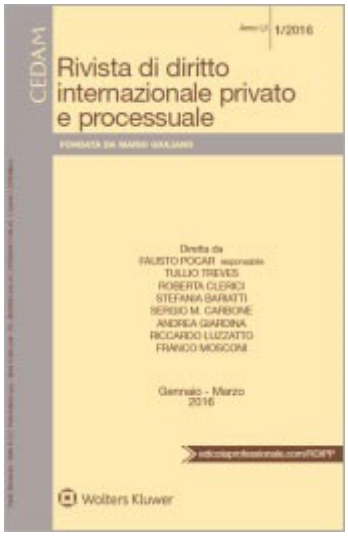
Rivista di diritto internazionale privato e processuale (RDIPP) No 3/2021: Abstracts



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.

This project was funded by the European Union's Justice Programme (2014–2020). Project number: 101007502. The content of this Call represents the

views of the partners only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Mag. Paul Patreider, Institut für Italienisches Recht, Fachbereich Privatrecht, Universität Innsbruck

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The Nigerian Court of Appeal recognises the Immunity of the President of the Commission of ECOWAS from being impleaded in Nigerian courts

This is a case note on the very recent Nigerian Court of Appeal's decision that recognised the immunity of the President of the Commission of ECOWAS (Economic Community of West African States) from being impleaded in Nigerian courts.[1]

In Nigeria, the applicable law in respect of diplomatic immunities and privileges is the Diplomatic Immunities and Privileges Act, which implements aspects of the Vienna Convention on Diplomatic Relations 1961 (the "Vienna Convention"). Under the Diplomatic Immunities and Privileges Act, foreign envoys, consular officers, members of their families, and members of their official and domestic staff are generally entitled to immunity from suit and legal process.[2] Such immunities may also apply to organisations declared by the Minister of External Affairs to be organisations, the members of which are sovereign powers (whether foreign powers or Commonwealth countries or the Governments thereof).[3]

Where a dispute arises as to whether any organisation or any person is entitled to

immunity from suit and legal process, a certificate issued by the Minister stating any fact relevant to that question shall be conclusive evidence of that fact.[4]

In a very recent case the claimant/respondent who was a staff of the Commission of ECOWAS sued the defendant/appellant in the National Industrial Court in Nigeria for orders declaring his suspension from office by the Commission unlawful and a violation of ECOWAS Regulations, and damages from the defendant/appellant for publishing what the claimant/respondent considered a "libelous" suspension letter. The defendant/appellant responded to the suit with a statement of defence and equally filed a motion of notice objecting to the jurisdiction of the National Industrial Court on grounds of diplomatic immunity he enjoys from proceedings in municipal courts of Nigeria by virtue of the Revised Treaty of ECOWAS, General Convention on Privileges and Immunities of ECOWAS and the Headquarters Agreement between ECOWAS and the Government of the Republic of Nigeria. He also placed reliance on Principles of Staff Employment and ECOWAS staff Regulations. In addition he attached a certificate from Nigeria's Minister of Foreign Affairs which acknowledged his diplomatic immunity.

The trial court (Haastrup J) held that it had jurisdiction and dismissed the preliminary objection of the defendant/appellant. It relied on Section 254C (2)[5] of the 1999 Constitution (as amended in 2011) and Order 14A Rule 1 (1)[6] of the National Industrial Court of Nigeria(Civil Procedure) Rules, 2017 to hold that the National Industrial Court had jurisdiction to resolve all employment matters in Nigeria, including cases that have an international element.

The Nigerian Court of Appeal unanimously allowed the appeal. Ugo JCA in his leading judgment held as follows:

"So this Certificate of the Minister of Foreign Affairs of Nigeria attached to the affidavit of Chika Onyewuchi in support of appellant's application/objection before the trial National Industrial Court for the striking out of the suit is sufficient and in fact conclusive evidence of the immunity claimed by appellant. That also includes the statement of the Minister in paragraph 2 of the same certificate that the ECOWAS Revised Treaty of 1993 was *"ratified by the Federal Republic of Nigeria on 1st July, 1994,"* thus, putting paid to the trial Judge's contention that appellant needed to prove that the said treaty was ratified by Nigeria for him to properly claim immunity.

Even Section 254C(2) of the 1999 Constitution of the Federal Republic of Nigeria which states that 'Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith,' does not by any means have the effect of conferring jurisdiction on the National Industrial Court over diplomats. In fact Section 254C(2) of the 1999 Constitution, as was correctly argued by Mr. Obi, only confers on the National Industrial Court power to apply international conventions, protocols and treaties ratified by Nigeria relating to labour, employment, workplace, industrial relations and matters connected therewith while exercising its jurisdiction over persons subject to its jurisdiction. Diplomats who enjoy immunity from Court processes from municipal Courts in Nigeria like the Respondent are not such persons. Incidentally, the apex Court in *African Reinsurance Corporation v. Abate Fantaye* (1986) 3 NWLR (PT 32) 811 in very similar circumstances conclusively put to rest this issue of immunity from proceedings in municipal Courts enjoyed by persons like appellant. That case was cited to the trial Judge so it is surprising that she did not make even the slightest reference to it in expanding her jurisdiction to appellant who has always insisted, correctly, on his immunity. In truth, the lower Court did not simply expound its jurisdiction but attempted to expand it too. A Court is competent when, among others, the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction…
Appellant's diplomatic status and his consequent immunity from proceedings in the Courts of this country was such a feature that prevented the National Industrial Court from exercising jurisdiction over him and Suit No. NICN/ABJ/230/2019 of respondent; it was therefore wrong in holding otherwise and dismissing his preliminary objection…"[7]

Adah JCA in his concurring judgment held as follows:

"The Appellant, being an international organization enjoys immunity from suit and legal process, both by virtue of Section 11 and 18 of the 1962 Act, and Certificate issued by the Minister of External Affairs. Where a sovereign or International Organization enjoys immunity from suit and legal process, waiver of such immunity is not to be presumed against it. Indeed, the presumption is that there

is no waiver until the contrary is established. Thus, waiver of immunity by a Sovereign or International Organization must be expressly and positively done by that Sovereign or International Organization.

In the instant case, the appellant from the record before the Court is an international organization. The Foreign Affairs Minister of Nigeria had given a certificate to indicate the immunity of the appellant. Exhibit CA issued by the Ministry of Foreign Affairs on 16th January, 2020 in paragraphs 2 and 3 thereof state as follows:

"2. The ministry of Foreign Affairs wishes to reaffirm the status of the ECOWAS Commission as an international organization and the immunity and privileges of the Commission and its staff members with exception of Nigerians and holders of Nigeria permanent residency from Criminal, Civil and Administrative proceedings by virtue of ECOWAS Revised Treaty by of 1993, which was ratified by the Federal Republic of Nigeria on 1st July, 1994.
3. The Headquarters Agreement between the ECOWAS Commission and the Federal Republic of Nigeria also confers immunity on officials and other employees of ECOWAS by virtue of Article VII (3) (C) of the Agreement."

It is very clear therefore, that the appellant is covered by the Diplomatic Immunities and Privileges Act and is not amenable to the jurisdiction of the Municipal Courts. The fact that their base is in Nigeria or that Nigeria is the Host Country of the appellant does not make the appellant subserviate to the jurisdiction of Nigerian Courts. It is therefore, the law as stated lucidly in the leading judgment of my learned brother that the lower Court has no jurisdiction to entertain the claim against the appellant…"[8]

This is not the first time Nigerian courts have dealt with the issue of impleading a diplomat or foreign sovereign before the Nigerian court.[9] The decision of the trial judge was surprising in view of the weight of authorities from the Nigerian Supreme Court and Court of Appeal on the concept of diplomatic immunities in Nigeria. The claimant/respondent may have argued that matters of employment qualify as waiver of diplomatic immunity, but this position has never been explicitly endorsed by Nigerian courts. The Supreme Court of Nigeria has only accepted the concept of waiver in situations where the person claiming immunity entered into commercial transactions with the claimant.[10]

Looking at the bigger picture how does an employee who has been unfairly dismissed by a diplomatic organisation gain access to justice in Nigerian and African courts? Should the law be reformed in Nigeria and African countries to take into account the interest of employees as weaker parties?

[1] *President of the Commission of ECOWAS v Ndiaye* (2021) LPELR-53523(CA).

[2]Diplomatic Immunities and Privileges Act, Cap D9 LFN 2004 ss 1, 3-6.

[3]ibid, ss 11 and 12.

[4]ibid, s 18.

[5] 'Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.'

[6] It provides that:

1.—(1) Where an action involves a breach of or non-compliance with an international protocol, a convention or treaty on labour, employment and industrial relations, the Claimant shall in the complaint and witness statement on oath, include,

(a) the name, date and nomenclature of the protocol, convention or treaty ; and

(b) proof of ratification of such protocol, convention or treaty by Nigeria.

(2) In any claim relating to or connected with any matter, the party relying on the International Best Practice, shall plead and prove the existence of the same in line with the provisions relating to proof of custom in the extant Evidence Act."

[7] *President of the Commission of ECOWAS v Ndiaye* (2021) LPELR-53523(CA) 19-20.

[8] *Ibid* 24-26.

[9] See generally CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, Oxford, 2020) (chapter 7).

[10]*African Reinsurance Corporation v JDP Construction (Nig) Ltd* (2007) 11 NWLR 224, 234-5 (Akintan JSC)..

CJEU on donation mortis causa under the Succession Regulation in the case UM, C-277/20

This Thursday, the Court of Justice delivered its judgment in the case UM, C-277/20, where it clarifies whether a donation mortis causa may fall within the scope of the notion of "agreement as to succession" in the sense of the Succession Regulation.

The request for a preliminary ruling in this case arises out of proceedings in Austria on the inscription in the land registry of the property right to real estate situated in that Member State. The requested inscription is supposed to be made on the basis of a contract of donation mortis causa in respect to that real estate, entered into between two German nationals habitually resident in Germany. Prior to the request for the inscription, the succession proceedings have been opened before a German court for the last place of residence of the donor.

Before the Austrian courts, the request for the inscription of the propriety right have been already rejected by two instances and ultimately the Oberster Gerichtshof referred to the Court the preliminary questions that read as follows:

> *Is Article 3(1)(b) of [the Succession Regulation] to be interpreted as meaning that a contract of donation mortis causa entered into between two German nationals habitually resident in Germany in respect of real estate located in*

> *Austria, granting the donee a right having the character of an obligation against the estate to registration of his title after the donor's death pursuant to that contract and the donor's death certificate, that is without the intervention of the probate court, is an agreement as to succession within the meaning of that provision?*
>
> *If the answer to the above question is in the affirmative: Is Article 83(2) of [The Succession Regulation] to be interpreted as meaning that it also regulates the effect of a choice of applicable law made before 17 August 2015 for a contract of donation mortis causa that is to be qualified as an agreement as to succession within the meaning of Article 3(1)(b) of [the Succession Regulation]?*

In his Opinion presented this July, AG Richard de la Tour considered that Article 3(1)(b) of the Succession Regulation must be interpreted to the effect that the notion of "agreement as to succession" includes donation contracts inter vivos, by which, in favor of the donee, the transfer of the ownership of one or several assets even only partially accounting for the hereditary estate of the donor does not take place until the death of the donor.

In its judgments, the Court also **pronounces itself in favour of the interpretation according to which a contract of donation mortis causa is to be qualified as an "agreement as to succession".**

The reasoning of the Court commences with the juxtaposition of exclusion from the scope of the application of the Succession Regulation provided for in its Article 1(2)(g) ["shall be **excluded (…) property rights (…) created or transferred otherwise than by succession, for instance by way of gifts**"], on the one hand, and definition of the notion of "agreement as to succession" in the sense of Article 3(1)(b) of the Succession Regulation ["an agreement resulting from mutual wills, which, with or without consideration, **creates, modifies or terminates rights to the future estate or estates** (…)], on the other hand (paragraph 27).

The Court stresses then the importance of **autonomous and uniform interpretation** of the notions of the Succession Regulation (paragraph 29) and contends that the very wording of the definition of the notion of "agreement as to succession" indicates that this notion covers also transfers relating to **future estates** (paragraph 30).

By contrast, the second preliminary question is answered in the negative. For the Court, as nothing indicates that a choice of law applicable have been made to succession as a whole, Article 83(2) of the Succession Regulation is not applicable to the case at hand. As such, the choice made solely with regards to the agreement as to succession is not governed by Article 83(2) (paragraph 39).

The judgment can be found here (in German and French so far).

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2021: Abstracts

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

B. Heiderhoff: **International Product Liability 4.0**

While the discussion on how liability for damages caused by autonomous systems, or “artificial intelligence”, should be integrated into the substantive law is well advanced, the private international law aspect has, so far, been neglected. In this contribution, it is shown that unilateral approaches – such as the EU Parliament has suggested (P9_TA-PROV(2020)0276) – are unnecessary and detrimental. It is preferable to develop a classical conflict of laws rule with connecting factors, which mirror the assessments of the substantive law. It is shown that a mere reinterpretation of the existing Article 5 Rome II Regulation might lead to legal insecurity, and that an addition of the provision is preferable. In particular, the notion of marketing, and its importance as a connecting factor, should be revised.

K. Vollmöller: **The determination of the law applicable on claims for infringement of trade secrets in contractual relationships**

Subject of the article is the determination of the applicable law in cross-border situations when a lawsuit is based on the violation of trade secrets within a contractual relationship. According to German Law, claims for infringement of trade secrets are regulated in the German Trade Secrets Act (Geschäftsgeheimnisgesetz – GeschGehG) that has implemented the European Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. The focus is on the question how tort claims are connected if the contracting partners have agreed on confidentiality terms, in particular under a non-disclosure agreement. In case the agreement of the parties is ruled by the laws of a Non-European state, it is doubtful whether the harmonized European trade secret law is applicable. The author comes to the conclusion that a secondary connection to the jurisdiction governing the agreement according to Art. 4 Paragraph 3 Rome II Regulation should be limited to relationships where the parties have assumed further contractual obligations beyond confidentiality. In this case, the law applicable on the contract overrides the harmonized European trade secret law regulations which cannot be considered as mandatory rules either.

T. Lutzi: **Ruth Bader Ginsburg – Internationalist by Conviction**

In Ruth Bader Ginsburg, the Supreme Court has not only lost an icon of gender equality and towering figure, but also a great internationalist. Ginsburg's jurisprudence was characterised by her own academic background as a proceduralist and comparativist, a decidedly international perspective, and a firm belief in a respectful and cooperative coexistence of legal systems. An English version of this text can be found at www.iprax.de/de/dokumente/online-veroeffentlichungen/

C. Kohler: **Dismantling the „mosaic principle": defining jurisdiction for violations of personality rights through the internet**

In case C-194/16, Bolagsupplysningen, the ECJ ruled that, according to Article 7(2) of Regulation (EU) No 1215/2012, a legal person claiming that its personality rights have been infringed by the publication of incorrect information on the

internet and by a failure to remove comments relating to it can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located. On the other hand, an action for rectification of that information and removal of those comments cannot be brought before the courts of each Member State in which the information published on the internet is or was accessible. Thus, the ECJ's decision in case C-509/09 and C-161/10, eDate Advertising a.o., also applies where the aggrieved party is a legal person. However, the "mosaic principle" defined in that judgment is inapplicable because an action for rectification and removal of information on the internet is "single and indivisible" and can, consequently, only be brought before a court with jurisdiction to rule on the entire damage. The author welcomes this limitation and advocates that the mosaic principle be given up entirely, particularly as it does not find resonance on the international level.

P. Mankowski: **Consumer protection under the Brussels Ibis Regulation and company agreements**

Company agreements pose a challenge to Arts. 17–19 Brussels Ibis Regulation; Arts. 15–17 Lugano Convention 2007 since these rules are designed for bipolar contracts whereas the formers typically are multi-party contracts. This generates major problems, amongst them identifying the "other party" or answering how far a quest for equal treatment of shareholders might possibly carry. Arguments from the lack of a full-fledged forum societatis might weigh in, as do arguments from the realm of European private law or possible consequences for jurisdiction clauses in company statutes. The picture is threefold as to scenarios: founding and establishing a company; accession to an already established company; and derivative acquisition of a share in an already established company.

W. Wurmnest/C. Grandel: **Enforcement of consumer protection rules by public authorities as a „civil and commercial matter"**

In case C-73/19 (Belgische Staat ./. Movic) the European Court of Justice once again dealt with the delineation of "civil and commercial matters" (Art. 1(1) of the Brussels Ibis Regulation) when public authorities are involved. The Court

correctly classified an action brought by Belgian authorities against Dutch companies seeking a declaration as to the unlawfulness of the defendants' business practices (selling tickets for events at prices above their original price) and an injunction of these practices as a "civil and commercial matter", as the position of the authorities was comparable to that of a consumer protection association. Furthermore, the Court clarified its case law on the thorny issue as to what extent evidence obtained by public authorities based on their powers may turn the litigation into a public law dispute. Finally, the judgment dealt with the classification of various ancillary measures requested by the Belgian authorities. Most notably, a request by the authorities to be granted the power to determine future violations of the law simply by means of a report "under oath" issued by an official of the authorities was not a "civil- and commercial matter" as private litigants could not be granted similar powers under Belgian law.

R. Wagner: **Jurisdiction in a dispute with defendants in different member states of the European Union**

The article discusses a court ruling of the Higher Regional Court of Hamm on jurisdiction concerning the "Diesel emission scandal". The plaintiff had his domicile in Bielefeld (Germany). He bought a car in Cologne (Germany) where the seller had his domicile. Later on, the plaintiff brought an action for damages and for a declaratory judgment against the seller, the importer of the car (domicile: Darmstadt, Germany) and the producer of the car (domicile: in the Czech Republic) before the District Court of Bielefeld. The plaintiff argued that the producer of the car had used illegal software to manipulate the results of the emissions tests. He based his claim on tort. Against the first defendant he also claimed his warranty rights. In order to sue all three defendants in one trial the plaintiff requested the District Court of Bielefeld to ask the Higher Regional Court of Hamm to determine jurisdiction. In its decision the Court in Hamm took into account Article 8 No. 1 of the Brussels Ibis Regulation and § 36 I No. 3, II of the German Code of Civil Procedure.

J. Wolber: **Jurisdiction for an Application opposing Enforcement in cross-border Enforcement of a Maintenance Decision**

The question, whether the maintenance debtor should be entitled to raise the objection that he has predominantly discharged his debt in the Member State of enforcement is highly relevant in practice and disputed in the scientific literature. The European Court of Justice (ECJ) has decided on this question – upon a request for a preliminary ruling by a German court – in the case FX ./. GZ with judgment of 4th June 2020. The ECJ confirms the jurisdiction of the German court based on Article 41 of Regulation No 4/2009. This judgment has effects beyond the enforcement of maintenance decisions on other instruments of European Law of Civil Procedure. While this judgment deserves approval in the result, the reasoning of the court is not convincing. The ECJ judgment does not cover the question of the territorial scope of such a judgment.

P. Schlosser: **Clarification of the service of documents abroad**

In extending the term "demnächst" ("soon") the judgment of the Bundesgerichtshof ruled that a person interested in serving a document to somebody (in particular the initial claim) must only request the court to care for the translation and pay immediately thereafter the estimated costs of the translation for correctly initiating the litigation and thus meeting the term of limitation. The rest of time needed for the translation is irrelevant. The author is developing the impact of this decision for the three variants of serving a document to someone abroad in the European Union:

(1) Serving the document spontaneously in time together with the translation,

(2) Serving the document belated together with the translation after

the court has asked whether the respective person wants a translation,

(3) Serving initially without a translation but serving the document again together with a translation after the addressee has refused to accept service without any translation.

A. Dutta: **European Certificate of Succession for administrators of insolvent estates?**

German law provides for a special insolvency procedure for insolvent estates (Nachlassinsolvenzverfahren) which is subject to the European Insolvency Regulation. The Oberlandesgericht Frankfurt am Main came to the conclusion that nevertheless the liquidator of such an insolvency procedure can apply for a European Certificate of Succession under the Succession Regulation being an "administrator of the estate". The case note argues that the German Nachlassinsolvenzverfahren falls within the scope of the Insolvency and the Succession Regulation (section II & III) and that issuing a Certificate causes only indirect frictions between both instruments which are not grave enough to invoke the conflict rule in Article 76 of the Succession Regulation (section IV). The case shows that the model of the Certificate could be extended to other areas (section V).

E. Jayme: **The restitution of the „Welfenschatz" before the U.S. Supreme Court**

The US Supreme Court, in a case involving the restitution of the treasure of the Guelphs and the question of state immunity of the Federal Republic of Germany, decides that the FSIA's exception concerning property taken in violation of the international law of expropriation does not refer to property owned by German nationals ("domestic takings rule"). The heirs of German Jewish Art dealers who had acquired a large part of the art treasure of the Guelphs from the Ducal family of Braunschweig asked for the restitution of such parts of the treasure which they had sold to Prussia in 1935 alleging that they had been unlawfully coerced to sell the pieces for a third of its value. The defendants were the Federal Republic of Germany and the Stiftung Preußischer Kulturbesitz. The plaintiffs argued inter alia that the forced purchase of the treasure had been an act of genocide in violation of international law and, therefore, justified an exception to State immunity. The District Court denied Germany's motion to dismiss, and the D.C. Circuit Court affirmed. The Supreme Court held that the phrase "rights in property taken in violation of international law" refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule. The case was remanded to the D.C. Circuit Court of Appeals for further proceedings which inter alia will concern the question whether the Jewish art dealers were German nationals at the time of the sale of the treasure (1935).

Online seminar on Private International Law in Islamic Countries – Developments and Challenges

The Faculty of Law, Brawijaya University, Indonesia is organizing a one-day international online seminar on *Private International Law in Islamic Countries – Developments and Challenges.* The main purpose of the seminar is to examine and discuss the current situation of private international law in Islamic countries especially from the point of view of the influence of religion (Sharia/Islamic law) on the regulation of private international relationships.

Participation is free but online registration (here) is kindly requested to receive the link to the conference, which will be emailed shortly before the event.

After registering, attendees will receive a confirmation email containing information about joining the webinar. The event will also be live streamed via YouTube (here). E-certificate for attendance will also be issued for attendees to prove that they joined the online seminar.

Details about the forthcoming seminar are as follows:

Date: 24 August 2021

Time: 13:00 (Western Indonesia Time); 14:00 (Brunei & Hong Kong Time); 15:00 (Japan Time)

Program (details can be found here):

1. Admittance for Key-note Speaker, Invited Speakers, and Seminar
2. Opening Ceremony by the Dean of the Faculty of Law, Brawijaya
3. Keynote Speech by Professor Yun Zhao, Representative of the HCCH Regional Office for Asia and the Pacific
4. Seminar Presentation (Moderator: Cyndiarnis, SH. MKn)
    - a. Associate Professor Béligh Elbalti, Ph.D., Graduate School of Law and Politics, Osaka University (*The Influence of Islamic Law Principles on the Treatment of International Private Relationships – Family Law as Example*)
    - b. Nobumichi Teramura, Assistant Professor of the Institute of Asian Studies, and University of Brunei Darussalam (*Shariah as the Law Applicable to an International Commercial Contract: Challenges and Opportunities in Australia and Brunei*)
    - c. Afifah Kusumadara, SH. LL.M. SJD., Faculty of Law, Brawijaya University (*The connecting factors to determine the applicable law and the court jurisdiction in Indonesia: The interference of religion*)
5. Question and Answer
6. Photo Session and Closing
7. Announcement by the M.C. concerning:
    - Certificates of Participation
    - Seminar materials

Any enquiries should be directed to seminar_pil@ub.ac.id. The organisers are looking forward to having fruitful discussion with and exchange of ideas among all participants.

The University of Buenos Aires and the National University of Córdoba (Argentina) are organising a series of seminars entitled “New Perspectives in Private International Law” this European summer / Argentinean winter – in Spanish

SEMINARIO INTERNACIONAL:

NUEVAS PERSPECTIVAS EN DERECHO INTERNACIONAL PRIVADO

Directoras:
Luciana Scotti (UBA) y Candela Villegas (UNC – CONICET)

Coordinadores:
Mariana Antón Pérez (UBA), Leandro Baltar (UBA), Virginia Carletti (UNC) y Lucía Protti (UNR)

Colaboradores:
Bahía Gatti (UES21), Martín Juez (UNC) y María Belén Villarreal Bracamonte (UNC)

Viernes
17 a 19 hs. (Argentina)

16 de julio: *"Agenda actual de los foros de codificación internacional"*
- Ignacio Goicoechea
- Dante Negro

23 de julio: *"Contratos de vacunas y métodos de resolución de controversias"*
- Sixto Sánchez Lorenzo
- Julio César Rivera (h).

30 de julio: *"Perspectiva de género en la restitución internacional de NNA"*
- Adriana Dreyzin de Klor
- Nuria González Martín

6 de agosto: *"Procesos de codificación en la dimensión interna del DIPr en la region"*
- Jorge Oviedo Albán
- Eduardo Picand Albónico

13 de agosto: *"Protección internacional de datos personales"*
-María Mercedes Albornoz

"Responsabilidad social empresaria y DIPr"
- Alejandra Olay

20 de agosto: *"Migraciones y DIPr"*
- Eugenio Hernández Bretón
- Carmen Ruiz Sutil

27 de agosto: *Reunión de cierre del seminario*

Consultas:
seminario.gioja.cijs@gmail.com

Organizan: Instituto GIOJA Derecho — CONICET UNC Universidad Nacional de Córdoba — C I J S

Colabora: UNIVERSIDAD SIGLO 21 La educación evoluciona

The series of seminars are organised by the Ambrosio L. Gioja Research Institute

of the University of Buenos Aires, the Center for Legal and Social Research of the National University of Córdoba (Argentina) and the National Council for Scientific and Technical Research (CONICET). The seminars will take place each Friday from 16 July to 27 August 2021 at 17:00 (Buenos Aires time) / 22:00 CEST time (Central European Summer Time).

The topics that will be discussed are very diverse, ranging from vaccination contracts to migration and Private International Law. The series of seminars will end on 27 August 2021 with a summary of the findings, coordinated by Candela Villegas and Luciana Scotti.

I am proud to announce that several AMEDIP members will be speaking at these seminars.

The seminars are free of charge but registration is required. Please click here to register.

Certificates of participation will be issued and certifications of approval will also be issued but only to those who prepare a final paper.

For more information, click here (Facebook page). The platform that will be used is Zoom. Any questions may be directed to seminario.gioja.cijs@gmail.com.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2021: Abstracts

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

O. Remien: **The European Succession Regulation and the many questions of the European court practice – five years after entry into force**

After five years of application of the European Succession Regulation it is time to have a look at European court practice: The general connecting factor of habitual residence has somehow been addressed by the European Court of Justice (ECJ) in *E.E.*, but especially national court practice shows many interesting cases of the necessary overall assessment. Choice of law by the testator is particularly important and a notary should point not only at the present situation, but also at possible developments in the future. Estate planning has become more interesting. The legacy *per vindicationem* (*Vindikationslegat*, i.e. with *in rem* effect) recognized in *Kubicka* poses specific problems. The position of the surviving spouse under § 1371 BGB in German law has become a highly debated subject and here the aspect of free movement of persons is highlighted. The European Succession Certificate also raises many questions, among them the applicability of the competence rules in case of national notarial succession certificates or court certificates, cases *Oberle*, *WB* and *E.E.*. The article pleads for an equilibrated multilateral approach. Donation *mortis causa* will have to be dealt with by the ECJ soon. Five years of application of the Succession Regulation – and many questions are open.

P. Hay: **Product Liability: Specific Jurisdiction over Out-of-State Defendants in the United States**

“Stream of commerce” jurisdiction in American law describes the exercise of jurisdiction in product liability cases over an out-of-state enterprise when a product produced and first sold by it in another American state or a foreign country reached the forum state and caused injury there. The enterprise cannot be reached under modern American rules applicable to “general” (claim unrelated) jurisdiction. Can it be reached by exercise of “specific” (claim related) jurisdiction even though it did not itself introduce the product into the forum state? This is an important question for interstate American as well as for foreign companies engaged in international commerce. The applicable federal constitutional limits on the exercise of such “stream of commerce” jurisdiction have long been nuanced and uncertain. It was often assumed that the claim must have “arisen out of” the defendant’s forum contacts: what did that mean? The long-awaited U.S. Supreme Court decision in March 2021 in Ford vs. Montana now permits the exercise of specific jurisdiction when the claim arises out of or is (sufficiently) “related” to the defendant’s in-state contacts and activities. This

comment raises the question whether the decision reduces or in effect continues the previous uncertainty.

W. Wurmnest: **International Jurisdiction in Abuse of Dominance Cases**

The CJEU (Grand Chamber) has issued a landmark ruling on the borderline between contract and tort disputes under Article 7(1) and (2) of the Brussels I-bis Regulation. *Wikingerhof* concerned a claim against a dominant firm for violation of Art. 102 TFEU and/or national competition law rules. This article analyses the scope of the ruling and its impact on actions brought against dominant firms for violation of European and/or national competition law and also touches upon the salient question as to what extent such disputes are covered by choice of court agreements.

C.F. Nordmeier: **The waiver of succession according to Art. 13 Regulation (EU) 650/2012 and § 31 IntErbRVG in cases with reference to third countries**

According to Art. 13 Regulation (EU) 650/2012, a waiver of succession can be declared before the courts of the state in which the declarant has his habitual residence. The present article discusses a decision of the Cologne Higher Regional Court on the acceptance of such a declaration. The decision also deals with questions of German procedural law. The article shows that – mainly due to the wording and history of origin – Art. 13 Regulation (EU) 650/2012 presupposes the jurisdiction of a member state bound to the Regulation (EU) 650/2012 to rule on the succession as a whole. Details for establishing such a jurisdiction are examined. According to German procedural law, the reception of a waiver of succession is an estate matter. If Section 31 of the IntErbRVG is applicable, a rejection of the acceptance demands a judicial decree which is subject to appeal.

P. Mankowski: **The location of global certificates – New world greets old world**

New kinds of assets and modern developments in contracting and technology

pose new challenges concerning the methods how to locate assets. In many instances, the rules challenged are old or rooted in traditional thinking. Section 23 of the German Code of Civil Procedure (ZPO) is a good example for such confrontation. For instance, locating global certificates requires quite some reconsideration. Could arguments derived from modern legislation like the Hague Intermediated Securities Convention, Art. 2 pt. (9) EIR 2015 or § 17a DepotG offer a helping hand in interpreting such older rules?

S. Zwirlein-Forschner: **All in One Star Limited – Registration of a UK Company in Germany after the End of the Brexit Transition Period**

Since 1 January 2021, Brexit has been fully effective as the transition period for the UK has ended. In a recent decision, the Federal Court of Justice (BGH) has taken this into account in a referral procedure to the Court of Justice of the European Union (CJEU). The decision raises interesting questions on the demarcation between register law and company law, on conflict of laws and on the interpretation of norms implementing EU law. This article comments on these questions.

K. Sendlmeier: **Informal Binding of Third Parties – Relativising the Voluntary Nature of International Commercial Arbitration?**

The two decisions from the US and Switzerland deal with the formless binding of third parties to arbitration agreements that have been formally concluded between other parties. They thus address one of the most controversial issues in international commercial arbitration. Both courts interpret what is arguably the most important international agreement on commercial arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The Supreme Court has ruled that the Convention does not preclude non-signatories from being bound by arbitration based on equitable estoppel in US arbitration law. In the Swiss decision, the binding nature of a non-signatory is based on its interference in the performance of the main contract of other parties. According to the established case law of the Swiss Federal Tribunal, this binding approach does not conflict with the New York Convention either.

K. Bälz: **Can a State Company be held liable for State Debt? Piercing of the Corporate Veil vs. attribution pursuant to Public International Law – Cour d'appel de Paris of 5 September 2019, No. 18/17592**

The question of whether the creditor of a foreign state can enforce against the assets of public authorities and state enterprises of that state is of significant practical importance, particularly in view of the increasing number of investment arbitrations. In a decision of 5 September 2019, the Paris Court of Appeal has confirmed that a creditor of the Libyan State can enforce an arbitral award against the assets of the Libyan Investment Authority (LIA), arguing that – although the LIA enjoys separate legal personality under Libyan law – it was in fact an organ *(émanation)* of the Libyan State, that was functionally integrated into the state apparatus without clearly separated assets of its own. This approach is based on public international law concepts of state liability and diverges from corporate law principles, according to which a shareholder cannot generally be held liable for the corporation's debts.

O.L. Knöfel: **Liability of Officials for Sovereign Acts (acta iure imperii) as a Challenge for EU and Austrian Private International Law**

The article reviews a decision of the Supreme Court of the Republic of Austria (Case 1 Ob 33/19p). The Court held that a civil action for compensation brought in Austria, by the victim of a downhill skiing accident, against a German school teacher on account of alleged negligence during a reconnaissance ride down an Austrian ski slope, does not constitute a "civil and commercial matter" under the Rome II Regulation, as it involves an *actum iure imperii* (Art. 1 cl. 1 Rome II Regulation). As a consequence, the Court applied German Law, relying on an alleged customary conflicts rule (*lex officii* principle), according to which indemnity claims against officials who act on behalf of the State are inevitably and invariably governed by the law of the liable State. Finally, the Court held that an action brought directly against a foreign official in Austria is not barred by sec. 9 cl. 5 of the Austrian Act of State Liability *(Amtshaftungsgesetz)*. The Court's decision is clearly wrong as being at variance with many well-established principles of the conflict of laws in general and of cross-border State liability in

particular.

E. Piovesani: **Italian Ex Lege Qualified Overriding Mandatory Provisions as a Response to the "COVID-19 Epidemiological Emergency"**

Art. 88-bis Decree-Law 18/2020 (converted, with modifications, by Law 27/2020) is headed "Reimbursement of Travel and Accommodation Contracts and Package Travel". This provision is only one of the several provisions adopted by the Italian legislator as a response to the so-called "COVID- 19 epidemiological emergency". What makes Art. 88-bis Decree-Law 18/2020 "special" is that its para. 13 qualifies the provisions contained in the same article as overriding mandatory provisions.

Conversations on transnational surrogacy and the ECtHR case Valdís Fjölnisdóttir and Others v. Iceland (2021)

Comments by Ivana Isailovic & Alice Margaria

The case of *Valdís Fjölnisdóttir and Others v. Iceland* brings to the attention of the European Court of Human Rights (ECtHR) the no longer new, yet persistently complex, question of the determination of legal parenthood following international surrogacy arrangements. Similar to previous cases, such as *Mennesson v France*, *Labassee v France*, and*Paradiso and Campanelli v Italy*, this complaint originated from the refusal of national authorities to recognise the parent-child relationship established in accordance with foreign law on the ground that surrogacy is prohibited under national law. *Valdís Fjölnisdóttir and Others* is the first case of this kind involving a married same-sex couple who subsequently divorced. Like the applicants in the case of *Paradiso and Campanelli v Italy*, Ms Valdís Glódís Fjölnisdóttir and Ms Eydís Rós Glódís Agnarsdóttir are not biologically linked to their child, who was born in California.

Ivana Isailovic & Alice Margaria's comments answer three questions:

1) What's new in this case?

2) What are the legal effects of this decision?

3) What are alternative legal framings and ideas?

1. Were you surprised by this ruling? Is there anything new in this case?

Alice: This judgment is emblematic of the ECtHR's generally cautious and minimalistic approach to assessing the proportionality of non-recognition *vis-à-vis* unconventional parent-child relationships. It is widely agreed (e.g., Liddy 1998; Stalford 2002; Choudhry and Herring 2010) that the Court has over time expanded the boundaries of what constitutes 'family life' and supported the adoption of more inclusive and diverse conceptions of 'family' through its dynamic interpretation of Article 8 ECHR. Yet, as I have argued elsewhere, this conceptual expansion has not translated into the same protection of the right to respect for family life for all unconventional families. *Valdís Fjölnisdóttir and Others* is a

further manifestation of this trend. The Court has indeed no difficulty in qualifying the bonds existing between the two women and their child as 'family life'. As far as the applicability of the 'family life' limb of Article 8 is concerned, the quality and duration of the relationship at stake trump biological unrelatedness. Yet when it comes to assessing the proportionality of the interference of non-recognition with the applicants' right to respect for family life, the Court is satisfied with the *de facto* preservation of the family ties existing between the applicants, and diminishes the disadvantages created by lack of recognition of their parent-child relationship – just as it did in *Mennesson*. Icelandic authorities had taken steps to ensure that the applicants could continue to enjoy their family ties in spite of non-recognition by placing the child in the foster care of the two women and making these arrangements permanent. This had – from the Court's perspective – alleviated the distress and anguish experienced by the applicants. In addition, the child had been granted Icelandic citizenship by a direct act of Parliament, with the effect of making his stay and rights in the country regular and secure. As a result, according to the Court, non-recognition had caused the applicants only limited practical hindrances to the enjoyment of their family life. As in *Mennesson*, therefore, the Court finds that there is family life among the three applicants, but no positive obligation on the part of the State to recognise the parent-child relationships in accordance with the California birth certificate. Whilst it is true that, in the case at hand, the family ties between the applicants had indeed been afforded some legal protection through foster care arrangements (unlike in previous cases), it seems that the unconventional nature of the family at stake – be it due to the lack of a biological link, the fact that it involves two mothers, or because they resorted to surrogacy – continues to hold back the Court from requiring the State to recognise the existing ties *ab initio* and through filiation. This is also line with the Advisory opinionof 10 April 2019 (request no. P16-2018-001), where the Grand Chamber clarified that States have the obligation to provide 'only' *some* form of legal recognition – e.g., adoption – to the relationship between a child born from surrogacy and their non-genetic mother.

Whilst not setting a new jurisprudential trajectory on how to deal with the determination of legal parenthood following international surrogacy, *Valdís Fjölnisdóttir and Others* brings two novel elements to bear. The first is encapsulated in para 64, where the Court determines the Supreme Court's interpretation of domestic provisions attributing legal motherhood to the woman

who gives birth to be 'neither arbitrary nor unreasonable' and, accordingly, considers that the refusal to recognise the family ties between the applicants and the child has a 'sufficient basis in law'. In this passage, the Court takes a clear stance on the rule *mater semper certa est*, which, as this case shows, has the potential to limit the recognition of contemporary familial diversity (not only in the context of surrogacy but also in cases of trans male pregnancies, see e.g. *OH and GH v Germany*, Applications no. 53568/18 and 54941/18, communicated on 6 February 2019). Second, and in contrast, Judge Lemmens' concurring opinion takes one important step towards demystifying and problematising the relevance of biological relatedness in regulating legal parenthood following international surrogacy. He points out that the negative impact of non-recognition is equal for all children born from surrogacy abroad who find themselves in legal limbo, regardless of whether they are biologically connected to their parents or not. He further adds that, whilst adoption is an alternative means of recognition, it does not always provide a solution to all difficulties a child might be experiencing. In the case at hand, for instance, adoption would have benefited only one parent-child relationship: the couple had indeed divorced through the national proceedings and, therefore, a joint adoption was no longer a possibility for them. This concurring opinion therefore moves towards questioning and potentially revising the terms of the debate between, on the one hand, preventing illegal conduct by intended parents and, on the other hand, tolerating legal limbo to the detriment of children.

Ivana: On the one hand, there is nothing new in this decision. Like in Mennesson (2014) and Paradiso & Campanelli (2017), the Court continues to "constitutionalize" domestic PIL rules. As many PIL scholars argued, this reflects the transformations of conflict of laws rules and methods, as the result of human rights field's influence. Following the ECHtR and the CJEU case law, conflicts of laws rules became subordinate to a proportionality test which implies weighing various interests at stake. In this case, it involves balancing applicants' rights to private and family life, and the interests of the state in banning commercial surrogacy.

Second, like in its previous decisions on surrogacy, by recognizing the importance of the *mater semper est* principle, the ECtHR continues to make the biological link preeminent when defining the scope of human rights protection

On the other, it seems that there is a major rupture with previous decisions. In Mennesson (para 81 & 99), and the advisory opinion requested by the French Cour de cassation (2019) (para 37-38), the ECtHR emphasized child's right to a recognition of their legal relationship with their intended parents (part of the child's right to private and family life). This has in turn influenced the Court's analysis of the scope of states' margin of appreciation.

In the case however, the Court pays lip service to child's interests in having their legal relationship with their intended parents recognized (besides pointing out that, under domestic law, adoption is open to one of the two women, par. 71, and that the State took steps to preserve the bond between the (intended) parents and their child).

Without the legal recognition of the parent-child relationship, however, the child—who is placed in foster care—is left in a vulnerable legal position that is hardly in line with the protection of children's rights. It is unclear what explains this shift in the Court's reasoning, and Judge Lemmens' concurring opinion that tries to make sense of it is unconvincing.

2. What are the effects of this decision in terms of the regulation of global surrogacy?

Ivana: There are at least two legal consequences for PIL. First, the decision legitimizes a flawed, biological and marginalizing understanding of legal parenthood/motherhood. Second, it legitimizes feminists' anti-surrogacy arguments that dovetail with conservative anti-LGBTQ transnational movements' positions.

According to the Court, *mater semper certa est*—the notion that the woman who gives birth to the child is the legal mother of that child— which justifies Iceland's refusal to recognize the foreign parent-child link, is neither "arbitrary nor manifestly unreasonable" (para 69)

But *mater semper certa est* has consistently been a bit more than an incantation.

In France, scholars showed that the Civil Code from 1804 originally allowed and promoted the constitution of families which didn't reflect biological bonds, as it

was enough to prove marriage to infer kinship. In addition, the *mater semper certa est* principle has been continuously eroded by assisted reproductive technology, which today enables multiple individuals to be genetic parents.

Motherhood has always been stratified, and *mater semper est* has operated differently in relation to class, race and gender. Research shows how in the US during slavery, African American women were not considered to be the legal mothers of children they gave birth to, and how today, the state monitors and polices the lives of women of color and poor women (see for instance the work by Angela Davis and Dorothy Roberts). On this side of the Atlantic, between 1962-1984, the French state forcefully deported thousands of children from poor families from Réunion (a former French colony now an oversees territory) to metropolitan France. Finally, this principle penalizes those who do not identify with gender binaries, or with female identity, while being able to give birth, or those who identify as women/mothers, but are unable/unwilling to give birth.

Second, the decision in some respects illustrates the mainstreaming within law of feminists' anti-surrogacy arguments, which overlap with ant- feminist, conservative, anti-LGBTQ movements' discourses. Iceland' s argument that surrogacy is exploitative of surrogates, mirrors affluent anti-surrogacy networks' positions that anti-surrogacy feminist groups adopted in the 1980s. These lobbies argue that surrogacy constitutes the exploitation of women, and that surrogacy severs the "natural maternal bonding" and the biological link between the mother and the child.

This understanding of surrogacy promoted by feminists came to overlap with the one adopted by transnational conservative, pro-life, anti-feminist, anti-LGBTQ groups, and it is interesting that some of the arguments adopted by the Court correspond to those submitted by the conservative institute *Ordo Iuris*, which intervened in the case. Another example of this overlap, is the EU lobby group *No Maternity Trafficking*, which includes right-wing groups, such as *La Manif pour tous,* that organized protests against the same-sex marriage reform in France in 2013.

Here is how the emphasis on the biological link in relation to the definition of legal parenthood may overlap with anti-LGBTQ discourses. As I argued elsewhere, in France, private lawyers, feminists, psychoanalysts, and conservative groups such as *La Manif pour tous* defended the biological understanding of legal

filiation, to oppose the same-sex marriage reform which also opened adoption to same-sex couples, because, according to them, biological rules sustain a "symbolic order" which reflects the "natural order" and outside that order a child will become "psychotic." This understanding of legal filiation is however relatively recent in France and is in contradiction with the civil law approach to filiation based on individual will. In fact, different actors articulated these arguments in the 1990s, when queer families started demanding that their families be legally protected and recognized.

Alice: This decision confirms the wide, yet not unlimited, freedom States enjoy in regulating surrogacy and the legal consequences of international surrogacy in their territories and legal systems. In so doing, it legitimises the preservation and continuing operation of traditional filiation rules, in particular the *mater semper certa est* rule, which anchors legal motherhood to the biological processes of pregnancy and birth. It follows that the public order exception can still be raised. At the same time, however, authorities are required to ensure that *some* form of recognition be granted to *de facto*parent-child relationships created following international surrogacy through alternative legal routes, such as foster care or adoption. In a nutshell, therefore, the regulatory approach to international surrogacy supported by this decision is one of *accommodation*, as opposed to *recognition*, of familial diversity. Parental ties created following surrogacy arrangements abroad have to be *granted* some form of legal recognition, to be given some standing in the national legal order, but do not necessarily have to be *recognised* in their original version, i.e., as legal parental ties *ab initio*.

3. If not this legal framing, which one should we (scholars, courts or activists) adopt to think about transnational surrogacy?

Alice: Conflicts of laws in this context can result in two opposing outcomes: openness to familial and other types of diversity, but also – as this case shows – attachment to conventional understandings of parenthood, motherhood and ways of creating and being a family. If we imagine a continuum with the abovementioned points as its extremes, the Court seems to take an intermediary position: that of *accommodating* diversity. The adoption of such an intermediary

position in *Valdís Fjölnisdóttir and Others* was facilitated by the existence of foster care arrangements and the uninterrupted care provided by the first and second applicants to their child since his birth. In the Court's eyes, therefore, the child in this case was not left in 'complete' legal limbo to the same extent as the children in *Mennesson*, nor put up for adoption as in the case of *Paradiso and Campanelli*.

To address the question 'which framing shall we adopt?', the answer very much depends on who 'we' is. If 'we' is the ECtHR, then the margin for manoeuvring is clearly more circumscribed than for activists and scholars. The Court is bound to apply some doctrines of interpretation, *in primis* the margin of appreciation, through which it gains legitimacy as a regional human rights court. The application of these doctrines entails some degree of 'physiological' discretion on the part of the Court. Determining the width of the margin of appreciation is never a mechanical or mathematical operation, but often involves drawing a balance between a variety of influencing factors that might concur simultaneously within the same case and point to diametrically opposed directions. Engaging in this balancing exercise may create room for specific moral views on the issue at stake – i.e., motherhood/parenthood – to penetrate and influence the reasoning. This is of course potentially problematic given the 'expressive powers' of the Court, and the role of standard setting that it is expected to play. That being said, if regard is given to the specific decision in *Valdís Fjölnisdóttir and Others*, despite the fact that the outcome is not diversity-friendly, the reasoning developed by the Court finds some solid ground not only in its previous case law on surrogacy, but more generally in the doctrinal architecture that defines the Court's role. So, whilst scholars advocating for legal recognition of contemporary familial diversity – including myself – might find this decision disappointing in many respects (e.g., its conventional understandings of motherhood and lack of a child-centred perspective), if we put *Valdís Fjölnisdóttir and Others* into (the Strasbourg) context, it would be quite unrealistic to expect a different approach from the ECtHR. What can certainly be hoped for is an effort to frame the reasoning in a manner which expresses greater sensitivity, especially towards the *emotional and psychological* consequences suffered by the applicants as a result of non-recognition, and thus gives more space to their voices and perceptions regarding what is helpful and sufficient 'to substantially alleviate the uncertainty and anguish' they experienced (para 71).

Ivana: In some respects, this decision mirrors dominant PIL arguments about surrogacy. For some PIL scholars, surrogacy challenges traditional ("natural") mother-child bond, when historically legal motherhood has always been a stratified concept. Other PIL scholars argue that surrogacy raises issues of *(over)exploitation* of surrogates and that women are *coerced* into surrogacy, but never really explain what these terms mean under patriarchy, and in a neoliberal context.

Like many economic practices in a neoliberal context, transnational surrogacy leads to abuses, which are well documented by scholars. But, understanding what law can, cannot or should do about it, requires, questioning the dominant descriptions of and normative assumptions about surrogacy that inform PIL discourses.

Instead of the focus on *coercion*, or on a narrow understanding of what womanhood is, like the one adopted by relational feminism, I find queer and Marxist-feminists' interventions empirically more accurate, and normatively more appealing.

These scholars problematize the distinctions between nature/ technology, and economy/ love which shape most of legal scholars' understanding of surrogacy (and gestation). As Sophie Lewis shows in her book Full Surrogacy Nowprocreation was never "natural" and has always been "technologically" assisted (by doctors, doulas, nurses, nannies..) and gestation is *work*. Seeing gestation as *work* seeks to upend the capitalist mode of production which relies on the unpaid work around social reproduction. Overall, these scholars challenge the narrow genetic understanding of kinship, argue for a more capacious definition of *care*, while also making space for the recognition of surrogates' reproductive work, their voices and their needs.

Legally recognizing the reproductive labor done by surrogates, may lead to rethinking how we (scholars, teachers, students, judges, activists…) understand the public policy exception/ recognition in PIL, and the recent proposals to establish binding transnational principles, and transnational monitoring systems for regulating transnational surrogacy in the neoliberal exploitative economy.

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