practical analysis of the provisions of the EU Succession Regulation
- Consideration of issues at the intersection between cross-border successions and taxation
- Analysis of the specificities of the European Certificate of Succession and its interface with national laws
- Study of cross-border successions in the context of both estate planning

and the opening and liquidation of a succession
- Contextualization of the EU Succession Regulation in the framework of the national law and practice of several EU Member States

A comprehensive study of EU cross-border succession law with global reach, this volume is an invaluable source of reference and guidance for practitioners specialising in estate planning, family law and property law, including judges, notaries, tax specialists and lawyers. Scholars of European succession law and conflict of laws will also find this volume's critical analysis an instrumental tool in their research.

EU Cross-Border Succession Law, Stefania Bariatti, Ilaria Viarengo and Francesca C. Villata (eds), Elgar European Law and Practice series (2022) 576 pp.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2022: 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/)

P. Hay: **On the Road to a Third American Restatement of Conflicts Law**

American private international law (Conflict of Laws, "Conflicts Law") addresses procedure (jurisdiction of courts, recognition of judgments) as well as the choice of the applicable law. The last of these has been a mystery to many scholars and practitioners – indeed, even in the United States. Since 2014 the American Law Institute now seeks to draft a new "Restatement" – the Third – of the subject, with

the aim to clarify and perhaps to bring more uniformity to the resolution of conflict-of-laws problems. The following comments first recall the role of restatements in American law. The second part provides some historical background (and an assessment of the current state of American conflicts law, as it relates to choice of law) in light of the Second Restatement, which was promulgated in 1971. The third part addresses the changes in methodology adopted and some of the rules so far proposed by the drafters of the future new Restatement. Examples drawn from existing drafts of new provisions may serve to venture some evaluation of these proposed changes. In all of this, it is important to bear in mind that much work still lies ahead: it took 19 years (1952–1971) to complete the Second Restatement.

L. Hübner: **Climate change litigation at the interface of private and public law – the foreign permit**

The article deals with the interplay of private international law, substantive law, and public law in the realm of international environmental liability. It focuses on the question, whether the present dogmatic solution for the cognizance of foreign permits in "resident scenarios" can be extended to climate change scenarios. Since there exists significant doubts as to the transferability of this concept, the article considers potential solutions under European and public international law.

C. Kohler: **Recognition of status and free movement of persons in the EU**

In Case C-490/20, V.M.A., the ECJ obliged Bulgaria to recognise the Spanish birth certificate of a child in which two female EU citizens, married to each other, were named as the child's parents, as far as the implementation of the free movement of persons under EU law was concerned, but left the determination of the family law effects of the certificate to Bulgarian law. However, the judgment extends the effects of the recognition to all rights founded in Union law, including in particular the right of the mobile Union citizen to lead a "normal family life" after returning to his or her country of origin. This gives the ECJ the leverage to place further effects of recognition in public law and private law under the protection of the primary and fundamental rights guarantees of EU law without regard to the law applicable under the conflict rules of the host Member State. The author

analyses these statements of the judgment in the light of European and international developments, which show an advance of the recognition method over the traditional method of referral to foreign law in private international law.

W. Hau: **Interim relief against contracting authorities: classification as a civil and commercial matter, coordination of parallel proceedings and procedural autonomy of the Member States**

After a Polish authority awarded the contract for the construction of a road to two Italian companies, a dispute arose between the contracting parties and eventually the contractors applied for provisional measures in both Poland and Bulgaria. Against this background, the ECJ, on a referral from the Bulgarian Supreme Court of Cassation, had to deal with the classification of the proceedings as a civil and commercial matter and the coordination of parallel interim relief proceedings in different Member States. The case also gave the ECJ reason to address some interesting aspects of international jurisdiction under Article 35 of the Brussels Ibis Regulation and the relationship between this provision and the procedural laws of the Member States.

M. Thon: **Jurisdiction Clauses in General Terms and Conditions and in Case of Assignment**

Choice of court agreements are one of the most important instruments of international civil procedure law. They are intended to render legal disputes plannable and predictable. The decision under discussion comes into conflict with these objectives. In DelayFix, the CJEU had to deal with the question of whether (1.) Art. 25 of the Brussels Ibis Regulation is to be interpreted as precluding a review of unfairness of jurisdiction clauses in accordance with Directive 93/13/EEC and whether (2.) an assignee as a third party is bound by a jurisdiction clause agreed by the original contracting parties. The first question is in considerable tension between consumer protection and the unification purpose of the Brussels Ibis Regulation considering that the Member States may adopt stricter rules. For the latter question, the CJEU makes it a prerequisite that the assignee is the successor to all the initial contracting party’s rights and obligations, which regularly occurs in the case of a transfer of contract, but not an

assignment. In this respect, too, the CJEU's decision must be critically appraised.

C.F. Nordmeier: International jurisdiction and foreign law in legal aid proceedings – enforcement counterclaims, section 293 German Code of Civil Procedure and the approval requirements of section 114 (1) German Code of Civil Procedure

The granting of legal aid in cases with cross-border implications can raise particular questions. The present article illustrates this with a maintenance law decision by the Civil Higher Regional Court of Saarbrücken. With regard to international jurisdiction, a distinction must be made between an enforcement counterclaim and a title counterclaim. The suspension of legal aid proceedings analogous to section 148 of the German Code of Civil Procedure with pending preliminary ruling proceedings before the European Court of Justice in a parallel case is possible. When investigating foreign law in accordance with section 293 of the German Code of Civil Procedure, the court may not limit itself to "pre-ascertaining" foreign law in legal aid proceedings. In principle, the party seeking legal aid is not obliged to provide information on the content of foreign law. If the desired decision needs to be enforced abroad and if this is not possible prospectively, the prosecution can be malicious. Regardless of their specific provenance, conflict-of-law rules under German law are not to be treated differently from domestic norms in legal aid proceedings.

R.A. Schütze: Security for costs under the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America

The judgment of the Regional Court of Appeal Munich deals with the application of the German-American Treaty of Friendship, Commerce and Navigation as regards the obligation to provide security of costs in German civil procedure, especially the question whether a branch of plaintiff in Germany reliefs him from his obligation under section 110 German Code of Civil Procedure. The Court has based its judgment exclusively on article VI of the Treaty and section 6 and 7 of the protocol to it and comes to the conclusion that any branch of an American plaintiff in Germany reliefs him from the obligation to put security of costs.

Unfortunately, the interpretation of the term “branch” by the Court is not convincing.

The court has not taken into regard the ratio of section 110 German Code of Civil Procedure. The right approach would have been to distinguish whether the plaintiff demands in the German procedure claims stemming from an activity of the branch or from an activity of the main establishment.

P. Mankowski: **Whom has the appeal under Art. 49 (2) Brussels Ibis Regulation to be (formally) lodged with in Germany?**

Published appeal decisions in proceedings for the refusal of enforcement are a rare breed. Like almost anything in enforcement they have to strike a fine balance between formalism and pragmatism. In some respects, they necessarily reflect a co-operative relationship between the European and the national legislators. In detail there might still be tensions between those two layers. Such a technical issue as lodging the appeal to the correct addressee might put them to the test. It touches upon the delicate subject of the Member States’ procedural autonomy and its limits.

K. Beißel/B. Heiderhoff: **The closer connection under Article 5 of the Hague Protocol 2007**

According to Article 5 of the Hague Protocol 2007 a spouse may object to the application of the law of the creditor’s habitual residence (Article 3 of the Protocol) if the law of another state has a “closer connection” with the marriage. The Local Court of Flensburg had to decide whether there was a “closer connection” to the law of the state, in which the spouses had lived together for five years in the beginning of their marriage. The criteria which constitute a “closer connection” in the sense of Article 5 of the Protocol have received comparatively little discussion to date. However, for maintenance obligations, the circumstances at the end of marriage are decisive in order to ascertain the claim. Therefore, they should also have the greatest weight when determining the closest connection. This has not been taken into account by the Local Court of Flensburg, which applied the law of the former common habitual residence, the

law of the United Arab Emirates (UAE).

The authors also take a critical stance towards the Court's assessment of public policy under Article 13 of the Protocol. As the law of the UAE does not provide for any maintenance obligations of the wife (as opposed to maintenance obligations of the husband), the Court should not have denied a violation.

M. Lieberknecht: **Transatlantic tug-of-war – The EU Blocking Statute's prohibition to comply with US economic sanctions and its implications for the termination of contracts**

In a recent preliminary ruling, the European Court of Justice has fleshed out the content and the limitations of the EU's Blocking Statute prohibiting European companies from complying with certain U.S. economic sanctions with extraterritorial reach. The Court holds that this prohibition applies irrespective of whether an EU entity is subject to a specific order by U.S. authorities or merely practices anticipatory compliance. Moreover, the ruling clarifies that a termination of contract – including an ordinary termination without cause – infringes the prohibition if the terminating party's intention is to comply with listed U.S. sanctions. As a result, such declarations may be void under the applicable substantive law. However, the Court also notes that civil courts must balance the Blocking Statute's indirect effects on contractual relationships with the affected parties' rights under the European Charter of Fundamental Rights.

E. Piovesani: **The Falcone case: Conflict of laws issues on the right to a name and post-mortem personality rights**

By the commented decision, the LG Frankfurt dismissed the action of two Italian claimants, namely the sister of the anti-mafia judge Falcone and the Falcone Foundation, for protection of their right to a name and the said judge's postmortem personality right against the owner of a pizzeria in Frankfurt. The decision can be criticized on the grounds that the LG did not apply Italian law to single legal issues according to the relevant conflict of laws rules. The application of Italian law to such legal issues could possibly have led to a different result than that reached by the court.

M. Reimann: **Jurisdiction in Product Liability Litigation: The US Supreme Court Finally Turns Against Corporate Defendants, Ford Motor Co. v. Montana Eighth Judicial District Court / Ford Motor Company v. Bandemer (2021)**

In March of 2021, the US Supreme Court handed down yet another important decision on personal jurisdiction, once again in a transboundary product liability context. In the companion cases of Ford Motor Co. v. Eighth Montana District Court and Ford Motor Co. v. Bandemer, the Court subjected Ford to jurisdiction in states in which consumers had suffered accidents (allegedly due to a defect in their vehicles) even though their cars had been neither designed nor manufactured nor originally sold in the forum states. Since the cars had been brought there by consumers rather than via the regular channels of distribution, the "stream-of-commerce" theory previously employed in such cases could not help the plaintiffs (see World-Wide Volkswagen v. Woodson, 444 U.S. 286, 1980). Instead, the Court predicated jurisdiction primarily on the defendant's extensive business activities in the forum states. The problem was that these in-state activities were not the cause of the plaintiffs' harm: the defendant had done nothing the forum states that had contributed to the plaintiffs' injuries. The Court nonetheless found the defendant's business sufficiently "related" to the accidents to satisfy the requirement that the defendant's contacts with the forum state be connected to the litigation there. The consequences of the decision are far-reaching: product manufacturers are subject to in personam jurisdiction wherever they are engaged in substantial business operations if a local resident suffers an accident involving merely the kind of product marketed in the forum state, regardless how the particular item involved arrived there. This is likely to apply against foreign corporations, especially automobile manufacturers, importing their products into the United States as well. The decision is more generally remarkable for three reasons. First, it represents the first (jurisdictional) victory of a consumer against a corporation in the Supreme Court in more than half-a-century. Second, the Court unanimously based in personam jurisdiction on the defendant's extensive business activities in the forum state; the Court thus revived a predicate in the specific-in-personam context which it had soundly rejected for general in personam jurisdiction just a few years ago in Daimler v. Baumann (571 U.S. 117, 2014). Last, but not least, several of the Justices openly

questioned whether corporations should continue to enjoy as much jurisdictional protection as they had in the past; remarkably these Justices hailed from the Court's conservative camp. The decision may thus indicate that the days when the Supreme Court consistently protected corporations against assertions of personal jurisdiction by individuals may finally be over.

R. Geimer: Service to Foreign States During a Civil War: The Example of an Application for a Declaration of Enforceability of a Foreign Arbitral Award Against the Libyan State Under the New York Convention

With the present judgment, the UK Supreme Court confirms a first-instance decision according to which the application to enforce an ICC arbitral award against the state of Libya, and the later enforcement order (made ex parte), must have been formally served through the Foreign, Commonwealth and Development Office under the State Immunity Act 1978, despite the evacuation of the British Embassy due to the ongoing civil war. The majority decision fails to recognize the importance of the successful claimant's right of access to justice under Art 6(1) ECHR and Art V of the 1958 New York Convention.

K. Bälz: Arbitration, national sovereignty and the public interest – The Egyptian Court of Cassation of 8 July 2021 ("Damietta Port")

The question of whether disputes with the state may be submitted to arbitration is a recurrent topic of international arbitration law. In the decision Damietta Port Authority vs DIPCO, the subject of which is a dispute relating to a BOT-Agreement, the Egyptian Court of Cassation ruled that an arbitral award that (simultaneously) rules on the validity of an administrative act is null and void. The reason is that a (private) arbitral tribunal may not control the legality of an administrative decision and that the control of the legality of administrative action falls into the exclusive competency of the administrative judiciary. This also applies in case the legality of the administrative decision is a preliminary question in the arbitral proceedings. In that case, the arbitral tribunal is bound to suspend the proceedings and await the decision of the administrative court. The decision of the Egyptian Court of Cassation is in line with a more recent tendency in Egypt that is critical of arbitration and aims at removing disputes with the state from

arbitration in order to preserve the “public interest”.

CEDEP: Online course on Choice of Law, International Contracts and the Hague Principles

The Center for Law, Economics and Policy Studies (CEDEP) is organising an online course on Choice of Law, International Contracts and the Hague Principles. For more information on this course, click here.

The course will officially begin on Tuesday 22 March 2022, with weekly sessions (a total of 9) to be released on Tuesdays (which may be supplemented with additional lessons in May). The sessions will be in English with Spanish subtitles and will be available throughout the year 2022 on the CEDEP e-learning platform, thus there is no deadline for registration. The registration fee is 90USD – several payment methods are possible (including online). To register click here.

CEDEP has kindly provided in advance the link to the Introductory Session (Choice of Law – 22 March 2022) for Conflictoflaws.net readers, which may be viewed free of charge here: 1. Choice of Law – Introductory Session.

The speakers of the Introductory Session are Luca Castellani (UNCITRAL), Anna Veneziano (UNIDROIT) and Ning Zhao (HCCH) and the topic is UNCITRAL, HCCH, and UNIDROIT Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales. The Legal Guide and other information may be accessed on the Hague Conference website, click here.

The e-learning platform will also make available relevant bibliography, the presentations of the speakers, discounts for a relevant publication and much more. A certificate of participation will be given if a minimum attendance is confirmed.

Below is a list of the speakers per session:

CEDEP

CHOICE OF LAW IS GLOBAL

CONTRIBUTORS:	TOPIC
LUCA CASTELLANI ANNA VENEZIANO NING ZHAO	Tripartite Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts.
DANIEL GIRSBERGER	Introductory lecture on the Hague Principles
MARTA PERTEGÁS	Practical implementation of the Hague Principles
GENEVIÈVE SAUMIER	Art. 3 of the Hague Principles
LAURO GAMA	Tacit choice of the law governing the contract.
SYMEON SYMEONIDES	Public Policy and the Hague Principles
BÉLIGH ELBALTI	Overriding Mandatory Rules and the Hague Principles: Article 11
YUKO NISHITANI	Assignment of Receivables and the Hague Principles
JOSÉ A. MORENO R.	Application of the international principles to investment arbitration

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The assistant is supposed to support the organizational and educational work of the chairholder, to participate in research projects of the chair as well as to teach their own courses (students' exercise). Applicants are offered the opportunity to obtain a doctorate.

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Please send your application (Curriculum Vitae, certificates and, if available, further proofs of talent) to Prof. Dr. Jan von Hein, Albert-Ludwigs-Universität Freiburg, Institut für Ausländisches und Internationales Privatrecht, Abteilung III, Niemensstraße 10 (Peterhof), D?79098 Freiburg (Germany), no later than February 18th, 2022.

As the application documents will not be returned, we kindly request you to submit only unauthenticated copies. Alternatively, the documents may be sent as a pdf file via e-mail to ipr3@jura.uni-freiburg.de.

AG Maciej Szpunar on the interpretation of the ESR in relation to cross-border declarations of waiver of succession and on substitution and characterisation, Opinion of 20 January 2022, C-617/20 – T.N. et al. ./. E.G.

Yesterday, AG Maciej Szpunar delivered an Opinion (a French version is available, a German as well, not yet, however, an English one) that is of high relevance both to the practical application of the European Succession Regulation (ESR) as well as to issues of European choice of law methodology in relation to substitution and characterisation.

The case emerged from a preliminary reference by the German Higher Regional Court (Oberlandesgericht) Bremen of 11 November 2020 and involved the following facts:

The deceased person, a Dutch national, died in Bremen (habitual residence) on 21 May 2018. He left behind his widow (E.G.) and two descendants (T.N. and N.N.) of his formerly deceased brother. His widow applied by notarial deed of 21 January 2019 for the issuance of a joint certificate of inheritance to the Local Court of Bremen, attributing to her ¾ of the estate and 1/8 to each of T.N. and N.N. The two descendants, however, having their habitual residence in the Netherlands, declared their waiver of succession before the Rechtbank Den Haag on 30 September 2019. In the proceedings before the Local Court of Bremen, T.N. and N.N. were heard, and by letter of 13 December 2019 in Dutch language they submitted copies of their declarations of waiver (as well in Dutch). The German court answered that it would not be able to take notice of these documents as

long as it would not receive a translation into German. The two descendants thereupon declared in German to the court by letter of 15 January 2020 that they had waived, properly registered with the Dutch court, and that under European law there would be no need for translation. By decision of 27 February 2020, the Local Court issued the certificate as applied for by the applicant, i.e. certifying T.N. and N.N. as co-heirs. The latters appealed against this decision and, on 30 June 2020 submitted colour copies of the deeds they had used in the Netherlands as well as German translations, on 17 August 2020 they submitted the original deeds. The Local Court referred the case to the Higher Regional Court Bremen and stated that it considers the time limit for waiver under section 1944 (1) German Civil Code of six weeks after gaining knowledge about the inheritance elapsed, as a declaration of waiver would have required timely submission of the original deeds.

Thereupon, the Higher Regional Court of Bremen, in essence, referred the question to the ECJ whether a waiver in the Member State of habitual residence of the heir other than the Member State of habitual residence of the deceased would be capable of replacing the waiver required by the applicable succession law by way of substitution or whether additional requirements exist, such as that the waiving heir informs, with a view to Recital 32 Sentence 2, the competent court in the Member State of habitual residence of the deceased and if so whether the official language of that court must be used and whether the original deeds must be used in order to comply with time limits under the applicable law.

AG Maciej Szpunar reframed this question (para. 34): According to his subtle analysis, the question should be whether Articles 13 and 28 ESR are, of course autonomously (see para. 50), to be interpreted to the effect that the requirement to declare a waiver before the competent court („*Nachlassgericht*“) must be characterised as a question of form rather than substance which would lead to the application of the law of the Member State of the waiving heirs on this point of form under Article 28 lit. b ESR. Whereas only if this question were to be characterised as a matter of substance, the question of substitution could at all be posed. It will not come as a surprise that with this point made, the result of the – careful and comprehensive – analysis of this issue of characterisation (paras. 45 – 69), including considerations on the effet utile of the ESR (para. 64), was that indeed the point must be considered as one of form. The consequence is that since the local form was complied with in the Netherlands, the waiver must be

held valid as of 30 September 2019 and as such still in time under the applicable succession law – a result that indeed facilitates cross-border succession cases in an important aspect as it is the overall objective of the ESR.

Remains the problem of how to ensure that the competent court takes notice of such a waiver (paras. 70 et seq.). This is the issue of Recital 32 Sentence 2: „Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession." However, as in the concrete case at hand the court definitively had knowledge about the waiver, the question was not relevant and thus remained expressly left open (para. 77). As it was expressly left open as irrelevant in the concrete case we may at least conclude that any kind of gaining knowledge must suffice. Then the only remaining question is what happens if the court did not gain any knowledge. From a practical point of view a party interested in bringing its waiver to the attention of the competent court, it seems that a letter (or even an email) to that court should suffice.

One last question. Could we not say: either it is "substance", then Article 13 refers to the lex causae (German law) or it is "form", then Article 28 refers to the same law (German law) under lit. a and then substitution comes up, or, alternatively, under lit. b, to the law for formal issues (Dutch law). And when further proceeding sub lit. a of Article 28, could not substitution provide for the same result, at least in this concrete case, than applying lit. b? If so, we might be tempted to add that two parallel avenues to the same result indicate quite reliably that the result must be the right one. It might have been for reasons of simplifying things that AG Maciej Szpunar did not fully map out these two avenues, all the more because substitution is a technique that is little explored on the level of the EU's PIL. However, if even the referring national court directly asks about substitution, the ECJ should take the opportunity to give us a bit more insights on this classical concept of the general part of any PIL from the perspective of the EU's conflicts of law methodology.

Let's hope that the ECJ takes up the ball and discusses the theoretical connotations of this case on methodical questions of characterisation and substitution as precisely and subtly as it was done in the Opinion. The CoL community will certainly await the judgment with excitement.

Relevant provisions of the ESR

Article 13: Acceptance or waiver of the succession, of a legacy or of a reserved share

In addition to the court having jurisdiction to rule on the succession pursuant to this Regulation, the courts of the Member State of the habitual residence of any person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court.

Article 28: Validity as to form of a declaration concerning acceptance or waiver

A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of: (a) the law applicable to the succession pursuant to Article 21 or Article 22; or (b) the law of the State in which the person making the declaration has his habitual residence.

Recital 32:

In order to simplify the lives of heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, this Regulation should allow any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, to make such declarations in the form provided for by the law of the Member State of his habitual residence before the courts of that Member State. This should not preclude such declarations being made before other authorities in that Member State which are competent to receive declarations under national law. Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be

dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession

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Court of Justice of the EU on the recognition of parentage

After the Coman judgment of 2018, the Grand Chamber of the Court of Justice of the European Union (CJEU) has again rendered a judgment in the field of free movement of citizens that is of importance for private international law. Like in Coman, the judgment in V.M.A. of 14 December 2021 concerned a non-traditional family of which the members sought to make use of their right to free movement in the EU under the Treaty on the Functioning of the European Union (TFEU) and Directive 2004/38. The Charter of Fundamental Rights of the EU (Charter) was also pertinent, particularly its Article 7 on respect for private and family life, Article 9 on the right to marry and the right to found a family, Article 24 on the rights of the child, and Article 45 on freedom of movement and of residence.

While Coman concerned the definition of "spouse" under Article 2 of the Directive, in V.M.A. the CJEU addressed the definition of "direct descendants" in the same provision.

Two women, V.M.A., a Bulgarian national, and K.D.K., a national of the United Kingdom, were married and lived in Spain. A daughter, S.D.K.A., was born in Spain. Her Spanish birth certificate indicated V.M.A. as "mother A" and K.D.K. as "mother". V.M.A. applied to the Sofia municipality for a birth certificate for S.D.K.A. in order to obtain a Bulgarian identity document for her. She submitted a legalised and certified translation into Bulgarian of the extract from the civil register of Barcelona.

The Sofia municipality refused this application, due to the lack of information on S.D.K.A.'s biological mother and because the reference to two mothers was

contrary to Bulgarian public policy.

The Administrative Court of the City of Sofia, to which V.M.A. appealed the municipality's decision, posed four questions to the CJEU. It sought to know whether Articles 20 and 21 of the TFEU and Articles 7, 24 and 45 of the Charter oblige Bulgaria to recognise the Spanish birth certificate despite its mentioning two mothers and despite the fact that it was unclear who the biological mother of the child was. It also questioned EU Member States' discretion regarding rules for the establishment of parentage. A further relevant point was Brexit and the fact that the child would not be able to get EU citizenship through the other mother, who is a UK citizen.

The Grand Chamber ruled as follows:

Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 4(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

The CJEU thus obliges Bulgaria, through EU law, to recognise the Spanish birth certificate. The CJEU is not concerned with the issue of a birth certificate in Bulgaria, but rather with the identity document (the requirements under national law for the identity document cannot be used to refuse to issue such identity document – see para 45).

The parentage established lawfully in Spain has the result that the *parents of a Union citizen who is a minor and of whom they are the primary carers, be recognised by all Member States as having the right to accompany that child when her right to move and reside freely within the territory of the Member States is being exercised* (para 48)

The CJEU refers to the identity document as the document that permits free movement. This wording seems, on a first reading, to be broader than the ruling in Coman, where the CJEU ruled on the recognition of the same-sex marriage only for purposes of the right to residence. However, in para 57 the Court seems to include the Coman limitation: *Such an obligation does not require the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents.*

But I'm sure much debate will follow about the extent of the obligation to recognise. As readers might be aware, the European Commission earlier this year set up an Expert Group on the Recognition of Parentage between Member States.

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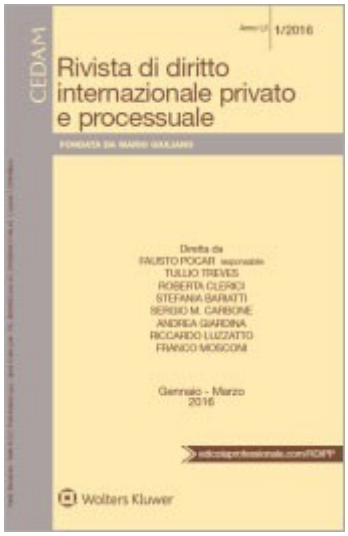

The third issue of 2021 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Cristina Campiglio, Professor at the University of Pavia, **Conflitti positivi e negativi di giurisdizione in materia matrimoniale** (Positive and Negative Conflicts of Jurisdiction in Matrimonial Matters)

> Regulation (EC) No 2201/2003 (Brussels II-bis) provides for a range of alternative grounds for jurisdiction in matrimonial matters and is strongly marked by the *favor actoris* principle. The system sets the scene not only for forum shopping but also for a rush to the court. However, spouses who have the nationality of different Member States and reside in a Third State remain deprived of the right to an effective remedy before an EU court. Taking a cue from a case currently pending before the Court of Justice of the European Union, this article examines the possible avenues to address these cases of denial of justice, also in light of Art. 47 of the EU Charter of Fundamental Rights. This analysis is conducted, in particular, with the overarching goal of launching, at a political level, a general reflection on the question of conflicts of jurisdiction and on the opportunity to create a coherent, unified "European system" in which general and special regulations operate in a coordinated manner.

Fabrizio Marrella, Professor at the Ca' Foscari University of Venice, **Forza maggiore e vendita internazionale di beni mobili in un contesto di**

pandemia: alcune riflessioni (*Force Majeure* and International Sales of Goods in the Context of a Pandemic: Some Remarks)

> For centuries, national legal systems have recognised both the principle *pacta sunt servanda* and its exceptions, *i.e*. the *rebus sic stantibus* and *ad impossibilia nemo tenetur* principles. However, the manner in which these basic rules operate varies in the landscape of comparative law. The unforeseeable change of circumstances is among the most relevant issues for international contracts. For this reason, international commercial practice has provided some standard solutions. The Vienna Convention on the International Sale of Goods (CISG) of 11 April 1980 is among the instruments that provide some uniform law solutions: however, these are not satisfactory when compared to modern commercial practice and the potential litigation arising from the Covid-19 pandemic crisis. In this context, legal doctrine on the private international law aspects of *force majeure* also seems scarce. This article explores some of the most pressing private international law issues arising from the impact of the Covid-19 pandemic on cross-border B2B contracts. Notably, it analyses the choice of the *lex contractus* and its scope in relation to *force majeure*, addressing issues of causation, penalty clauses, evidence (with particular reference to "*force majeure* certificates" imposed by some governments), payment, and overriding mandatory rules.

The following comments are also featured:

Marco Argentini, PhD Candidate at the University of Bologna, **I criteri di radicamento della giurisdizione italiana nei contratti di trasporto aereo transnazionale** (The Criteria for Establishing Italian Jurisdiction in Contracts for International Carriage by Air)

> This article analyses the rules to identify the competent courts, in the field of international air carriage contracts, for passenger claims aimed at obtaining the flat-rate and standardised rights provided for in Regulation No 261/2004 and the compensation for further damage under the Montreal Convention. In particular, the jurisdiction over the former is governed by the Brussels I-bis Regulation, whereas the one over the latter is governed by the Convention itself. Since passengers are the weaker contractual party, the article also addresses some remedies to avoid fragmentation of legal actions between courts of different States, as well as the particular case, tackled by the Court

of Justice of the European Union, of a flight forming part of a broader package tour.

Claudia Cantone, PhD Candidate at the University "Luigi Vanvitelli" of Campania, **Estradizione e limiti all'esercizio della giurisdizione penale extraterritoriale nel diritto internazionale: riflessioni a margine della sentenza della Corte di cassazione n. 30642/2020** (Extradition and Limits to the Exercise of Extraterritorial Criminal Jurisdiction in International Law: Reflections on the Court of Cassation's Judgment No 30642/2020)

This article builds upon the judgment of the Court of Cassation 22 October 2020 No 30642, delivered in an extradition case towards the United States of America. The decision of the Supreme Court is noteworthy since, for the first time, the Court examines the restrictions imposed by public international law on States in the exercise of criminal jurisdiction outside their territory. Notably, it states that the existence of a "reasonable connection" could justify the exercise of extraterritorial jurisdiction under international law. In this regard, the Author also analyses the emerging principle of jurisdictional reasonableness in the theory of jurisdiction under international law. Finally, the paper focuses on whether, in extradition proceedings, the judicial authority of the requested State might ascertain the basis of jurisdiction upon which the request is based, taking into consideration the absence of any provision in extradition treaties allowing such assessment.

Curzio Fossati, PhD Candidate at the University of Insubria, **Le azioni di private enforcement tra le parti di un contratto: giurisdizione e legge applicabile** (Private Enforcement Actions between Parties to a Contract: Jurisdiction and Applicable Law)

This article deals with the main private international law issues of antitrust damage claims between contracting parties, according to the latest rulings of the Court of Justice of the European Union. In particular, these issues concern (a) the validity and the scope of jurisdictions clauses, (b) the determination of jurisdiction under the Brussels I-bis Regulation, and (c) the applicable law under the Rome I and the Rome II Regulations. The article aims at demonstrating that the analysis of these aspects should be preceded by the proper characterization of the damage action for breach of competition law between contracting parties. The conclusion reached is that

the adoption of a univocal method to characterize these actions as contractual or non-contractual fosters coherent solutions.

In addition to the foregoing, this issue features the following book review by *Francesca C. Villata*, Professor at the University of Milan: Matthias HAENTJENS, ***Financial Collateral: Law and Practice***, Oxford University Press, New York, 2020, pp. XXXIX-388.

Indonesia deposits its instrument of accession to the HCCH 1961 Apostille Convention

Guest post by Priskila P. Penasthika, Ph.D. Researcher at Erasmus School of Law – Rotterdam and Lecturer in Private International Law at Universitas Indonesia.

Indonesian Accession to the HCCH 1961 Apostille Convention

After almost a decade of discussions, negotiations, and preparations, Indonesia has finally acceded to the HCCH 1961 Apostille Convention. In early January this year, Indonesia enacted Presidential Regulation Number 2 of 2021, signed by President Joko Widodo, as the instrument of accession to the HCCH 1961 Apostille Convention. The HCCH 1961 Apostille Convention is the first HCCH Convention to which Indonesia became a Contracting Party.

In its accession to the HCCH 1961 Apostille Convention, Indonesia made a declaration to exclude documents issued by the Prosecutor Office, the prosecuting body in Indonesia, from the definition of public documents whose requirements of legalisation have been abolished in accordance with Article 1(a) of the HCCH 1961 Apostille Convention.

In accordance with Article 12 of the Convention, Indonesia deposited its instrument of accession to the HCCH 1961 Apostille Convention with the Ministry

of Foreign Affairs of the Netherlands on 5 October 2021. The ceremony was a very special occasion because it coincided with the celebration of the 60th anniversary of the Convention. Therefore, the ceremony was part of the Fifth Meeting of the Special Commission on the practical operation of the HCCH 1961 Apostille Convention and witnessed by all Contracting Parties of the Convention.

The Minister of Law and Human Rights of the Republic of Indonesia, Yasonna H. Laoly, joined the ceremony and delivered a speech virtually via videoconference from Jakarta. Minister Laoly voiced the importance of the HCCH 1961 Apostille Convention for Indonesia and underlined Indonesia's commitment to continue cooperating with the HCCH.

Indonesia's accession to the HCCH 1961 Apostille Convention brings good news for the many parties concerned. The current process of public document legalisation in Indonesia still follows a traditional method that is highly complex, involves various institutions, and is time-consuming and costly. Because of the accession to the Convention, the complicated and lengthy procedure will be simplified to a single step and will involve only one institution – the designated Competent Authority in Indonesia. Referring to Article 6 of the HCCH 1961 Apostille Convention, in its accession to the Convention, Indonesia designated the Ministry of Law and Human Rights as the Competent Authority. When the HCCH 1961 Apostille Convention enters into force for Indonesia, this Ministry will be responsible for issuing the Apostille certificate to authenticate public documents in Indonesia for use in other Contracting Parties to the Convention.

A Reception Celebrating the 60th Anniversary of the HCCH 1961 Apostille Convention and Indonesian Accession

To celebrate the 60th anniversary of the HCCH 1961 Apostille Convention and Indonesia's accession to it, an evening reception was held on 5 October 2021 at the residence of the Swiss ambassador to the Kingdom of the Netherlands in The Hague. The reception was organised at the invitation of His Excellency Heinz Walker-Nederkoorn, Swiss Ambassador to the Kingdom of the Netherlands, His Excellency Mayerfas, Indonesian Ambassador to the Kingdom of the Netherlands, and Dr Christophe Bernasconi, Secretary-General of the HCCH. Representatives of some Contracting Parties to the HCCH 1961 Apostille Convention attended the reception; among other attendees were the representatives from recent

Contracting Parties such as the Philippines and Singapore, as well as some of the earliest signatories, including Greece, Luxembourg, and Germany.

The host, Ambassador Walker-Nederkoorn, opened the reception with a welcome speech. It was followed by a speech by Ambassador Mayerfas. He echoed the statement of Minister Laoly on the importance of the HCCH 1961 Apostille Convention for Indonesia, especially as a strategy to accomplish the goals of Vision of Indonesia 2045, an ideal that is set to commemorate the centenary of Indonesian independence in 2045. Ambassador Mayerfas also emphasised that Indonesia's accession to the HCCH 1961 Apostille Convention marked the first important step for future works and cooperation with the HCCH.

Thereafter, Dr Christophe Bernasconi warmly welcomed Indonesia as a Contracting Party to the HCCH 1961 Apostille Convention in his speech at the reception. He also voiced the hope that Indonesia and HCCH continue good cooperation and relations, and invited Indonesia to accede to the other HCCH Conventions considered important by Indonesia.

The Entry into Force of the HCCH 1961 Apostille Convention for Indonesia

Referring to Articles 12 and 15 of the HCCH 1961 Apostille Convention, upon the deposit of the instrument of accession, there is a period of six months for other Contracting Parties to the Convention to raise an objection to the Indonesian accession. The HCCH 1961 Apostille Convention will enter into force for Indonesia on the sixtieth day after the expiration of this six-month period. With great hope that Indonesia's accession will not meet any objection from the existing Contracting Parties to the Convention, any such objection would affect only the entry into force of the Convention between Indonesia and the objecting Contracting Party. The HCCH 1961 Apostille Convention will therefore enter into force for Indonesia on 4 June 2022.

A more in-depth analysis (in Indonesian) concerning the present procedure of public document legalisation in Indonesia and the urgency to accede to the HCCH 1961 Apostille Convention can be accessed here. An article reporting the Indonesian accession to the HCCH 1961 Apostille Convention earlier this year can be accessed here.

Call for Papers and Panels: “Identities on the move – Documents cross borders” Final Conference

by **Paul Patreider**

The European Project “***DXB – Identities on the move – Documents cross borders***” aims at facilitating the dissemination and implementation of Regulation (EU) 2016/1191 in the everyday practice of several EU Member States, improve the knowledge of the links between circulation of public documents, fundamental rights and freedom of movement, ensure a sound implementation of the Regulation for “hard cases” and raise awareness among registrars and legal practitioners. The partnership is supported by a consortium of academic institutions and associations of registrars. More information on the Project and its partners on the official website.

DxB’s Final Conference takes place on **23–24 June 2022** at the premises of A.N.U.S.C.A.’s **Academy in Castel San Pietro Terme, Bologna (Italy)**. The conference will offer a unique opportunity to take stock of the implementation status of Regulation (EU) 2016/1191. The event will also launch the Commentary and the EU-wide comparative survey placing the Regulation in the context of daily national practice.

The Conference will be a truly international event, gathering scholars, registrars, public administrators, political scientists, judges, PhD students and practitioners from all over Europe. Translation services are offered in **English**, **Italian and German**. To ensure wide participation as well as the variety of topics and viewpoints, we are pleased to announce a **Call for Papers & Panels**.

CONFERENCE TOPICS

Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents has so far gone largely unnoticed in scholarly debates and practitioners' discussions. As issues related to the circulation and mutual recognition of authentic instruments in civil status and criminal matters are becoming more and more pressing, the Regulation represents a great opportunity to strengthen the principles and values of the European Union.

Given the strict connection between the scientific and practical dimension of Regulation 2016/1191, authors are invited to examine how this act is currently implemented in the context of national civil status systems and fundamental rights. They should explore the potential positive impact on the freedom of movement of European citizens and on the enjoyment of their fundamental rights as well as focus on critical aspects and deficiencies of the current legal framework.

We encourage applicants to submit proposals for papers and panels related to the Regulation and its context. Possible topics include:

- The creation of a common European civil status framework;
- The **notion of "public document"** under the Regulation and similar instruments (e.g. formal and substantial requirements) and under domestic law;
- The circulation of **criminal records**;
- Problems arising from the lack of standardized definitions shared by all Member States (e.g. **"crime", "sex", "intended parent", "intersex"**);
- The impact of the Regulation on the effective exercise of the **freedom of movement**;
- Connections between **EU citizenship**, national citizenship status, and circulation of public documents;
- Case-law of the Court of Justice influencing the interpretation and implementation of the Regulation, with special regard to the Charter of Fundamental Rights and the ECHR;
- Exercise of **electoral rights** and the circulation of public documents under Article 2.2. of the Regulation;
- Analysis of "**hard cases**" when applying the Regulation (e.g. marriages

celebrated by religious authorities as third-country public documents etc.);

- The Regulation in comparison to the **ICCS Conventions** and other relevant international conventions (e.g. the Hague Apostille Convention (1961));
- **E-Justice Portal tools** (e.g. the multilingual form-filling system) and the efficiency of the Internal Market Information System (IMI) in the event of doubts as to the veracity of the documents, or the authenticity of the authority that signed them;
- The **digitalization of documents** and their circulation; how to ensure the authenticity of digital documents (both native digital size or digital copies of a paper original); forms of electronic signature or seals, with special regard to electronic signatures governed by the **eIDAS Regulation** and country-specific standards;
- Extension of the scope of the Regulation to public documents relating to, among others, the **legal status and representation of a company or other undertakings**, diplomas, certificates and other evidence of formal qualifications, officially recognised disabilities, etc. (see article 23 of the Regulation);
- Critical issues related to **multilingual standard forms** (**regional/local linguistic minorities**; public documents for which multilingual standard forms are not yet established by the Regulation etc.).

WHO SHOULD PARTICIPATE

Participation is not restricted to **lawyers** or to **established scholars**. We welcome **registrars, public administrators, professionals, practitioners, doctoral students**. We welcome proposals that offer multi-disciplinary perspectives from various areas of law (including European, civil, administrative, comparative, international, criminal, and labour law), as well as from scholars in the humanities and the social sciences (e.g. history, economics, political science, sociology) with an interest in the Conference's themes. We also welcome submissions from both senior and junior scholars (including doctoral students) as well as interested practitioners.

PAPER AND PANEL SUBMISSIONS

- Submit your **PAPER proposal** with an **abstract of a maximum of 500 words** and **5 keywords**. The abstract must also contain **Title**, **Name**, **Affiliation** (e.g. university, institution, professional association), **Country** and **E-mail address**.
- Submit your **PANEL proposal** with an **abstract of a maximum of 800 words** and **5 keywords**. We welcome a state-of-the art symposium or a round-table providing on key issues. Fully formed panel proposals should include at least three and no more than five presentations by scholars or practitioners who have agreed in advance to participate. Panel proposals should also identify **one panel chair/moderator**. Include: **title of the panel**, **names of speakers** and of the **chair/moderator** and their **affiliation** (e.g. university, institution, professional association), t**itle of each presentation** (if applicable), e**-mail address** of panel participants, **language**(s) to be used.

We encourage submissions in **English**. However, as part of the vision of a truly European conference, paper and panel proposals will also be **accepted in Italian and German**.

Selected paper authors will receive further information on the publication of the proceedings.

Submission templates for paper & panel proposal are available on the DXB website.

HOW AND WHEN TO SUBMIT

Send proposals to: info@identitiesonthemove.eu. Indicate in the e-mail subject line: "*Conference call – name of the (lead) author (or moderator) – Title of the paper or panel proposal*".

The deadline for submitting the paper or panel abstract proposal is 22 December 2021.

Applicants will be informed about the outcome of the abstract selection process no later than **15 January 2022**. If successfully selected, full papers must be

submitted by **15 April 2022**.

PROGRAMME AND REGISTRATION

The draft of the **Conference Programme** will be published on 1st March 2022. The final Conference Programme with all panel sessions will become available on 25 April 2022.

Registration for the Conference opens on the DXB website on 15 January and **closes on 20 May 2022**.

The event will be held in person, in compliance with the current health safety regulations, and will also be **broadcast online via live streaming with free access**.

Onsite participants will need a **Covid-19 digital certificate** (Green Pass), or equivalent certificate recognized under Italian law, if still so required by the Authorities at the time of the conference.

N.B. All speakers and moderators, including those invited under the call, are required to attend the event in person.

Registration fee: it includes conference materials, shuttle service (see website for details), tea/coffee and lunch refreshments as well as the certificate of attendance.

Ordinary fee: 80 Euros

Reduced student fee (including Ph.D. students): 40 Euros

Check the Project website for updates.

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