HCCH Note on the concept of "purposeful and substantial connection" of the February 2017 draft Convention of the Judgments Project

The Permanent Bureau of the Hague Conference on Private International Law (HCCH) has just issued a Note on the concept of "purposeful and substantial connection" in Article 5(1)(g) and 5(1)(n)(ii) of the February 2017 draft Convention of the Judgments Project for the attention of the *Special Commission meeting of November 2017 on the Recognition and Enforcement of Foreign Judgments*. The February 2017 draft Convention is available here.

This Note was prepared by **Professor Ronald A. Brand** and **Dr Cristina M. Mariottini**. Professor Geneviève Saumier provided comments.

Article 5(1)(g) and 5(1)(n)(ii) reads as follows:

Article 5(1)

"A judgment is eligible for recognition and enforcement if one of the following requirements is met" – […]

(g)

"[T]he judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place, or should have taken place, in accordance with

(i) the parties' agreement, or

(ii) the law applicable to the contract, in the absence of an agreed place of performance

unless the defendant's activities in relation to the transaction clearly did not

constitute a **purposeful and substantial connection to that State**;" (our emphasis)

(n)(ii)

"[T]he judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and – […]

(ii) the law of the State of origin is expressly or impliedly designated in the trust instrument as the law governing the aspect of the trust that is the subject of the litigation that gave rise to the judgment[, unless the defendant's activities in relation to the trust clearly did not constitute a **purposeful and substantial connection to that State**];" […] (our emphasis)

Other information relating to the meeting is available at https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission.

Please note that the meeting above-mentioned is open only to delegates or experts designated by the Members of the Hague Conference, invited non-Member States and International Organisations that have been granted observer status.

5th Petar Sarcevic Conference on Information and Data

The good tradition of the biannual Petar Sarcevic conferences is being continued this year with the 5th conference titled **Information and Data: The Road Ahead**. It will take place in a beautiful Croatian coastal tourist and conference resort Opatija, on 6 and 7 October.

This two-day event will provide ample oportunities for the professionals and scholars to discuss current issues of protection of confidential information, business secrets and personal data in the context of technological advancement and resulting economic and social developments. The conference is divided into three sessions:
– Protection of confidential information v access/disclosure
– Managing data protection: A tall order for controllers and subjects
– Litigation in the midst of economic and technological changes.
The wast range of speakers includes members of the judiciary (EU and national), representatives of the executive branch, leading lawyers and prominent academics.

For additional information about the conference, programme, speakers, venue and special early-bird rates expirying on 10 September please consult the conference webpage.

Job Vacancy: Ph.D. Position/Teaching Fellow at Leuphana Law School, Lüneburg (Germany)

Leuphana Law School is looking for a highly skilled and motivated Ph.D. candidate and fellow (wissenschaftliche/r Mitarbeiter/in) on a part-time basis (50%) as of 1 December 2017.

The successful candidate holds a first law degree (ideally the First State Exam (Germany) or LL.M. (UK)/J.D. (USA)/similar degree) and is interested in private international law, international economic law, and intellectual property law—all from a comparative and interdisciplinary perspective. A very good command of German and English is expected; good IT skills are required.

The fellow will be given the opportunity to conduct his/her own Ph.D. project (under the faculty's regulations). The position is paid according to the salary scale E-13 TV-L, 50%. The initial contract period is three years, with an option to be extended. The research fellow will conduct research as part of the unit led by Professor Dr. Tim W. Dornis (Chair in Private Law, International Private and Economic Law, and Comparative Law) and will have an independent teaching obligation (2 hours/week).

If you are interested in this position, please send your application (cover letter, CV, and relevant documents) by 4 October 2017 to

Leuphana Universität Lüneburg

Personalservice, Corinna Schmidt

Kennwort: **WiMi Rechtswissenschaften**

Universitätsallee 1

21335 Lüneburg

bewerbung@leuphana.de

Leuphana University is an equal opportunity employer.

The job advert in full detail is accessible here

Bolivia joins the Hague Apostille Convention

Today (6 September 2017) Bolivia joined the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (Apostille Convention). With the accession of Bolivia, the Apostille Convention

now has 115 Contracting Parties. The Apostille Convention will enter into force for Bolivia on 7 May 2018.

Four out of the last five States that have joined the Apostille Convention since December 2015 have been from the Americas (Brazil, Chile, Guatemala and Bolivia). The Apostille Convention has already entered into force for Brazil and Chile and will enter into force for Guatemala on 18 September 2017.

There are 5 States that are yet to join the Apostille Convention from the Americas: Canada, Cuba, Guyana, Haiti and Jamaica.

For more information visit https://www.hcch.net/en/news-archive/details/?varevent=568. The full list of Contracting Parties is available here.

For the First Time, a Chinese Court Recognizes and Declares Enforceable a US Monetary Judgment

Jie Huang from the University of New South Wales provides more information and commentary. Some further information and background from Don Clarke is here.

On the Global Community of

Private International Law – Impressions from Brazil

From August 3-5 this year, the Pontifical Catholic University of Rio de Janeiro hosted the 7th biennial conference of the Journal of Private International Law. Ably organized by Nadia de Araujo and Daniela Vargas from the host institution, together with Paul Beaumont from Aberdeen, the conference was a great success, as concerns both the quality and quantity of the presentations. Instead of a conference report, I want to provide some, undoubtedly subjective, impressions as concerns the emerging global community of private international law.

First, no less than 168 participants attended, from all over the world. The Journal conference has, by now, become something like a World Congress of Private International Law. This is no small achievement. The Journal of Private International Law started out in 2005 as a very doctrinal publication focusing primarily on common law systems and European private international law. Fittingly, the first two conferences took place in the UK. It was a very wise decision to move, after that, to cities in other countries—New York (2009), Milan (2011), Madrid (2013) and now, after a return to the UK (Cambridge) for the ten-year anniversary in 2015, Rio de Janeiro (2017). By now, it can be said that Journal and conference both really represent the world. And what is emerging is a global community that comes together at these and other events.

Second, this first Journal conference in Latin America was an excellent opportunity to showcase the tremendous developments of the discipline on this Continent. Latin America, the region that created the Código Bustamante, has long produced excellent scholars in private international law. However, for some time the discipline appeared, at least to the outside observer, marginalized, caught between a very doctrinal approach on the one side and a very philosophical one on the other, both often without connection to actual practice. In recent years, this has changed, for a number of reasons: the Hague Conference established a bureau, led by Ignacio Goicoechea; a young generation of scholars connects theory and practice, doctrine and interdisciplinarity; legislators are, at long last, replacing antiquated legislation. Many Latin American scholars and practitioners at the conference proved that interest and quality. But the best sign for the vitality of the field were the many excellent Brazilian students who

followed the conference with enthusiasm and expertise.

Third, and finally, this emerging globalization captures all regions, but not to the same degree. The great importance of Latin America in Rio was no surprise. Nor was the great role that European private international law, a testament not only both to the European background of the journal and the more generous travel budgets in European universities, but also to the legislative and scholarly developments in Europe. Asia was somewhat less well represented, as far as I could see, despite exciting developments there (including current work on Asian Principles of Private International Law), but several presentations dealt with Asian development. The most palpable absence concerned the United States. There were only two participants from the US, fewer than there were Nigerians. In a not so distant past, US private international law was the avant-garde of the discipline worldwide. When the Second Restatement was being discussed, the whole world was watching what the conflicts revolution would yield. Now, a third Restatement is underway. But I heard no word about that from participants in Rio, and the Restatement's reporters did not use the occasion to advertise their project. The United States is no longer leading the globalization of the field. Will it at least follow?

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2017: Abstracts

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

D. Coester-Waltjen: **Fighting Child Marriages – even in Private International Law**

The article describes the newly enacted German law against "child marriages" and analyses the critical points. This law raises the minimum marriage age to 18

years without any option for younger persons to conclude a valid marriage. The former possibility of a dispensation by the family court has been abolished. Even more important and critical at the same time are the new provisions with regard to cases where foreign law governs the ability to marry. Despite the principal application of the spouses' national law, German law will always govern the question of the minimum marital age. This applies to marriages formed in Germany as well as to those already validly concluded elsewhere. Thus, irrespective of the applicable national law of the spouses a marriage cannot be concluded in Germany by persons who are younger than 18. If such a marriage has been formed nevertheless, it will be null and void from the beginning if one spouse was younger than 16 at the time of the marriage. If the spouses had attained the age of 16, but at least one of them was younger than 18, the marriage will be voidable (and must be declared void) in Germany. This is true also for heterosexual marriages of minors concluded elsewhere and valid under the otherwise applicable law. German law invalidates these marriages either directly (one spouse under 16) or through annulment proceedings (one spouse over 16 but under 18). The law provides only few exceptions and applies to all persons under 18 at the time the new law entered into force.

C. F. Nordmeier: **The German Law on the Modification of Rules in the Area of Private International Law and Private International Procedural Law – New Provisions for Cross-Border Civil Proceedings**

By the recently enacted law on the modification of rules in the area of Private International Law and Private International Procedural Law the German legislator created several alterations for civil procedures involving crossborder elements. The present contribution critically analyses the new rules. As far as service is concerned, the prohibition to demand the designation of an authorized recipient within the scope of application of the EU Service Regulation, the competence of judicial officers to handle incoming requests for service and new one-month periods for certain procedural measures are discussed. Also, the annulment of a European order for payment in the event that the applicant fails to indicate the competent court for the adversary proceedings is examined – as well as the possibility for the States of the Federal Republic of Germany to concentrate proceedings under the European Small Claims Regulation before certain courts. Finally, the consequences of the continued non-admission of judicial assistance for pre-trial discoveries in Germany are subject to discussion.

F. Maultzsch: **International Jurisdiction and Jointly Committed Investment Torts (Art. 5 No. 3 Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 Brussels I*bis* Regulation)**

The German Federal Supreme Court (BGH) has denied an attribution of acts among joint participants of cross-border investment torts for the purposes of Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels I*bis* Regulation. The judgment is based on a broad reading of the Melzer-decision of the CJEU. This article gives a critical assessment of the BGH's judgment. First of all, the Melzer-decision with its restrictive position as to attribution of tortious acts seems to be problematic in itself. Furthermore, the BGH does not consider that the case law of the CJEU has been developed for situations different from those to be judged by the BGH. The issue of attribution of tortious acts under Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels I*bis* Regulation should be approached in a nuanced way that accounts for the nature of the tort in question. This may also include a resort to the lex causae for specific protective laws (Schutzgesetze). In the case at hand where a foreign financial service provider had relied purposefully on acts of procurement carried out by a third party in Germany, jurisdiction of the German courts should have been approved under Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels I*bis* Regulation.

W.-H. Roth: **Private international law and consumer contracts: data protection, injunctive relief against unfair terms, and unfairness of choice-of-law provisions**

In its Amazon judgment, C-191/15, the European Court of Justice deals with three conflict-of-laws issues. Firstly, it determines the international applicability of data protection laws of the Member States in the light of Directive 95/46/EEC: A Member State may apply its law to business activities of an out-of-state undertaking directed at its territory if it can be shown that the undertaking carries out its data processing in the context of the activities of an establishment situated in that Member State. Secondly, it holds that an action for an injunction directed against the use of unfair terms in general terms and conditions, pursued by a consumer protection association, has to be classified as non-contractual. The law applicable to the action and the remedy has to be determined on the basis of Article 6 (1) of the Rome II Regulation, being related to an act of unfair

competition, whereas the (incidental) question of unfairness of a specific term in general terms and conditions shall be classified as a contractual issue and has to be judged on the basis of the law applicable to contracts according to the Rome I Regulation. Thirdly, the Court holds that the material scope of Directive 93/13/EEC extends to choice-of-law clauses in pre-formulated consumer contracts. Such a choice-of-law clause may be considered as unfair if it leads the consumer into error as far as the laws applicable to the contract is concerned.

C. Thomale: **Refusing international recognition and enforcement of civil damages adjunct to foreign criminal proceedings due to irreconcilability with a domestic civil judgment**

The German Supreme Court refused to enforce a civil claim resulting from criminal proceedings seated in Italy for reasons of irreconcilability with a German judgment given between the same parties. The case illustrates the considerable legal uncertainty that persists with the application of this ground for refusal of recognition and enforcement. The paper argues for a narrow interpretation in order to strengthen free movement of judgments within the European judicial area.

U. P. Gruber: **Recognition of provisional measures under Brussels lla**

In Purrucker, the ECJ established criteria for the recognition of provisional measures in matters of parental responsibility. Pursuant to the ECJ, if the court bases its jurisdiction on Art. 8 to 14 of the Brussels IIa Reg., the judgement containing provisional measures will be recognized and enforced in other Member States by way of Art. 21 et seqq. of the Regulation. If, however, the judgement does not contain an unambiguous statement of the grounds in support of the substantive jurisdiction of that court pursuant to Art. 8 to 14 Brussels IIa, the judgement does not qualify for recognition and enforcement under Art. 21 et seqq. Nevertheless, recognition and enforcement of the judgement are not per se excluded in this case. Rather, it has to be examined whether the judgement meets the prerequisites of Art. 20 Brussels IIa. If this is the case, the judgement can be recognized by use of other international instruments or national legislation. In a new decision, the Bundesgerichtshof applied this two-step-approach established by the ECJ to a Polish judgement, consequently denying any possibility to recognize the Polish judgement in Germany.

W. Hau: E**nforcement of penalty orders protecting parental rights of access within the European Union**

A dispute over the enforcement in Finland of a Belgian penalty order protecting parental rights of access has uncovered a loophole in the European law of international civil procedure: The Brussels I resp. Brussels I*bis* Regulation deals with the preconditions of the enforcement of foreign penalty orders (especially as regards the final determination of the payable amount), but only in the context of civil and commercial matters, excluding family matters. The Brussels II*bis* Regulation, on the other hand, covers disputes over parental rights of access but remains silent about penalty orders. The CJEU proposes an appropriate solution, bridging the gap in the regulations.

R. Geimer: **Ordre public attenué de la reconnaissance in adoption law**

The relevance of timing by reason of recognizing child adoptions of foreign states despite violation of public order in the original proceedings.

C. A. Kern: **The enforceability of foreign enforcement orders arising from family relationships**

In Germany, various regimes govern the enforceability of foreign enforcement orders arising from family relationships. The traditional way is to have the foreign enforcement order declared enforceable on the basis of adversarial proceedings. Various supranational texts and international treaties provide for a more advanced solution under which the foreign enforcement order is declared enforceable ex parte. The most progressive solution is automatic enforceability. Moreover, depending on the applicable regime, the remedies and the requirements governing their admissibility differ. Two recent decisions of the German Federal Supreme Court (Bundesgerichtshof) illustrate how complex the situation is. It is advisable to unify the applicable procedural rules at least insofar as the complexity is the consequence of diverging national rules.

R. Schaub: **Traffic Accidents with an International Element: The Complex Interaction of European and National Rules in two Cases from the Austrian Supreme Court**

Traffic accidents with an international element are common occurrences but still raise a lot of questions as to the applicable law. In Europe, different sets of rules

have been created to facilitate the compensation of victims in such cases. The complex interaction of EU and national rules on substantive law as well as private international law can be seen in two cases from the Austrian Supreme Court.

M. Andrae: **Again on the term „obligations arising out of matrimonial property regimes“**

The article deals with the characterization of claims between spouses living apart, which concern the joint property marital home and its financing through a credit. It involves: (1) compensation between spouses, in case they are jointly and severally liable for their obligations from the contract; (2) reimbursement of expenses for the matrimonial home, in case of the sole use of the matrimonial home by one of the spouses and (3) cases in which one spouse may demand from the other compensation for use of the matrimonial home. The main problem is whether this claim can be subsumed as “obligations arising out of matrimonial property regimes” with the consequence that it would be excluded from the scope of the Rome I and Rome II Regulation. For this the article presents a number of arguments. Finally, a solution will be discussed, insofar as the Brussels I*bis* Regulation for the jurisdiction and the Rome I and Rome II Regulations referring to conflict-of-laws rules are not applicable.

L. M. Kahl: **Differences in dealing with foreign law in German and Italian jurisprudence**

The article compares two cases in which the German Federal Court of Justice (BGH) and the Italian Supreme Court had to decide on the requirements for dealing with foreign law. The BGH only reviews whether the court of lower instance correctly determined the foreign law under Section 293 German Code of Civil Procedure (ZPO), whereas the Corte di Cassazione reviews if the court correctly applied foreign law under Art. 15 Italian law on Private International Law (legge numero 218/1995). In practice, the criteria set out by the BGH provide for a more in-depth review of judgments on foreign law than the criteria of the Corte di Cassazione. The BGH’s approach on review of judgments on foreign law promotes international harmony of judgments.

Douglas and Bath on important changes to the New South Wales' Uniform Civil Procedure Rules

Mr Michael Douglas and Prof Vivienne Bath, of Sydney Law School, have published an article on recent amendments to the Uniform Civil Procedure Rules regarding service outside the Australian state of New South Wales. Under the Rules, effective service of the court's originating process on a defendant outside New South Wales will establish the court's personal jurisdiction over the defendant. The article clearly sets out and analyses changes to the bases on which a defendant can be served outside Australia under the Rules. Numerous bases have been significantly expanded. It also considers the effect of a new rule allowing for a defendant to be served outside Australia, with the court's leave, where the claim does not fall within one of those bases. Among the particularly helpful aspects of the article are several comparative tables displaying the original rule, the revision and the authors' projected impact of the revision.

The authors' abstract is as follows:

'In December 2016, the Uniform Civil Procedure Rules 2005 (NSW) were amended in respect of service outside of the jurisdiction and outside Australia. Previously, service outside Australia was authorised if the claim had a specified connection to the forum. The claim was required to fall within one or more of the heads of Schedule 6. If the defendant failed to appear, the plaintiff would require leave to proceed. That position remains the default under the amended Rules, although the heads of Schedule 6 have been revised. However, there has also been a significant change. Under the new Rules, if the claim does not fall within Schedule 6, service may be authorised with the prior leave of the court. This article outlines and comments on the changes to the Rules, identifying areas which may require judicial clarification.'

The paper is available on SSRN at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025146

Its suggested citation is: Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil

Procedure Rules' (2017) 44(2) *Australian Bar Review* 160.

Litigación Internacional en la Unión Europea I: el Reglamento Bruselas I-bis

A new book on the Brussels I-bis Regulation, opening a brand new collection of Treaties on European Private International Law, has just seen the light. Entitled "Litigación internacional en la Unión Europea I: el Reglamento Bruselas I-bis" ("International litigation in the European Union I: the Brussels I-bis Regulation"), it is authored by Alfonso-Luis Calvo Caravaca, Javier Carrascosa González and Celia Caamiña Domínguez.

The book is divided into two major parts. The first is devoted to the European system of private international law. It examines the impact of European freedoms of movement on the European rules of private international law and the legal techniques used by the European legislator and the European court of Justice to implement these freedoms: the principle of mutual recognition (*Anerkennungsprinzip*), the doctrine of the "Law of origin" as a general rule of Private International Law and the creation of all-European new conflict rules. The process of europeanisation of Private International Law and its direct relationship with the European judicial area is also set out. To conclude this first part, the legal scenario of European private international law is analyzed, with a particular focus on the "Brussels Regulations" and the "Rome Regulations", as the fundamental pillars of EU private international law.

The second part is devoted to an in-depth study of the Brussels I-bis Regulation. It covers the general aspects of this important bastion of European private international law, as well as the rules of international jurisdiction those regarding extraterritorial validity of judgments and other decisions.

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28/08/2017. Number of pages: 850.

For more information, click here

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HCCH discussion paper on the operation of Article 15 of the 1980 Hague Child Abduction Convention

The Permanent Bureau of the Hague Conference on Private International Law (HCCH) has just issued a discussion paper on the operation of Article 15 of the 1980 Hague Child Abduction Convention for the attention of the *Special Commission meeting of October 2017 on the practical operation of the 1980 Child Abduction Convention and of the 1996 Child Protection Convention*.

Article 15 of the Child Abduction Convention reads as follows: "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child **a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention**, where such a decision or

determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination." (our emphasis)

The paper proposes the following summary of possible measures to improve the application of Article 15:

- "Encouraging the availability of Article 15 decisions or determinations in all Contracting States;
- Encouraging clarification and improvement of internal Article 15 implementation with a view to making the procedures expeditious and effective;
- Enhancing the Country Profile under the 1980 Convention in relation to Article 15;
- Drafting of an Information Document on Article 15, which would also encourage:
    1. discretion in the use of the Article 15 mechanism and the use of alternatives;
    2. the systematic use of Article 8(3)(f) and Article 14, and the use of direct judicial communications and the IHNJ, where appropriate;
- Drafting of an Article 15 Model Request Form;
- Improving Central Authority practice in:
    1. facilitating the obtaining of decisions or determinations from competent authorities;
    2. encouraging more systematic inclusion of Article 8(3)(f) certificates / affidavits in applications, where deemed necessary;
- Encouraging improved quality of the decisions or determinations (under Art. 15) and certificates or affidavits (under Art. 8(3)(f)) (*e.g.*, through an Information Document and / or Model Request Form);
- Encouraging greater international consistency in a number of identified areas, if feasible (*e.g.*, certain trends / approaches could be described in an Information Document drafted with the assistance of a Working Group; use of a questionnaire to Contracting States to collect additional information)."

Preliminary and Information Documents of the meeting are available at https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57.

A draft agenda, as well as other Preliminary Documents including statistical information, will be uploaded in due course.

Please note that the meeting above-mentioned is open only to delegates or experts designated by the Members of the Hague Conference, invited non-Member States and International Organisations that have been granted observer status.