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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Alice Margaria is a Senior Research Fellow in the Law & Anthropology Department at the Max Planck Institute for Social Anthropology. Her current research focuses on fatherhood, cultural/religious diversity and human rights. She teaches 'Gender and Diversity in the International Context' at Freie Universität (Berlin).

Hague Academy of International Law: Last chance to register for the online Summer Courses 2021!

The Hague Academy of International Law is holding its Summer Courses on Private International Law for the first (and perhaps last) time online from **26 July to 13 August 2021**. Registration is open until Sunday 27 June 2021 at 23:59 The Hague time. More information is available here.

As you may remember, we announced in a previous post that the 2020 Summer Courses were postponed and that the only prior time that the courses were cancelled was World War II.

This year's general course will be delivered by NYU Professor **Linda Silberman** and is entitled ***The Counter-Revolution in Private International Law in the United States: From Standards to Rules***. The special courses will be given by José Antonio Moreno Rodríguez, Mary Keyes, Pietro Franzina (former editor of Conflictoflaws.net), Sylvain Bollée, Salim Moollan, Jean-Baptiste Racine and Robert Wai. The inaugural lecture will be delivered by Alexis Mourre, President of the International Court of Arbitration of the ICC. The poster is available here.

The holding of the Summer Courses in times of the Covid-19 pandemic attests to the perseverance of the Hague Academy, which has organised two live broadcasts per day to cater to people living in different time zones.

Please note that "no certificate of attendance will be delivered upon completion of the courses. Instead, each attendee will receive an electronic certificate of enrolment at the end of the session."

If you are interested in a more full-fledged experience, you may consider registering for the Winter Course, which appears to be an in-person course. Registration for the Winter Courses 2022 is open since 1 June 2021 and will end 31 July (scholarships) and 29 September 2021 (full fee). For more information, click here.

Workshop Report: The Circulation of Public Documents in Italy,

Austria and Germany. Regulation (EU) 2016/1191 in a cross-border context. (April 30th, 2021)

by Mag. Paul Patreider, Institute for Italian Law, Private Law Section, University of Innsbruck, Austria

In November 2020, a team of researchers at the Universities of Verona (I), Innsbruck (A) and Thessaloniki (EL), in cooperation with associations of registrars – EVS[1] and ANUSCA[2] – launched the project "Identities on the move – Documents cross borders (DXB)", co-financed by the e-justice programme. The project focuses on the use of authentic instruments within the European Union and on the implementation of Regulation (EU) 2016/1191. A first workshop with practitioners and representatives from academia was successfully held on April 30th.

The Regulation was initially meant to simplify the circulation of public documents, favouring the free movement of citizens in a cross-border context and abolishing the need for legalisation. As first responses from registrars,[3] however, show, it finds little application in everyday practice and has remained largely unnoticed in scholarly debates. In order to comprehend the implications and the framework of the Regulation, the project (DXB) investigates the context of national civil status systems and places the Regulation under the strict scrutiny of obligations deriving from the Treaties and, in particular, the Charter of fundamental rights of the European Union. Research is developed by means of a permanent dialogue with registrars. The outcome[4] will be transferred to practitioners and various stakeholders.

To gain a better understanding of the current implementation of the Regulation within national systems and to raise awareness among registrars and legal practitioners, a first workshop was organised by the University of Innsbruck on April 30th.

The event focused on the cross-border region between Italy, Austria and Germany and involved representatives from each country. After an introduction by Prof. Laura Calafà from the University of Verona, who highlighted the general

framework of the project, the first session was opened. It dealt with multilingual standard forms issued under the Regulation and tackled hard cases in civil status matters. Public documents covered by Regulation (EU) 2016/1191 and their certified copies are generally exempt from all forms of legalisation and similar formalities (Arts 1, 4). This applies, to a certain extent, also to official translations of authentic instruments.[5] To simplify their circulation and the civil status registration process, (country specific) translation aids were introduced in 2016.[6] Due to their somewhat complex nature and time-consuming processing, these multilingual standard forms remain, however, unsatisfactory. Oliver Reithofer (Bundesministerium für Inneres, Austria[7]) highlighted these aspects from an Austrian point of view. The number of standard forms issued by the Austrian authorities has so far remained very low, especially when compared to documents issued under the ICCS-Conventions.[8]

The second speaker, Giacomo Cardaci (University of Verona, Italy), addressed potential "hard cases" arising from the application of the Regulation. Given that the Regulation itself does not apply to the recognition of legal effects and that the legal terminology differs from Member State to Member State, problems are mainly due to the use of multilingual standard forms and the scope of application[9] of the Regulation. Standard forms for parentage, for example, are currently missing, other facts may not emerge from the translation aids or may not be registered therein (e.g. intersexuality, gender reassignment, maiden name, …). As a result, to ensure the continuity of personal status in private international law, additional documentation is frequently needed when bringing authentic instruments abroad.

During the first round table, participants reflected on the scarce application of the Regulation stressing the fact that it would not affect the application of other international instruments such as the ICCS-Conventions. The latter already provide for clear standard forms with evidential value. Despite the Regulations multilingual standard forms not having similar effects (Art 8(1)), it was proposed that they could be deemed valid certified copies, since they contain information taken from original documents, are dated and signed by a public official.

The second session was opened by a comparison of selected ICCS Conventions and the Public Documents Regulation by Renzo Calvigioni (ANUSCA). Calvigioni went on to identify a number of problematic aspects regarding Regulation (EU) 2016/1191. Registrars face difficulties when confronted with multilingual

standard forms as they merely summarise the original public document. The partial translations often do not contain enough information in order to proceed to the registration of a civil status event. It can be difficult to verify if a document is contrary to public policy when certain facts cannot be identified from the standard form (e.g. adoptions, use of reproductive technologies, surrogacy). The need for legalisation (or an apostille) does, however, not necessarily arise in these cases, as the information could be supplemented. Contrary to the objective of simplification of Regulation 2016/1191, additional documentation would need to be attached to the original document. As far as certain ICCS-Conventions are concerned (e.g. No. 16), this would not be the case.[10]

Besides the bureaucratic burden and the economic costs for citizens that wish to obtain public documents and translation aids (subject to two separate fees in Germany), a big concern, shared by Gerhard Bangert (Director of the German Association of Registrars), is related to the authenticity of public documents. So far, the verification process set up in the Regulation relies on the Internal Market Information System (IMI). Where the authorities of a Member State have a reasonable doubt as to the authenticity of a public document or its certified copy,[11] they can submit a request for information through IMI to the authority that issued the public document or certified copy (or to a Central authority[12]). The information should then be made available within the shortest possible period of time and in any case within a period not exceeding 5 or 10 working days (where the request is processed through a central authority). As some registrars noted, delays frequently happen, making the proceedings not always efficient. The topic has been picked up by the EU Commission's Expert Group as well, with further improvements currently on the way.

Giovanni Farneti (ANUSCA) then illustrated the "European Civil Registry Network (ECNR)", an EU-funded pilot project finalised in 2011 that worked on a web interface for the (online) exchange of public documents. In the years to come the relevance of electronic public documents will further increase. Some countries, such as Belgium, are currently in a transition period to fully digitalise documents in civil status matters. Regulation 2016/1191 should also cover electronic versions of public documents and multilingual standard forms suitable for electronic exchange. However, each Member State should decide in accordance with its national law whether and under which conditions those public documents and multilingual standard forms may be presented.[13] The topic of

digital public documents, unknown to most ICCS-Conventions,[14] was further developed by Alexander Schuster (University of Innsbruck, DXB coordinator). Even though the Regulation does not affect EU legislation in the field of electronic signatures and identification (e.g. eIDAS-Regulation), certain issues can already be identified.[15] The two main aspects pertain to the nature of the document itself (public documents created digitally or digital copies of documents originally issued in paper format) and to the way its authenticity can be ensured. It is still unclear which type of electronic signature is to be used in order for them to be accepted as a valid public document. National systems vary in this regard as Member States decide when an electronic document is valid, despite not complying with eIDAS standards. Therefore, to simplify their circulation and to coordinate family statuses across Europe, it is necessary to investigate how Member State regulate their digital instruments.

Even if – as of now – no extensive statistics exist with regard to the implementation of Regulation (EU) 2016/1191, it seems that it is mostly used in relation to States that are not Parties to the ICCS-Conventions. The multilingual standard forms raise problems for both issuing and receiving authorities.[16] Future developments will focus on the use of digital public documents and their circulation within the European Union. It is the project's intention to contribute to the implementation and the future improvement of the Public Documents Regulation and to supply possible solutions for the issues posed by it.

[1] Europäischer Verband der Standesbeamtinnen und Standesbeamten e.V. (European Association of Registrars).

[2] Associazione Nazionale Ufficiali di Stato Civile e d'Anagrafe (Italy's Association of Registrars).

[3] For a detailed report see https://www.identitiesonthemove.eu/ (accessed 1.6.2021).

[4] The two-year project will produce a thorough commentary on the Regulation and several other publications, carry out an EU-wide comparative survey placing the Regulation in the context of everyday and national practice and distribute a multilingual handbook (11.500 copies) offering among other things checklists, solutions to hard cases and country profiles in the appendix. Online and freely accessible electronic resources are meant to enrich the tools in view of

widespread dissemination.

[5] Art. 5 ff. Reg. (EU) 2016/1191.

[6] See https://e-justice.europa.eu/content_public_documents-551-en.do (accessed 1.6.2021).

[7] Federal Ministry of the Interior (BMI).

[8] International Commission on Civil Status (Commission Internationale de l'État Civil; CIEC).

[9] E.g. the Regulation could not technically be applied to marriage certificates issued by the Holy See according to Canon law and registered in a Member state as the Vatican is to be regarded as a third state for the purposes of Reg. 2016/1191 (Art 2(3)(a)).

[10] Extracts from civil status records (issued at the request of an interested party or when their use necessitates a translation) prepared according to the aforementioned Convention are accepted without any additional documentation.

[11] Models of documents are currently made available in the repository of IMI. They have to be checked first but are in practice not always sufficient.

[12] Cf https://e-justice.europa.eu/content_public_documents-551-en.do (accessed 1.6.2021).

[13] Rec 9.

[14] Neither Convention (No. 30) on international communication by electronic means signed at Athens on 17 September 2001 nor Convention (No. 33) on the use of the International Commission on Civil Status Platform for the international communication of civil-status data by electronic means signed at Rome on 19 September 2012 have yet entered into force, cf http://ciec1.org/SITECIEC/PAGE_Conventions/mBkAAOMbekRBd0d4VVl3VVRT9gw?WD_ACTION_=MENU&ID=A10 (accessed 1.6.2021).

[15] Art 17(2).

[16] Standardised forms for all Member States could have been introduced but a similar proposition was rejected by Member States during the legislative

procedure.

International Doctorate Programme “Business and Human Rights: Governance Challenges in a Complex World”

Funded by Elite Network of Bavaria the International Doctorate Programme „Business and Human Rights: Governance Challenges in a Complex World“ (IDP B&HR_Governance) establishes an inter- and transdisciplinary research forum for excellent doctoral projects addressing practically relevant problems and theoretically grounded questions in the field of business and human rights. Research in the IDP B&HR_Governance will focus on four distinct areas:

- Global value chains and transnational economic governance
- Migration and changing labour relations
- Digital transformation
- Environmental sustainability

The IDP’s research profile builds on law and management as the core disciplines of B&HR complemented by sociology, political, and information sciences. Close cooperation with partners from businesses, civil society, and political actors will enable the doctoral researchers to develop their projects in a broader context to ensure practical relevance. The IDP’s curriculum, lasting for eight semesters, aims at contributing to the professional development of independent and critical researchers through a variety of courses, research retreats, colloquia, and conferences as well as the possibility of practical projects.

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selected through a competitive process and sixteen principal investigators from Friedrich-Alexander-University Erlangen-Nürnberg (FAU), the University of Bayreuth and Julius-Maximilians-University Würzburg (JMU). The IDP involves law, management, sociology, political sciences and information systems.

The IDP B&HR_Governance will offer a comprehensive and innovative curriculum for the doctoral researchers. Its activities will commence on 1 November 2021.

The Acting Spokesperson of the IDP B&HR_Governance is Professor Markus Krajewski.

The IDP includes the following professors:

- University of Erlangen-Nürnberg: Anuscheh Farahat, Klaus Ulrich Schmolke, Patricia Wiater, Martin Abraham, Markus Beckmann, Evi Hartmann, Dirk Holtbrügge, Sven Laumer, Matthias Fifka, Petra Bendel, Sabine Pfeiffer
- University of Bayreuth: Eva Lohse, Thoko Kaime
- University of Würzburg: Isabel Feichtner, Eva Maria Kieninger

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The IDP B&HR invites applications for 12 doctoral research positions (4-year contract) starting 1 November 2021.

Applicants need an excellent university degree at master's level in a relevant discipline (law, management, sociology, political, or information science) and very good knowledge of English. International, intercultural, and practical experiences will be an asset.

An application comprises the following documents:

- Research proposal (in English, max. 5000 words)
- Curriculum Vitae (CV)
- Letter of motivation (in English, max. 1000 words)

- Writing sample, e.g. published article, thesis or seminar paper.
- Certificates of all university degrees with corresponding transcript of records

Applications must be sent in a single PDF document by 15 June 2021 to humanrights-idp@fau.de

The full Call for Applications can found here.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2021: Abstracts

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

A. Dickinson: **Realignment of the Planets – Brexit and European Private International Law**

At 11pm (GMT) on 31 December 2020, the United Kingdom moved out of its orbit of the European Union’s legal system, with the end of the transition period in its Withdrawal Agreement and the conclusion of the new Trade and Cooperation Agreement. This article examines the impact of this realignment on private international law, for civil and commercial matters, within the legal systems of the UK, the EU and third countries with whom the UK and the EU had established relationships before their separation. It approaches that subject from three perspectives. First, in describing the rules that will now be applied by UK courts to situations connected to the remaining EU Member States. Secondly, by examining more briefly the significance for the EU and its Member States of the change in the UK’s status from Member State to third country. Thirdly, by considering the impact on the UK’s and the EU’s relationships with third

countries, with particular reference to the 2007 Lugano Convention and Hague Choice of Court Convention. The principal focus will be on questions of jurisdiction, the recognition and enforcement of judgments and choice of law for contract and tort.

S. Zwirlein-Forschner: **Road Tolls in Conflict of Laws and International Jurisdiction – a Cross-Border Journey between the European Regulations**

Charging tolls for road use has recently undergone a renaissance in Europe – mainly for reasons of equivalence and climate protection. The payment of such road tolls can be organized either under public or under private law. If a person resident in Germany refuses to pay a toll which is subject to foreign private law, the toll creditor can sue the debtor for payment at its general place of jurisdiction in Germany. From the perspective of international private law, such claim for payment of a foreign toll raises a number of complex problems to be examined in this article.

T. Pfeiffer: **Effects of adoption and succession laws in US-German cases – the example of Texas**

The article discusses how adoption and succession laws are intertwined in cases of adoptions of German children by US-parents in post WW2-cases, when Germany still had a contract based system of adoptions. Addressing the laws of Texas as an example, the author demonstrates that, so far, the legal effects of these adoptions have not been analysed completely in the available case law and legal writing. In particular, the article sets forth that, in relation to adoption contracts, Texan conflicts law (like the law of other US States) refers to the law of the adoption state so that the doctrine of a so-called hidden renvoi is irrelevant. Furthermore, in this respect, the renvoi is a partial one only in these cases: Under Texan conflicts law, the reference to the laws of the adoption state is relevant only for the status of being adopted, not for the effects of adoption, e.g. the question to whom the adopted is related; the latter issue is governed by the law of the domicile of the child, which is identical to the adoptive parents' domicile, at least if this is also the adoptive family's domicile after the adoption.

Furthermore, the author discusses matters of succession and argues: According to the ECJ's Mahnkopf decision, a right of inheritance of the adopted child in relation to the biological parents under the laws applicable to the effects of the adoption, as provided for in Texas, has to be characterised as a succession rule, at least if that law provides for a mere right of inheritance, whereas all legal family relations to the biological family are cut off. As a consequence, such a "nude" inheritance right cannot suffice as a basis of succession under German succession laws. Even if one saw that differently, Texan succession conflicts law, for the purpose of succession, would refer to the law of the domicile of the deceased for movables and to the law of the situs for real property. Additionally, even if the Texas right of inheritance in relation to the biological parents constituted a family relationship, this cannot serve as a basis for a compulsory share right.

W. Voß: **Qualifying Direct Legal Claims and culpa in contrahendo under European Civil Procedure Law**

Legal institutions at the interface between contract and tort, such as the culpa in contrahendo or direct claims arising out of contractual chains, typically elude a clear, uniform classification even within the liability system of substantive national law. Even more so, qualifying them adequately and predictably under European civil procedure law poses a challenge that the European Court of Justice (ECJ) has not yet resolved across the board. In two preliminary rulings, the ECJ now had the opportunity to sharpen the borderline between contractual and noncontractual disputes in the system of jurisdiction under the Brussels I bis Regulation, thus defining the scope of jurisdiction of the place of performance of a contractual obligation and, at the same time, of jurisdiction over consumer contracts. However, instead of ensuring legal clarity in this respect, the two decisions rendered by the ECJ further fragment the autonomous concept of contract under international civil procedural law.

C. Thomale: **International jurisdiction for rights in rem in immovable property: co-ownership agreements**

The CJEU decision reviewed in this case note, in its essence, concerns the scope of the international jurisdictional venue for immovable property under Art. 24 No.

1 Brussels Ia-Regulation with regard to co-ownership agreements. The note lays out the reasons given by the court. It then moves on to apply these reasons to the Austrian facts, from which the preliminary ruling originated. Finally, some rational weaknesses of the Court's reasoning are pointed out while sketching out a new approach to determining the fundamental purpose of Art. 24 No. 1 Brussels Ia-Regulation.

F. Rieländer: **Solving the riddle of "limping" legal parentage: "Pater est" presumption vs. Acknowledgment of paternity before birth**

In its judgment of 5/5/2020, the Kammergericht Berlin (Higher Regional Court of Berlin) addressed one of the main outstanding issues of German private international law of filiation. When children are born out of wedlock, but within close temporal relation to a divorce, the competing connecting factors provided for in Art. 19 (1) EGBGB (Introductory Act to the German Civil Code) are apt to create mutually inconsistent results in respect of the allocation of legal parentage. While it is firmly established that parenthood of the (former) husband, assigned at the time of birth by force of law, takes priority over any subsequently established filiation by a voluntary act of recognition, the Kammergericht held that where legal parentage is simultaneously allocated to the husband by one of the alternatively applicable laws and to a third person by way of recognition of paternity before birth according to a competing law, the (domestic) law of the state of the child's habitual residence takes precedence. Though the judgment is well argued, it remains to be seen whether the controversial line of reasoning submitted by the Kammergericht will stand up to a review by the Bundesgerichtshof (German Federal Court of Justice). Nonetheless, the decision arguably ought to be upheld in any event. In circumstances such as those in the instant case, where divorce proceedings had commenced, recognition of legal parentage by a third person with the consent of the child's mother and her husband is to be treated as a contestation of paternity for the purposes of Art. 20 EGBGB. Thus, according to domestic law, which was applicable to the contestation of paternity since the child's habitual residence was situated in Germany, any possible legal ties between the child and the foreign husband of its mother were eliminated by a recognition of parentage by a German citizen despite suspicions of misuse. All in all, the judgment demonstrates once again the need for a comprehensive reform of German private international law of filiation.

Mark Makowsky: **The attribution of a specific asset to the heir in the European Succession Certificate**

According to Art. 63 (2) lit. b and Art. 68 lit. l of the European Succession Regulation, the European Certificate of Succession (ECS) may be used to demonstrate the attribution of a specific asset to the heir and shall contain, if applicable, the list of assets for any given heir. In the case at hand the ECS, which was issued by the Austrian probate court and submitted to the German land registry, assigned land plot situated in Germany solely to one of the co-heirs. The Higher Regional Court of Munich found, that the ECS lacked the presumption of accuracy, because the applicable Austrian inheritance law provides for universal succession and does not stipulate an immediate separation and allocation of the estate. Contrary to the court's reasoning, however, Austrian inheritance law does allow singular succession of a co-heir, if (1) the co-heirs agree on the distribution of the estate before the probate court orders the devolution of property and (2) the court's devolution order refers to this agreement. The presumption of accuracy of the ECS with respect to the attribution of specific assets is therefore not excluded by legal reasons. In the specific case, however, the entry in the land register was not based on the ECS, but on the devolution order of the Austrian probate court, which does not include a reference to a previous agreement of the co-heirs on the distribution of the estate. As a consequence, the devolution order proves that the land plot has become joint property of the community of heirs and that the ECS is therefore inaccurate.

R. Hüßtege: **Internet research versus expert opinion**

German courts have to determine the applicable foreign law by virtue of their authority. The sources of knowledge they rely on are based on their discretionary powers. In most cases, however, their own internet research will not be sufficient to meet the high demands that discretion demands. As a general rule, courts will therefore continue to have to seek expert opinions from a national or foreign scientific institute in order to take sufficient account of legal practice abroad.

A.R. Markus: **Cross-Border Attachment of Bank Accounts in Switzerland and the European Account Preservation Order**

On 18 January 2017 the Regulation on European Account Preservation Order (EAPO Regulation) came into force. It allows the creditor to place a security in a bank account so that enforcement can be carried out from an existing title or a title yet to be created. The provisions of the abovementioned Regulation stand beside existing national provisions with a similar purpose. As a non-EU member state, Switzerland does not fall within the scope of application of the EAPO Regulation and the provisional distraint of bank accounts is thus exclusively governed by national law. The present article illustrates in detail the attachment procedure under the Swiss Debt Enforcement and Bankruptcy Law. Comparative reference is made to the provisions of the EAPO Regulation. Finally, the recognition and enforcement of foreign interim measures, which is often crucial in cross-border cases, will be addressed. The article shows that there are considerable differences between the instruments provided by the Swiss law and those provided by the EU law.

J. Ungerer: **English public policy against foreign limitation periods**

Significantly different from the EU conflict-of-laws regime of the Rome I and II Regulations, the British autonomous regime provides for a special public policy exception in the Foreign Limitation Periods Act 1984, whose design and application are critically examined in this paper. When English courts employ this Act, which could become particularly relevant after the Brexit transition period, the public policy exception not only has a lower threshold and lets undue hardship suffice, it also leads to the applicability of English limitation law and thereby splits the governing law. The paper analyses the relevant case law and reviews the recent example of Roberts v Soldiers [2020] EWHC 994, in which the three-years limitation period of the applicable German law was found to cause undue hardship.

E. Jayme: **Forced sales of art works belonging to the Jewish art dealer René Gimpel in France during the Nazi–period of German occupation – The Court of Appeal of Paris (Sept. 30, 2020) orders the restitution of three**

paintings by André Derain from French public museums to the heirs of René Gimpel

The heirs of the famous French art dealer René Gimpel brought an action in France asking for the restitution of three paintings by André Derain from French public museums. René Gimpel was of Jewish origin and lost his art works – by forced sales or by expropriation – during the German occupation of France; he died in a concentration camp. The court based its decision in favor of the plaintiffs on the "Ordonnance n. 45-770 du 21 avril 1945" which followed the London Inter-Allied Declaration of Dispossession Committed in Territories Under Enemy Occupation Control (January 5th 1943).

M. Wietzorek: **First Experience with the Monegasque Law on Private International Law of 2017**

This essay presents the Monegasque Law concerning Private International Law of 2017, including a selection of related court decisions already handed down by the Monegasque courts. Followed by a note on the application of Monegasque law in a decision of the Regional Court of Munich I of December 2019, it ends with a short summary.

CJEU on the EU-third State child abduction proceedings under article 10 of the Brussels IIA Regulation

This post was written by Vito Bumbaca, PhD candidate/ Assistant Lecturer, University of Geneva

The EAPIL blog has also published a post on this topic, click here.

Introduction:

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIA Regulation) still applies to the United Kingdom in EU cross-border proceedings dealing with parental responsibility and/ or child civil abduction commenced prior to the 31 December 2020 (date when 'Brexit' entered into force). Moreover, the Court of Justice of the European Union (CJEU) is entitled to exercise its jurisdiction over such proceedings involving the UK.

The decision of the High Court of England and Wales (Family Division, 6 November 2020, EWHC 2971 (Fam)), received at the CJEU on 16 November 2020 for an urgent preliminary ruling (pursuant to article 19(3)(b) of the Treaty of the European Union, art. 267 of the Treaty of the Functioning of the European Union, and art. 107 of the Rules of Procedure of the Court of Justice), and the CJEU judgment (*SS v. MCP*, C-603/20, 24 march 2021) are taken as reference in this analysis.

Question for a CJEU urgent preliminary ruling:

'Does Article 10 of [Regulation No 2201/2003] retain jurisdiction, without limit of time, in a Member State if a child habitually resident in that Member State was wrongfully removed to (or retained in) a non-Member State where she, following such removal (or retention), in due course became habitually resident?'

Contents of the EWHC (Family Division) judgment:

This judgment involved an Indian unmarried couple with a British daughter, born in England (2017), aged more than three (almost four at the time of the CJEU proceedings). Both parents held parental responsibility over their daughter, the father being mentioned as such in the birth certificate. The mother and the child left England for India, where the child has lived continuously since 2019. The father applied before the courts of England and Wales seeking an order for the return of the child and a ruling on access rights. The mother contested the UK jurisdiction (EWHC 2971, § 19).

The father claimed that his consent towards the child's relocation to India was temporary for specific purposes, mainly to visit the maternal grandmother (§ 6).

The mother contended that the father was abusive towards her and the child and, on that basis, they moved to India (§ 8). Consequentially, she had requested an order (Form C100 'permission to change jurisdiction of the child', § 13). allowing the child's continuous stay in India. Accordingly, the mother wanted their daughter to remain in India with her maternal grandmother, but also to spend time in England after the end of the pandemics.

In the framework of article 8, Brussels IIA, the Family Division of the Court of England and Wales held that the habitual residence assessment should be fact-based. The parental intentions are not determinative and, in many circumstances, habitual residence is established against the wishes of the persons concerned by the proceedings. The Court further maintained, as general principles, that habitual residence should be stable in nature, not permanent, to be distinguished from mere temporary presence. It concluded that, apart from British citizenship, the child did not have factual connections with the UK. Therefore, according to the Court, the child was habitually resident in India at the time of the proceedings concerning access rights initiated in England (§ 16).

The Family Division extended its analysis towards article 12(3) of the Regulation concerning the prorogation of jurisdiction in respect of child arrangements, including contact rights. For the Court, there was no express parental agreement towards the UK jurisdiction, as a prerogative for the exercise of such jurisdiction, at the time of the father's application. It was stated that the mother's application before the UK courts seeking the child's habitual residence declaration in India could not be used as an element conducive to the settlement of a parental agreement (§ 32).

Lastly, the Court referred to article 10 of Brussels IIA in the context of child abduction while dealing with the return application filed by the father. In practice, the said provision applies to cross-border proceedings involving the EU26 (excluding Denmark and the United Kingdom (for proceedings initiated after 31 December 2020)). Accordingly, article 10 governs the 'competing jurisdiction' between two Member States. The courts of the Member State prior to wrongful removal/ retention should decline jurisdiction over parental responsibility issues when: the change of the child's habitual residence takes place in another Member State; there is proof of acquiescence or ultra-annual inaction of the left-behind parent, holding custody, since the awareness of the abduction. In these circumstances, the child's return would not be ordered in

principle as, otherwise provided, the original jurisdiction would be exercised indefinitely (§ 37).

In absence of jurisdiction under Brussels IIA, as well as under the Family Law Act 1986 for the purposes of inherent jurisdiction (§ 45), the High Court referred the above question to the CJEU.

CJEU reasoning:

The Luxembourg Court confirmed that article 10, Brussels IIA, governs intra-EU cross-border proceedings. The latter provision states that jurisdiction over parental responsibility issues should be transferred to the courts where the child has acquired a new habitual residence and one of the alternative conditions set out in the said provision is satisfied (*SS v. MCP*, C-603/20, § 39). In particular, the Court observed that article 10 provides a special ground of jurisdiction, which should operate in coordination with article 8 as a ground of general jurisdiction over parental responsibility (§ 43, 45).

According to the Court, when the child has established a new habitual residence in a third State, following abduction, by consequently abandoning his/ her former 'EU habitual residence', article 8 would not be applicable and article 10 should not be implemented (§ 46-50). This interpretation should also be considered in line with the coordinated activity sought between Brussels IIA and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (§ 56).

Ultimately, the Court maintained that article 10 should be read in accordance with recital 12 of the Regulation, which provides that, as one of its fundamental objectives, parental responsibility issues should be decided by the courts that better suit the principle of factual proximity in the child's best interests (§ 58). Accordingly, the courts that are closest to the child's situation should exercise general jurisdiction over parental responsibility. To such an extent, article 10 represents a balance between the return procedure, avoiding benefits in favour of the abductor parent, and the evoked proximity principle, freezing jurisdiction at the place of habitual residence.

The Court further held that if the courts of the EU Member State were to retain jurisdiction unconditionally, in case of acquiescence and without any condition

allowing for account to be taken concerning the child's welfare, such a situation would preclude child protection measures to be implemented in respect of the proximity principle founded on the child's best interests (§ 60). In addition, indefinite jurisdiction would also disregard the principle of prompt return advocated for in the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (§ 61).

The Court concluded that insofar as the child's habitual residence changes to a third State, which is thus competent over parental responsibility, and article 12 of the Regulation is not applicable, the EU courts seised of the matter should apply the rules provided in the bilateral/multilateral instruments in force between the States in question or, on a subsidiary basis, the national Private International Law rules as indicated under article 14, Brussels IIA (§ 64).

Comment:

Considering the findings of fact, the CJEU reasoning and, prior to it, the EWHC judgment, are supported in that the daughter's habitual residence at the time of the parental *de facto* separation (EWHC 2971, § 6-10) was in India; and remained there at the relevant date of the father's application for return and access rights. If we assume, as implicitly reported in the decisions, that the child was aged less than one at the time of the first relocation from England to India, and that she lived more than two years (18 months between 2017-2018 and almost fully 2019-2020, (EWHC 2971, § 25)) within the maternal family environment in India, including prior to the wrongful act, her place of personal integration should be located in India at the above relevant date. Such a conclusion would respect the factual proximity principle enshrined in recital 12 of Brussels IIA, according to which habitual residence is founded on the child's best interests. Recital 12 constitutes a fundamental objective applicable to parental responsibility, including access rights, and child abduction proceedings. As a result, the courts of the EU26 should be bound by it as a consequence of the Brussels IIA direct implementation.

The CJEU has not dealt with specific decisive elements that, in the case under analysis, would determine the establishing of the child's habitual residence in India at a relevant time (the seisin under art. 8 and the period before abduction under art. 10 of the Regulation). Considering the very young age (*cf.* CJEU, *SS v. MCP*, C-603/20, § 33: 'developmentally sensitive age') of the daughter at the time

of the relocation, the child's physical presence corresponding to the mother's and grandmother's one as the primary carers prior to the wrongful act (retention) and to the return application, as well as the Indian social and family environment at the time of the seisin, highlighted by the EWHC, should be considered determinative (*cf.* CJEU, *UD v. XB*, C-393/18, 17 October 2018, § 57) – the Family Division instead excluded the nationality of the child as a relevant factor. The regularity of the child's physical presence at an appreciable period should be taken into account, not as an element of *temporal* permanent character, but as an indicator of *factual* personal stability. In this regard, the child's presence in one Member State should not be artificially linked to a limited duration. That said, the appreciable assessment period is relevant in name of predictability and legal certainty. In particular, the child's physical presence after the wrongful act should not be used as a factor to constitute an unlawful habitual residence (Opinion of Advocate General Rantos, 23 February 2021, § 68-69).

Again, in relation to the child's habitual residence determination in India, the child's best interests would also play a fundamental role. The father's alleged abuse, prior to the relocation, and his late filing for return, following the wrongful retention, should be considered decisive elements in excluding the English family environment as suitable for the child's best interests. This conclusion would lead us to retain India as the child-based appropriate environment for her protection both prior to the wrongful retention, for the return application, as well as at the seisin, for access rights.

In sum, we generally agree with the guidance provided by the CJEU in that factual proximity should be considered a fulfilling principle for the child's habitual residence and best interests determination in the context of child civil abduction. In this way, the CJEU has confirmed the principle encapsulated under recital 12, Brussels IIA, overcoming the current debate, which is conversely present under the Hague Convention 1980 where the child's best interests should not be assessed [comprehensively] for the return application (HCCH, Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b); a *contrario*, European Court of Human Rights, *Michnea v. Romania*, no. 10395/19, 7 October 2020). However, it is argued (partly disagreeing with the CJEU statement) that primary focus should be addressed to the mutable personal integration in a better suited social and family environment acquired within the period between the child's birth and the return application (*cf.* CJEU, *HR*, C-512/17, 28 June 2018, §

66; *L v. M*, 2019, EWHC 219 (Fam), § 46). The indefinite retention of jurisdiction, following abduction, should only be a secondary element for the transfer of jurisdiction in favour of the child's new place of settlement after the wrongful removal/ retention to a third State. In practice, it is submitted that if the child had moved to India due to forced removal/ retention by her mother, with no further personal integration established in India, or with it being maintained in England, founded on the child's best interests, the coordinated jurisdictional framework of articles 8 and 10 (and possibly article 12.4) of the Brussels IIA Regulation might have still been retained as applicable (*cf.* Opinion of Advocate General Rantos, § 58-59; as a comparative practice, see also *L v. M*, and to some extent Cour de cassation, civile, Chambre civile 1, 17 janvier 2019, 18-23.849, 5°). That said, from now on the CJEU reasoning should be binding for the EU26 national courts. Therefore, article 10 shall only apply to intra-EU26 cross-border proceedings, unlike articles 8 and 12 governing EU26-third State scenarios.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2021: Abstracts

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

H.-P. Mansel/K. Thorn/R. Wagner: **European Conflict of Law 2020: EU in crisis mode!**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2019 until December 2020. It provides an overview of newly adopted legal instruments and summarizes current projects that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in

Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the CJEU as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

C. Kranz: **International private law aspects of taking security over membership rights in international financing transactions**

In international financing transactions, pledges of membership rights play an important role. The private international law question, pursuant to which law the pledge is determined in the case of companies with a cross-border connection, cannot be answered in a generalised manner, but confronts those applying the law with some differentiations, in particular where membership rights have been certified in share certificates. The following analysis undertakes the attempt to clarify the key aspects from the perspective of German international private law.

F. Eichel: **Choice of Court Agreements and Rules of Interpretation in the Context of Tort or Anti-trust Claims**

In its rulings CDC (C-352/13) and Apple Sales (C-595/17) the ECJ gave a boost to the discussion on the range of choice of court agreements vis-à-vis antitrust claims. The article discusses a decision of the OLG München (Higher Regional Court of Munich, Germany) which has decided on this topic. In spite of a choice of court agreement pointing to Irish courts for “all suits to enforce this contract” (translation), the OLG München has held itself competent for antitrust claims, as – according to the reasons given – no interpretation of the contract was necessary. In the opinion of the author, this decision will no longer be relevant in Germany because it is not consistent with the decision Apple Sales, which has been rendered almost a year later. However, the reasons given by the OLG München are of particular interest, as it has made reference to the ECJ’s decision Brogsitter (C-548/12). Brogsitter is a decision on the range of the contractual jurisdiction of Art. 7 No. 1 Brussels Ia Regulation/Art. 5 No. 1 Lugano Convention 2007 vis-à-vis claims in tort. The present article has taken this as a reason to

examine if the Brogsitter ruling can be understood as a “rule of interpretation” which comes into play once the intention of the parties of a choice of court agreement remains unclear. The article argues that in general the interpretation of choice of court agreements is subject to the lex causae of the main contract. However, with regard to torts and antitrust claims there are rules of interpretation arising from Art. 25 Brussels Ia Regulation itself. They are effective throughout the EU and are not influenced by the peculiarities of the national substantive law of the member states.

A. Kronenberg: **Yet again: Negative consequences of the discrepancy between forum and ius in direct lawsuits after traffic accidents abroad**

The Higher Regional Court (OLG) Saarbrücken had to decide upon appeal by a German-based limited liability company (GmbH) against a French motor vehicle liability insurer on various questions of French indemnity law and its interaction with German procedural law. The case once again highlights both well-known and less prominent disadvantages of the discrepancy between international jurisdiction and applicable law in actions which accident victims can bring directly against the insurer of the foreign party responsible for the accident at their place of residence.

M. Andrae: **Once Again: On Jurisdiction when the Child’s Usual Residence Changes to Another Contracting Member State of the Hague Convention 1996**

The discussed decision deals with the jurisdiction for a decision when it comes to a parent’s right of access. If at the time of the decision of the court of appeal the child has their habitual residence in a contracting state of the Hague Convention 1996 for the Protection of Children that is not a member state of the European Union, the Convention shall apply. For the solution it cannot be left open at which date the change of habitual residence occurred. If the change took place before the family court made the decision on the matter, the court of appeal must overturn this due to a lack of jurisdiction. This is done afterwards, the court of appeal lacks international jurisdiction to make a decision on the matter. The decision of the family court that has become effective remains in force in

accordance with Art. 14 (1) Hague Convention 1996 until an amended decision by the authorities of the new habitual state of residence is made.

D. Stefer: **Third-Party Effects of Assignment of Claims – Not a Case for Rome I**

While an assignment of claims primarily involves the assignor, the assignee and the debtor of the assigned claim, it may nevertheless concern third parties that, though not directly involved in the transfer of the claim itself, may still be subjected to its effects. Such third parties can be creditors of the assignor, a liquidator or another potential assignee of the same claim. From a conflict of laws perspective, it is of particular relevance to determine which law applies to these thirdparty effects, since the outcome may differ depending on the jurisdiction. For instance, in case of multiple assignments of the same claim, German law gives priority to the assignment that was first validly concluded. Contrary to that, under Italian or English law priority will be given to that assignee who first notifies the debtor of the assignment. Yet, Article 14 of the Rome I Regulation does not contain an explicit rule governing the law applicable to third-party effects of an assignment. It is for that reason that the issue has been subject to constant debates. In particular, it was controversial to what extent the Rome I Regulation applied at all to the issue of third-party effects.

In BNP Paribas ./. Teambank AG, the Court of Justice recently held that no direct or implicit rule in that respect could be inferred from the Regulation. In the Court's view, it was a deliberate choice of the EU legislature not to include rules governing the third-party effects of assignments of claims into the Regulation. Consequently, de lege lata the issue is subject to the national rules of private international law. Hence, under the rules of German private international law, the law applicable to the third-party effects of an assignment is the law that applies to the assigned claim.

F. Rieländer: **The displacement of the applicable law on divorce by the law of the forum under Article 10 Rome III Regulation**

In its judgment (C-249/19) the ECJ provided clarification on the interpretation of

Article 10 of Regulation No 1259/2010 in a twofold respect. Firstly, Article 10 of Regulation No 1259/2010 does not lead to the application of the law of the forum if the applicable foreign law permits divorce, but subjects it to more stringent conditions than the law of the forum. Since Article 10 of Regulation No 1259/2010 applies only in situations in which the lex causae does not foresee divorce under any form, it is immaterial whether in the specific case the individual marriage can already be divorced or can still be divorced according to the applicable foreign law. Secondly, the ECJ held that the court seised must examine and establish the existence of the substantive conditions for a mandatory prior legal separation of the couple under the applicable foreign law, but is not obliged to order a legal separation. Unfortunately, the ECJ missed the opportunity to give a clear guidance on distinguishing substantive conditions foreseen by the applicable law from procedural questions falling within the law of the forum. Apart from this, it remains uncertain whether recourse to the law of the forum according to Article 10 of Regulation No 1259/2010 is possible if the lex causae knows the institution of divorce as such but does not make it available for the concrete type of marriage, be it a same-sex marriage or a polygamous marriage.

M. Scherer/O. Jensen: **The Law Governing the Arbitration Agreement: A Comparative Analysis of the United Kingdom Supreme Court's Decision in Enka v Chubb**

On 9 October 2020 the Supreme Court of the United Kingdom rendered its much-anticipated decision in Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb (Enka v Chubb). In an extensive judgment, the Supreme Court engaged in a detailed review of the different approaches to determining the law applicable to the arbitration agreement and set out the relevant test under English law. The present case note analyses the judgment, explains why the majority's decision is well-reasoned but its conclusion not inevitable and provides a comparative analysis of the English approach. The result: the age-old question of which law governs the arbitration agreement (and why) has not lost in complexity and continues to engage courts and scholars around the world.

D. Otto: **In-/validity of unconscionable arbitration clauses**

Impecunious parties occasionally are an issue in international arbitration. The Canadian Supreme Court had to decide a case involving a – nominally self-employed – driver of Uber, who commenced a class action in a Canadian court to have Uber drivers declared as employees and to challenge violations of Canadian employment laws. His standard-term service agreement with Uber provided for the application of Dutch law and for mediation and arbitration in the Netherlands, which would have required the driver to advance mediation and arbitration fees in an amount of over 70 % of his total annual income from Uber. Uber requested the court to stay proceedings in favour of arbitration in the Netherlands. The Supreme Court held that the arbitration clause was unconscionable and void. The court opined that in general parties should adhere to agreed arbitration clauses. However, the court found that in this case the driver was not made aware of the high costs of arbitration in the Netherlands, that Uber had no legitimate interest to have such disputes decided in far away countries and that the unusual high costs of such proceedings (amounting to over 70 % of the drivers total annual income) effectively made it impossible for him to enforce his rights before the foreign arbitration tribunal. The court dodged the other issue (affirmed by the lower court) whether a dispute involving alleged violation of Ontario's Employee Standards Act was arbitrable at all.

V. Bumbaca: **Remarks on the judgment of the US Supreme Court "Monasky v. Taglieri"**

The decision of the US Supreme Court in Monasky v. Taglieri confirms that the determination of the newborn/infant's habitual residence should focus on the intention and habitual residence of his/her parents or caregiver – the analytical approach is parent-centered. The US Supreme Court ruling, in affirming the decision of the Sixth Circuit Court of Appeals, also clarifies that the determination of the habitual residence of the adolescent/older child should focus on his/her own acclimatization – the analytical approach is child-centered. According to the Supreme Court, the determination of the habitual residence of the child found to be within a transnational family conflict, such as that contemplating an international abduction or an international marital dispute concerning, inter alia, parental authority, must take into account the specific circumstances and facts of each individual case – fact-intensive determination. Based on the practice of other States and of the CJEU, this judgment considers that a predetermined formula

applied to the analysis of the child's habitual residence cannot be deemed to be in conformity with the objectives of the 1980 Hague Convention (applicable to the United States and Italy, both of which are involved in this case) – in particular, by virtue of the fact-based approach followed by this notion, unlike other connecting factors such as domicile and nationality. Regrettably, in affirming the decision the Supreme Court upheld the reasoning of the Court of Appeal as a whole. Thus, it set aside two elements which were not considered in depth by the Court and which in the author's opinion it should have retained, regardless of the child's age and given the child's development within a potentially disruptive family context: The principle of the best interests of the child and the degree of instability attributed to the child's physical presence before the wrongful removal.

E. Jayme: **Canada: Export restriction for cultural property of national importance: The Federal Court of Appeal – Attorney General of Canada and Heffel Gallery Limited, 2019 FCA 82 (April 16, 2019) – restores the decision of the Canadian Cultural Export Review Board which rejected the export permit for a painting by the French artist Gustave Caillebotte**

Canada: The case decided by the Federal Court of Appeal (Attorney General of Canada, Appellant, and Heffel Gallery Limited, Respondent, and 10 Canadian cultural institutions as interveners, 2019 FCA 82 [April 16, 2019]) involved the following facts: A Toronto based auction house sold a painting by the French impressionist Gustave Caillebotte ("Iris bleus") to a commercial gallery based in London, and applied to the Department of Canadian Heritage for a cultural export permit, which was refused following the recommendation of an expert examiner. Then, the auction house requested a review of that decision before the Canadian Cultural Export Review Board which rejected the export permit application. Then, the auction house asked for a judicial review of that decision: The Federal Court held that the Board's decision was unreasonable and remitted the case to another panel for reconsideration. This decision of the Federal Court was appealed by the Attorney General of Canada. Thus, the case passed to the Canadian Federal Court of Appeal which allowed the appeal, dismissed the application for judicial review and restored the decision of the Board, i.e. the refusal to issue an export permit for the painting, in the words of the court: "I am of the view that the Federal Court erred in failing to properly apply the standard of reasonableness. The Board's interpretation of its home statute was entitled to deference, and the

Federal Court’s failure to defer to the Board’s decision was a function of a disguised correctness review.”

The case involves important questions of international commercial law regarding art objects, questions which arise in situations where art objects have a close connection to the national identity of a State. The Canadian decision shows the importance of experts for the decision of whether a work of art is part of the national cultural heritage. The Canadian cultural tradition is based on English and French roots. In addition, the Canadian impressionism has been widely influenced by the development of French art. Thus, it is convincing that the painting by Caillebotte which had been owned and held by a private Canadian collector for 60 years forms part of the Canadian cultural heritage, even if the painter never visited Canada. In addition, the case is interesting for the general question, who is entitled to decide that question: art experts, other boards or judges. The court applied the standards of reasonableness and deference to the opinion of the art experts.

A. Kampf: **International Insolvency Law of Liechtenstein**

Due to various crises, the International Insolvency Law increasingly comes into the focus of currently discussed juridical issues. With reference to this fact, the essay gives an overview of the corresponding legal situation in Liechtenstein, considering that the EU regulation 2015/848 on insolvency proceedings is not applicable. In particular, the author concerns himself with the complex of recognition and the insofar existing necessity of reciprocity. In comparison to the regulation mentioned above, the author comes to identical or at least similar results. He votes for necessity to be abolished and argues for recognition not only of movable assets being located in Liechtenstein.

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