

‘Legal identity’, statelessness, and private international law

Guest post by Bronwen Manby, Senior Policy Fellow and Guest Teacher, LSE Human Rights, London School of Economics.

In 2014, UNHCR launched a ten-year campaign to end statelessness by 2024. A ten-point global action plan called, among other things, for universal birth registration. One year later, in September 2015, the UN General Assembly adopted the Sustainable Development Goals (SDGs), an ambitious set of objectives for international development to replace and expand upon the 15-year-old Millennium Development Goals. Target 16.9 under Goal 16 requires that states shall, by 2030, ‘provide legal identity for all, including birth registration’. The SDG target reflects a recently consolidated consensus among development professionals on the importance of robust government identification systems.

Birth registration, the protection of identity, and the right to a nationality are already firmly established as rights in international human rights law – with most universal effect by the 1989 Convention on the Rights of the Child, to which every state in the world apart from the USA is a party. Universal birth registration, ‘the continuous, permanent, compulsory and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national legal requirements’, is already a long-standing objective of UNICEF and other agencies concerned with child welfare. There is extensive international guidance on the implementation of birth registration, within a broader framework of civil registration.

In a recent article published in the *Statelessness and Citizenship Review* I explore the potential impact of SDG ‘legal identity’ target on the resolution of statelessness. Like the UNHCR global action plan to end statelessness, the paper emphasises the important contribution that universal birth registration would make to ensuring respect for the right to a nationality. Although birth registration does not (usually) record nationality or legal status in a country, it is the most authoritative record of the information on the basis of which nationality, and many other rights based on family connections, may be claimed.

The paper also agrees with UNHCR that universal birth registration will not end statelessness without the minimum legal reforms to provide a right to nationality based on place of birth or descent. These will not be effective, however, unless there are simultaneous efforts to address the conflicts of law affecting recognition of civil status and nationality more generally. UNHCR and its allies in the global campaign must also master private international law.

In most legal systems, birth registration must be accompanied by registration of other life events - adoption, marriage, divorce, changes of name, death - for a person to be able to claim rights based on family connections, including nationality. This is the case in principle even in countries where birth registration reaches less than half of all births, and registration of marriages or deaths a small fraction of that number. Fulfilling these obligations for paperwork can be difficult enough even if they all take place in one country, and is fanciful in many states of the global South; but the difficulties are multiplied many times once these civil status events have to be recognised across borders.

Depending on the country, an assortment of official copies of parental birth, death or marriage certificates may be required to register a child's birth. If the child's birth is in a different country from the one where these documents were issued, the official copies must be obtained from the country of origin, presented in a form accepted by the host country and usually transcribed into its national records. Non-recognition of a foreign-registered civil status event means that it lacks legal effect, leaving (for example) marriages invalid in one country or the other, or still in place despite a registered divorce. If a person's civil status documents are not recognised in another jurisdiction, the rights that depend on these documents may also be unrecognised: the same child may therefore be born in wedlock for the authorities of one country and out-of-wedlock for another. On top of these challenges related to registration in the country of birth, consular registration and/or transcription into the records of the state of origin is in many cases necessary if the child's right to the nationality of one or both parents is to be recognised. It is also likely that the parents will need a valid identity document, and if neither is a national of the country where their child is born, a passport with visa showing legal presence in the country. A finding of an error at any stage in these processes can sometimes result in the retroactive loss of nationality apparently held legitimately over many years. Already exhausting for legal migrants in the formal sector, for refugees and irregular migrants of few

resources (financial or social) these games of paperpurchase make the recognition of legal identity and nationality ever more fragile.

These challenges of conflicts of law are greatest for refugees and irregular migrants, but have proved difficult to resolve even within the European Union, with the presumption of legal residence that follows from citizenship of another member state. The Hague Conference on Private International Law has a project to consider transnational recognition of parentage (filiation), especially in the context of surrogacy arrangements, but has hardly engaged with the broader issues.

The paper urges greater urgency in seeking harmonisation of civil registration practices, not only by The Hague Conference, but also by the UN as it develops its newly adopted 'Legal Identity Agenda', and by the UN human rights machinery. Finally, the paper highlights the danger that the SDG target will rather encourage short cuts that seek to bypass the often politically sensitive task of determining the nationality of those whose legal status is currently in doubt: new biometric technologies provide a powerful draw to the language of technological fix, as well as the strengthening of surveillance and control rather than empowerment and rights. These risks - and their mitigation - are further explored in a twinned article in *World Development*.

Out now: RabelsZ 1/2021

Issue 1/2021 of RabelsZ is now available online! It contains the following articles:

Reinhard Zimmermann (Hamburg): Zwingender Angehörigenschutz im Erbrecht - Entwicklungslinien jenseits der westeuropäischen Kodifikationen (Mandatory Family Protection in the Law of Succession), RabelsZ 85 (2021) 1-75 - DOI: 10.1628/rabelsz-2020-0092

*Following on from an earlier contribution devoted to the development of the notions of forced heirship and compulsory portion, this contribution pursues the development of mandatory family protection for legal systems beyond the West European codifications: in postsocialist countries of Central and Eastern Europe, in Nordic states, in South and Central American codifications, and in countries without a code of private law, i.e. England and the legal systems originally based on English law. An interesting panorama of different solutions thus presents itself, in particular legal systems operating with fixed shares in the estate, those making available a fixed share only in cases of need, those awarding *asum* substituting for maintenance claims, or those turning the claim of the closest relatives into a discretionary remedy. Overall, an observation made in the previous essay is confirmed: a tendency towards achieving greater flexibility in legal systems traditionally operating with fixed shares. The concept of family provision originating in New Zealand, while providing a maximum degree of flexibility, cannot however serve as a model to be followed. The question thus arises whether maintenance needs are the criterion balancing legal certainty and individual justice in the comparatively best manner.*

Florian Eichel (Bern): Der „funktionsarme Aufenthalt“ und die internationale Zuständigkeit für Erbscheinverfahren (International Jurisdiction in Simple Succession Cases with an “Habitual Residence of Minor Significance”), *RabelsZ* 85 (2021) 76-105 - DOI: 10.1628/rabelsz-2020-0093

*In order to prevent inefficient parallel proceedings in international succession cases, the EU Succession Regulation concentrates jurisdiction in a single Member State. In the *Oberle* case (C-20/17), the ECJ decided that this jurisdiction also extends to non-contentious proceedings regarding the issuance of certificates of succession. In cases in which the deceased had moved abroad late in life, this could lead to a “remote justice”, as the certificate of succession would have to be issued there, even when the heirs and the assets are located in another Member State. This concerns in particular non-contentious succession cases which are of a simple nature, but such cases were not in the focus of lawmakers. The article shows that the Succession Regulation crafts solutions so as to avoid “artificial jurisdictions”. Whereas a flexible determination of the habitual residence is not a viable solution, there is*

room to allow proceedings in the Member State whose law is applicable by way of exception and thus to establish jurisdiction in that state. In the cases WB (C-658/17) and EE (C-80/19), the ECJ has shown another way of dealing with these cases and thereby enabling a citizen-friendly way of treating international succession cases.

Leonhard Hübner (Heidelberg): Die Integration der primärrechtlichen Anerkennungsmethode in das IPR (The Primary Law Recognition Method and Its Integration into Private International Law), RabelsZ 85 (2021) 106-145 - DOI: 10.1628/rabelsz-2020-0094

Since Savigny, private international law (PIL) has been chiefly shaped by the referral method. More recently, EU primary law has appeared on the scene as a rival that threatens to override the traditional system as a result of the influence that the fundamental freedoms and the freedom of movement have on PIL. This can be observed in the case law of the ECJ dealing with the incorporation of companies and names as personal status rights. The ECJ has determined certain results based on EU primary law without touching upon the (national) conflict rules. This “second track” of determining the applicable law was already labelled as the recognition method almost twenty years ago. According to previous interpretations of case law, it is limited to the two areas of law mentioned above. In particular, controversial topics in the culturally sensitive area of international family law, such as the recognition of same-sex marriages, are according to the prevailing opinion not covered by the recognition method. However, various developments, such as the ECJ’s Coman decision and the discussion on underage marriage in German PIL, raise doubts as to whether this purported limitation is in line with the integration concept of EU primary law. The question therefore arises as to how a meaningful dovetailing of conflict-of-law rules and EU primary law can be achieved in PIL doctrine.

Christiane von Bary / Marie-Therese Ziereis (München): Rückwirkung in grenzüberschreitenden Sachverhalten: Zwischen Statutenwechsel und ordre

public (Retroactive Effect in International Matters, Change of the Applicable Law, and Public Policy), *RabelsZ* 85 (2021) 146-171 – DOI: 10.1628/rabelsz-2020-0095

*While German law does provide for a detailed differentiation as regards retroactive effect in the domestic context (II.), retroactivity has rarely been discussed in transnational cases relating to civil matters. The national solutions cannot generally be transferred to the international level; instead, it is crucial to rely on the methods of private international law – in particular rules dealing with a change of the applicable law and with public policy. German private international law largely prevents retroactive effects from occurring through the methodology developed for dealing with a change of the applicable law (III.). Distinguishing between completed situations, ongoing transactions and divisible as well as indivisible long-term legal relationships, it is possible to ensure adherence to the principle of *lex temporis actus*. If the retroactive effect is caused by foreign law, it may violate public policy, which allows and calls for an adjustment (IV.). When determining whether a breach of public policy occurred in a case of retroactivity, it is necessary to consider the overall result of the application of foreign law rather than just the decision as to which foreign law is applicable. For guidance on whether such a result violates public policy, one has to look at the national principles dealing with retroactive effect.*

HCCH Monthly Update: December 2020

Membership

On 4 December 2020, **Mongolia** was issued with a certificate confirming an affirmative vote in favour of its admission as a Member of the HCCH, following a six-month voting period which ended on 3 December 2020. Mongolia has now been invited to deposit an instrument of acceptance of the HCCH Statute to

become a Member of the HCCH.

Meetings & Events

On 2 December 2020, the HCCH and the German Presidency of the Council of the European Union co-hosted the ***HCCH a|Bridged - Edition 2020***, the focus of which was the *Golden Anniversary of the HCCH 1970 Evidence Convention*. More information about the event is available [here](#).

On 3 December 2020, the HCCH and ASADIP co-hosted an **International Conference on the 2019 Judgments Convention**. A full recording of the event, held in Spanish, is available on the HCCH Facebook Page and the HCCH YouTube Channel (Part 1 and Part 2).

On 11 December 2020, the HCCH and UNCITRAL co-hosted a **Virtual Colloquium on Applicable Law in Insolvency Proceedings**. More information, including documentation and audio recordings, is available [here](#).

From 14 to 17 December 2020, the **Administrative Cooperation Working Group on the 2007 Child Support Convention** met via videoconference. The Group provided guidance in relation to the development of a standard statistical report under the Child Support Convention, including the use of the iSupport case management system, and other matters such as recommended forms and country profiles. More information is available [here](#).

Publications & Documentation

On 22 December 2020, the Permanent Bureau announced the publication of the **4th Edition of the *Practical Handbook on the Operation of the Evidence Convention*** (Evidence Handbook). This edition commemorates the 50th anniversary of the Convention and is complemented by the *Guide to Good Practice on the Use of Video-Link* released earlier this year. More information is available [here](#).

These monthly updates are published by the Permanent Bureau of the Hague Conference on Private International Law (HCCH), providing an overview of the latest developments. More information and materials are available on the HCCH website.

HCCH Monthly Update: September 2020

Membership

On 7 September 2020, **Nicaragua** and **Thailand** were issued with certificates confirming an affirmative vote in favour of their respective admissions as Members of the HCCH, following a six-month voting period which ended on 4 September 2020. Both Nicaragua and Thailand are now each invited to deposit an instrument of acceptance of the HCCH Statute to become a Member of the HCCH.

Conventions & Instruments

On 12 September 2020, the **HCCH 1965 Service Convention** entered into force for **Austria**. It currently has 78 Contracting Parties. More information is available [here](#).

On 16 September 2020, **Serbia** signed the **HCCH 2007 Child Support Convention**. The next step for it to enter into force is for Serbia to deposit its instrument of ratification. More information is available [here](#).

On 28 September 2020, the **United Kingdom** deposited its instrument of accession to the **HCCH 2005 Choice of Court Convention** and its instrument of ratification of the **HCCH 2007 Child Support Convention**. The United Kingdom is currently bound by both Conventions by virtue of the approval of the EU, and they will continue to be applicable until 31 December 2020. Both Conventions will then enter into force on 1 January 2021, ensuring a seamless continuity in operation. More information is available [here](#).

On 30 September 2020, **Belgium** deposited its instrument of ratification of the **HCCH Protection of Adults Convention**, which now has 13 Contracting Parties. More information is available [here](#).

Publications & Documentation

On 2 September 2020, the **Proceedings of the Twenty-First Session** were published online. The series contains all the minutes and working documents of the Twenty-First Session of the HCCH, during which the **HCCH 2007 Child Support Convention** was concluded. It also includes relevant documents from the preparatory Special Commissions and the preliminary studies carried out by the Permanent Bureau. It is published in bilingual form, with English and French texts appearing side by side. It is available for download [here](#).

On 22 September 2020, the **Explanatory Report on the HCCH 2019 Judgments Convention** was approved following a two-month silent approval procedure during which no Member of the HCCH raised an objection. This report, prepared in both English and French, reflects the discussions and consensus-based negotiations leading to the adoption of the Convention, and, although non-binding in nature, will serve as an important and authoritative resource in the implementation, operation and interpretation of the HCCH Judgments Convention. More information is available [here](#).

These monthly updates are published by the Permanent Bureau of the Hague Conference on Private International Law (HCCH), providing an overview of the latest developments. More information and materials are available on the HCCH website.

Job Offer at the University of Bayreuth

by Professor Dr Robert Magnus

The chair of civil law III at the Faculty of law and economics of the University of Bayreuth offers a position as a

Doctoral researcher / PhD Student (m/w/d)

which should be filled as soon as possible. The position is limited for a period of two years and is preferably granted for the purpose of preparing a doctoral thesis. The position is part-time (50 % of regular working hours) with the salary and the benefits of a public service position in the state of Bayern, Germany (TV-L E13, 50 %).

The Doctoral researcher will be working in the department of law. His main task will be to assist the research projects of his supervisor in the area of civil law, civil procedural law, arbitration law, conflict-of-laws and comparative law. The position includes the possibility to prepare a doctoral thesis. Applicants should fulfill the requirements to prepare a doctoral thesis under the doctoral degree regulation of the University of Bayreuth. It is expected that the first state examination is accomplished at least with the grade "vollbefriedigend". The position additionally requires the Applicant to be proficient in German.

Furthermore, the Applicant should be interested in the areas of expertise of the supervisor; preferably there is already knowledge in these fields. Desirable are good skills in English and IT-expertise.

Applicants with a disability as described in SGB IX (§ 2 Abs. 2, 3) will be preferred in case of equal qualifications. The advertising chair of civil law as well as the University of Bayreuth are interested in increasing the quota of women; therefore, we strongly encourage female candidates to apply.

Please send your application with the usual documents (especially CV, Abitur certificate, transcript of records, State Examination certificate(s) via email (preferably in a pdf file) to Ms. Birgit Müller, chair of civil law III at the Faculty of Law and economics, University of Bayreuth, 95440 Bayreuth, Tel.: +49 (0)921 - 55-6071, E-Mail: ze3.sekretariat@uni-bayreuth.de.

CJEU on the deceased's habitual

residence

Written by Vito Bumbaca, University of Geneva

On 16 July the CJEU issued its preliminary ruling in case *E.E. & K.-D. E.* (CJEU, C-80/19, ECLI:EU:C:2020:569, not yet available in English). The case concerned, *inter alia*, the assessment of the deceased's habitual residence under the EU Succession Regulation No. 650/2012. Given the novelty of the ruling, which represents the very first CJEU assessment of the deceased's habitual residence under the EU Succession Regulation, we will focus on this particular aspect only.

Facts:

A Lithuanian mother and her son moved to Germany to live with the mother's husband. Prior to her death in Germany, she drew up a testament in Lithuania, naming her son as her sole heir. The mother owned an apartment in Lithuania and when she died (in Germany), her son approached a notary in Lithuania concerning the apartment and in order to obtain a Certificate of Succession. This notary refused both requests based on their interpretation of the EU Succession Regulation according to which the deceased's last habitual residence was in Germany at the time of death. The deceased's son appealed against such a decision; subsequently the proceedings reached the Lithuanian Supreme Court (Lietuvos Aukščiausiasis Teismas), which decided to stay proceedings and ask the preliminary ruling of the CJEU. The CJEU found that a person can have only one habitual residence.

Relevance:

This is the first CJEU ruling on the determination of the deceased's habitual residence under the EU Succession Regulation.

It is welcomed to the extent that it provides a guiding assessment of the hierarchical order and practical implementation of recitals 23, 24 and 25. These are considered as explanatory rules for the determination of international competence and applicable law in matters of *EU 25* cross-border succession based on habitual residence as a primary connecting factor.

Specifically, the Court clarifies which key factors should be assessed in the

determination of the deceased's habitual residence by virtue of the above-mentioned recitals and in line with the objectives followed by the EU Succession Regulation. Furthermore, it confirms that, when assessing the deceased's habitual residence at the time of death, a lengthy determination of the deceased's life circumstances preceding his/her death should be made. Lastly, it leaves unresolved the factual assessment of the manifestly closest connection criterion applicable on an exceptional basis.

Brief analysis:

According to the Court, the deceased cannot simultaneously have more than one habitual residence at the time of death (§ 41). This however does not exclude the possibility of acquiring an alternative and consecutive habitual residence at different points in time during the deceased's life. The Court indicated that by virtue of recital 23 the main element in determining the deceased's habitual residence is the stability of his/ her stay, and therefore of his/ her physical presence, at the time of death (§ 38). In the absence of stability, therefore on a subsidiary basis (§ 39), recital 24 advises national authorities, in some circumstances including notaries (§ 46), to refer to the deceased's nationality (personal factor) and/ or assets (economic factor). Finally, the criterion relating to the "manifestly closest connection" in relation to the determination of applicable law will have to be applied in a strict manner and not subsidiary to the complex determination of habitual residence, in accordance with the principles of predictability and legal certainty as provided for by the EU Regulation (§ 37). The exceptional use of the "manifestly closest connection" criterion, however, is left to the judicial discretion of the first seised national courts (§ 45).

Ultimately, according to the Court's reasoning, which follows the Advocate General's Opinion of 26 March 2020 (§ 52), the element of stability relating to the deceased's physical presence at the time of death must be sought in the reasons (subjective element) and the conditions (objective element) of his/ her stay showing a close and stable link between the succession and the given State, in line with the objectives of the EU Succession Regulation (§ 37). The assessment of both objective and subjective elements, and generally of habitual residence, should consider the deceased's life circumstances at the time of death and the years preceding his/ her death (§ 23). Such a "lengthy" determination of the deceased's life assessment leaves the debate open as to its pertinence in an increasingly globalised society within which cross-border settlements regularly

occur, in particular when involving expats holding multiple nationalities and various assets in different countries.

Lastly, the Court has made clear that the habitual residence assessment must be twofold in matters of competence and threefold in relation to applicable law. With regard to competence, according to the Advocate General, the Court first seised will have to look primarily at the duration and regularity of the deceased's settlement and subsidiarily at his/ her nationality and/ or assets. In relation to the deceased's settlement, the Advocate General clarified that duration (time factor) cannot be considered, in itself, a decisive element and that it should be accompanied by other relevant factors such as the deceased's family and social integration, or his/ her proximity to the State in question (Advocate General's Opinion, § 54). Furthermore, the Advocate General confirmed that, in line with recital 24, the contexts typically falling under the subsidiary assessment of the deceased's nationality and/ or assets are: (i) the scenario involving expats; and (ii) that involving a "peripatetic" cross-border movement and life not allowing the establishing of stable connection (Advocate General's Opinion, § 55-57).

In relation to applicable law, the Court first seised should consider, as a last resort when none of the above elements can be traced, specific factors indicating a situation falling under "manifestly closest connection". According to the EU Succession Regulation, and confirmed by the Advocate General (§ 25 of the Opinion), a typical situation falling under "manifestly closest connection" is when the deceased moved to his/ her new habitual residence fairly recently before his/ her death. Nonetheless, the Court has not yet identified any specific elements for the determination of the exceptional "manifestly closest connection" criterion (§ 59).

The Hague Academy of

International Law Advanced Course in Hong Kong: First Edition: Current Trends on International Commercial Dispute Settlement

In cooperation with the Asian Academy of International Law, the Hague Academy of International Law will hold its first edition of its Advanced Courses in Hong Kong from 7 to 11 December 2020. The topic will be: “Current Trends on International Commercial Dispute Settlement”.

For this special programme, the Secretary-General of The Hague Academy of International Law has invited leading academics and practitioners from Paris (Professor Diego P. Fernández Arroyo), New York (Professor Franco Ferrari), Bonn (Professor Matthias Weller), Singapore (Ms Natalie Morris-Sharma), and Beijing (Judge Zhang Yongjian) to present expert lectures on the United Nations Convention on International Settlement Agreements Resulting from Mediation, Investor-State Dispute Settlement, international commercial arbitration, settlement of international commercial disputes before domestic courts, and the developments of the International Commercial Court. Registered participants will have pre-course access to an e-learning platform that provides reading documents prepared by the lecturers. At the end of the course, a certificate of attendance will be awarded.

For more information see [here](#).

For the flyer see [here](#).

The Artist, the Actor and the EEO Regulation; or, how the English Courts and the Spanish Constitutional Court prevented a cross-border injustice threatened via the EEO Regulation in the litigation concerning Gerardo Moreno de la Hija and Christopher Frank Carandini Lee

Written by Jonathan Fitchen, University of Aberdeen

Introduction

The EEO Regulation (805/2004) was mooted in the mid-1990's to combat perceived failings of the Brussels Convention that were feared to obstruct or prevent 'good' judgment creditors from enforcing 'uncontested' (i.e. undisputable) debts as cross-border debt judgments within what is now the EU. The characterisations 'good' and 'bad' are not employed facetiously; the unreasonable obstruction of a creditor who was assumed to pursue a meritorious debt claim was and remains a central plank of the EEO project: hence the Regulation offers an alternative *exequatur* and public policy free procedure for the cross-border enforcement of such uncontested monetary civil and commercial claims that, until 2002, fell under the quite different enforcement procedures of the Brussels Convention. The 2004 EEO Regulation covers money enforcement titles (judgments, settlements and authentic instruments) that are already enforceable in the Member State of origin and hence are offered an alternative route to cross-border enforcement in the Member State addressed via the successors to the Brussels Convention, first the Brussels I Regulation and now the

Brussels Ia Regulation, on an expedited basis due to omitting both an *exequatur* stage and the ability of the Member State addressed to refuse enforcement because of public policy infringements.

As the EEO Regulation was introduced some years *after* the cross-border enforcement provisions of the Brussels Convention had been replaced by those of the Brussels I Regulation, many of the EEO's 'innovations' to remedy 'unnecessary' or abusive delays, caused by either a 'bad' debtor or by an overly cautious enforcement venue, had already been mitigated three years before it came into force in 2005. This fact and other issues (e.g. a preference among lawyers for the familiar and now streamlined Brussels I Regulation enforcement procedure, the issue of ignorance of the EEO procedures, and a greater than expected willingness for creditors to litigate debt claims directly in foreign venues) contributed to a lower than expected take up of the EEO Regulation in the context of contentious legal proceedings.

Anecdotal evidence of low use of the EEO in contentious matters has led to a view that the EEO Regulation is somewhat redundant. The coming into force of the *exequatur*-free Brussels Ia Regulation and the surveys connected with the IC²BE project have re-enforced this view of its redundancy. An expected recasting for the 2004 Regulation did not however occur in 2012 as the Commission withdrew it. The same year the Commission had received a less than complimentary report from RAND Europe concerning the Regulation (with which it disagreed and continues to disagree). It may be speculated that having lost the argument on restricting or deleting public policy in the course of the re-casting of the Brussels I Regulation, the Commission may have feared that the re-casting of the EEO might tend towards its *de facto* deletion if the Member States were permitted to consider its reliance on control in the Member State of origin and the lack of a public policy exception given examples of national case law that were already suggestive of structural difficulties with the Regulation and its underlying drafting assumptions (e.g. see G Cuniberti's comment on French Cour de cassation chambre civile 2, 6 janvier 2012 N° de pourvoi: 10-23518).

As matters stand, the EEO Regulation continues to apply and continues to cause particular difficulties for debtors (and also creditors, enforcement authorities and the CJEU), whether in the Member State of origin or in the Member State addressed. This assertion is supported by two litigation notes, of which this is the first (and most extraordinary): indeed, it is suggested that the difficulties that

arose in the litigation discussed below are at least as significant for European private international law as the infamous case *C-7/98 Krombach v Bamberski*; *Krombach* and *Lee* each indicate the need for the inclusion of an overt public policy exception for those cases in which domestic civil procedure and the norms of European and international civil procedure have malfunctioned to such an extent that EU PIL is in danger of being 'understood' to force the Member State of enforcement to grant cross-border legal effect to a judgment granted improperly in flagrant breach of European and domestic human rights standards.

Facts

In January 2014 the civil judgment enforcement officials of the English High Court received a European Enforcement Order (EEO) application from a Spanish gentleman's lawyers requesting the actual enforcement of the Spanish judgment and costs recorded by the EEO certificate for €923,000. The enforcement target - who had been contacted officially by a letter from the applicant's lawyers *for the first time in the proceedings* shortly before this application and given 14 days to pay - was the well-known actor Christopher Lee, who was domiciled in the UK and resident in London where he had lived for many years.

Thus began the enforcement stage of a cross-border saga in which the judgment creditor and judgment debtor sought respectively to enforce or resist the enforcement of an EEO certificate that was incomplete (hence defective on its face) and unquestionably should never have been granted because it related to a Spanish judgment that should never have been delivered (or declared enforceable) concerning a debt, that had not been properly established according to Spanish procedural law, and relating to an at best contestable (and at worst fanciful) legal liability alleged to somehow fall upon an actor in a film concerning a subsequent unauthorised use by the DVD distributor of that film of the claimant artist's copyrighted artwork from that film in connection with the European DVD release of that film. The claim under Spanish copyright law was based on proceedings dating from June 2007 commenced before the Burgos Commercial court that unquestionably were never at any time (whether as a process, a summons or a judgment) in the following seven years served properly on the famous and foreign-domiciled defendant in accordance with the service provisions of the EU Service Regulation.

The original claim named three parties: 1) a production company (The Quaid

Project Ltd); 2) Mr. Juan Aneiros (who was alleged to have signed a contract pertaining to the artwork for the film with the claimant artist in 2004 and who was the son-in-law of Christopher Lee and who seemingly ran Mr Lee's website) and 3) Christopher Lee himself. The proceedings attempted in Spain however encountered an initial problem of how to serve these 'persons' in or from Spain. The solution selected as far as Lee was concerned did not use the Service Regulation nor did it anticipate the later reasoning of the CJEU in *Case C 292/10 G v de Visser ECLI:EU:C:2012:142*. After not finding Lee resident in Spain, the hopeless fiction of service by pinning the originating process to the noticeboard of the Burgos Commercial Court for a period of time was employed: it was then claimed that this properly effected service in circumstances where it was claimed to be impossible to find or serve a world renowned and famous English actor (or the actor's agent) in Spain (where he did not live).

Such modes of service where the defendant is likely to be domiciled in another state have been condemned as insufficient by the ECJ in cases such as: *Case 166/80 Peter Klomps v Karl Michel [1981] ECR 1593*; *Case C-300/14 Imtech Marine Belgium NV v Radio Hellenic SA ECLI:EU:C:2015:825*; *Case C-289/17 Collect Inkasso OU v Aint 2018 EU:C:2018*. These defects in serving Lee as intended defendant, and then as an enforcement target, proved fatal in February 2020 when, after roughly six years of challenges by Lee (and from mid 2015 by his Widow), the Spanish Constitutional Court decided that the consequences flowing from the service violations were sufficiently serious to remit the Spanish proceedings back to square one for noncompliance with Article 24 of the Spanish Constitution by the Spanish civil courts.

Significant aspects of the claim are unclear, in particular, why Lee was regarded as potentially liable for the claim. The various law reports make clear that the claim concerned compensation sought under Spanish copyright law by an artist whose contracted artwork for a film called 'Jinnah' (in which Christopher Lee had starred) had later been used without his permission for the subsequent European DVD release of that film. Though Spanish law permits such a contractual claim by the artist against the relevant party who uses his artwork, it is unclear from the various English and Spanish law reports how, in connection with the DVD release, this party was Christopher Lee. It is stated at para 11 of [2017] EWHC 634 (Ch) that Lee's lawyers told the English court that their client (who was not a producer or seemingly a funder of the original film) did not sign *any* contract with the

claimant. It is hence not clear that Lee made (or could make) any decisions concerning the artwork for the film and still less concerning its later use for the European DVD release to breach the claimant's copyright. Such decisions appear to have been made by other natural and legal persons, without any link to Lee capable of making him liable for the compensation claimed.

Though it is doubtful that the issue will ever be resolved, a few statements in the Spanish press (*El Pais*, 22 March 2010) suggest both that the claimant regarded Lee as having been amongst those who had 'authorised' his original appointment to the film as its artist/illustrator but also, and confusingly, that the artist had not been able to speak to Lee about the issue and did not, subject to what the court might hold, consider him responsible for the misuse. Though it is speculation, it may be that a connection was supposed by the claimant (or his lawyers) analogous to a form of partnership liability between Lee and some of the other defendants who might have been presumed to have been involved in the original decision to employ the artist at the time of the film and hence might possibly have later been involved in the decision to re-use the same artwork (this time without the artist's consent) for the European DVD release. Neither the matter nor the nature of Lee's potential liability is though clear.

Further uncertainty arises from the issue of quantum. Spanish law allows an aggrieved artist to bring a claim for contractual compensation to seek sums representing those revenues that would have accrued to him had there been a reasonable contractual agreement to use his artwork in this manner. One function of the Spanish court in such a claim is to determine the correct quantum of this sum by considering representations from *each* party to the claim: this process could not occur properly in the present case as the service defects meant that only the views of the claimant were ever presented. Why was €710,000 the correct sum? Why not €720,000, €700,000 or €10,000? Trusting the artist's own estimation seems optimistic given that the sum claimed was large and the matter concerned the European DVD release of a film that was many orders of magnitude less well-budgeted or commercially successful than other films in which Christopher Lee had starred (e.g. Star Wars and the Lord of the Rings). Equally, did the artist really have all the data in his possession to allow him to demonstrate unilaterally the proper quantum in a forensic manner?

Despite these uncertainties the suggested liability and quantum were asserted for the purposes of formulating the Spanish claim that led to the *in absentia*

judgment granted in March 2009 which, by May 2009, (in default of any appeal by the officially uncontacted Lee) was declared final. In October 2009 the judgment was declared enforceable by yet another notice from the same Burgos court that was again pointlessly fixed to the notice board of the court in default of employing any effective mode of service that should have been used in this context.

The matter was reported (inaccurately) in the UK press and media in 2010, possibly based on not quite understood Spanish newspaper reports, without however securing any comment from Lee. It is unclear if Lee ever did know unofficially of the Spanish proceedings, but it seems likely that he did as his son-in-law was involved in these. Such unofficial knowledge does not, of course, excuse successive service failures. One point that the UK media did record accurately in 2010 was that no defendant had appeared in the earlier Spanish proceedings.

In 2011, at the request of the claimant, the Burgos court issued him with an EEO certificate. It was seriously incomplete, omitting ticks for the boxes found at: 11.1 (that service had been as per the Service Regulation); 12.1 (ditto the summons); 13.1 (that service of the judgment had been as per the Regulation); 13.3 (that the defendant had a chance to challenge the judgment); and, 13.4 (that the defendant had not so challenged). The judgment on which the EEO certificate was based was claimed in the certificate to be one dated 26 April 2010 (seemingly never produced in the later London enforcement proceedings) while the certificate wrongly gave as Lee's London address as the address of his son-in-law and misspelled Lee's middle name.

In October 2013 the claimant applied to the Spanish courts for the rectification of the 2011 EEO certificate: such rectification was however confined only to correct the misspelled name and to add over €200,000 to the original 'debt' as costs due in part, it may be supposed from the comments of the Constitutional Court, to unsuccessful attempts to pursue the Spanish property of Lee's Spanish son-in-law. Seemingly no rectification was sought for the other serious omissions. The October 2013 EEO certificate was presented in January 2014 in London to Lee and to the English court. Lee's correct address had now been ascertained by the claimant's lawyers instructed to seek the cross-border enforcement of the EEO certificate concerning the 'uncontested' sums apparently due in Spain via its expedited and public policy free procedures.

On finally learning officially of the existence of the earlier Spanish *in absentia* proceedings when met with a lawyer's letter to his address demanding payment of the entire alleged debt within 14 days, Lee instructed his English lawyers and appointed Spanish lawyers to commence challenges to the earlier Spanish proceedings and to secure stays of enforcement in Spain and in the UK (the latter being via Art 23(c) EEO). By reason of a good-faith error, Lee's English lawyers 'jumped-the-gun' and represented to the English court that the Spanish challenge proceedings had already commenced - in fact at that point the Spanish lawyers had only been *instructed* to bring a challenge - and secured the English Art.23(c) stay some 17 days ahead of the actual commencement of the Spanish challenge proceedings. The creditor, via his lawyers, objected (correctly) to the premature grant and also to the continuation of the stay under Art.23(c) which first required the commencement of the Spanish challenges: this objection led to a Pyrrhic victory when the English court dispensed with the erroneous stay but replaced it, seamlessly, with another stay granted as part of its inherent jurisdiction (rather than via any provision of the EEO Regulation) which it justified as appropriate given the presentation of a manifestly defective and incomplete EEO certificate. The stay was to endure for the duration of the Spanish appeals and all Spanish challenges to enforcement. Lee's death in mid 2015 saw the stay endure for the benefit of his widow.

While the stay proceedings were ongoing in England, the attempts by Lee's lawyers to challenge the earlier Spanish proceedings before the Spanish civil courts and appeal courts went from bad to worse. The said courts all took the astonishing view (summarised in paras 23 - 30 of [2017] EWHC 634 (Ch) (03 April 2017)) that there had been sufficient service and that Lee was now out-of-time to raise objections by civil appeal. All Spanish stay applications were rejected; even the Constitutional Court rejected such a stay application (on an earlier appeal prior to the 2020 case), finding the earlier conclusions of the civil courts that there was no demonstrable irreparable harm for Lee without the stay to be in accordance with the Constitution. Appeal attempts before the civil courts to object to the frankly ridiculous triple failure of service of process, summons and judgment, or to the existence of a viable claim, or to the lack of the quantification stage required by Spanish procedural law, all fell on deaf ears in these courts.

In this sense, because the Spanish civil courts all demonstrated their unwillingness to remedy the successive misapplication of EU laws, the private

international law and procedural law of the EU all failed in this case in the Member State of origin. That this failure did not result in immediate actual enforcement against Lee's estate in the Member State addressed was due only to the extemporisation by an English court of an inherent jurisdiction stay in response to an incomplete certificate supporting the application. Without this extemporised stay the enforcement would have proceeded in the UK without any possibility of Lee requesting corrective intervention by English authorities to invoke a missing public policy exception. The English court was clear that had the empty boxes been ticked, there would have been no basis for the stay and enforcement would have been compelled. So much for the Recital 11 assurances of the EEO Regulation:

"This Regulation seeks to promote the fundamental rights and takes into account the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter."

These events left Lee's lawyers with only one remaining challenge possibility in Spain, viz. arguing that the Spanish civil courts had violated the Spanish Constitution. These challenges were brought to the Spanish Constitutional Court by lawyers acting first for Lee and then, after his death, acting for his widow. The decision of the Constitutional Court was delivered on 20 February 2020 (see comment by M Requejo Isidro) and found that there had indeed been a significant domestic breach of the Spanish Constitution, specifically, Section 24 para 1 which (in English) reads

"All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense."

The Constitutional Court - which necessarily is restricted to a consideration of the matters that go directly to the operation of the Spanish Constitution and hence has no further general appellate competence over the actions of the civil courts - concluded that the initial failure to serve a non-domiciled person, whose address was claimed to be unknown, but would have been very simple to discover, in accordance with the provisions of the relevant EU Service Regulation meant that Christopher Lee, and later his widow, were not adequately protected by the Spanish courts as required by Section 24 of the Spanish Constitution and hence

had been deprived impermissibly of the defence that had to be provided. The order of the Constitutional Court annulled the earlier Spanish proceedings and sent the contingency-fee-funded claimant back to square one to recommence any subsequent proceedings properly and with due service concerning his alleged claim against whatever parts of the estate of the late Christopher Lee might now still be located within the UK or the EU.

Reflections on some of the wider issues

Though this litigation was compared above with the cause-celebre that was *Krombach*, it can be argued to represent a greater Member State of origin catastrophe than the earlier case: at least Herr Krombach was officially notified, served, summoned to the proceedings and then notified of the judgment. *Krombach* and *Lee* do both however illustrate why a public policy exception in the Member State addressed is essential. Unfortunately, in *Lee* this illustration is set against the absence of that exception. Thus, *Lee* demonstrates the grim prospects facing the 'debtor of an uncontested sum' (who only has this status due to blatant and successive breaches of service and private international law procedures) in cross-border enforcement procedures if the 'emergency brake' of public policy has been removed by drafters keen to prevent its unnecessary application to facilitate faster 'forward-travel' in circumstances in which the application of the said brake would not be necessary.

Had not the presented EEO certificate been so deficient, the English courts would not have been willing to extemporise a stay and the whole sum would have been enforced against Lee in London long before the civil and constitutional proceedings - all of which *Lee* also had to fund - concluded in Spain. Few ordinary people could have effectively defended the enforcement across two venues for six years when facing a claimant pursuing a speculative claim via a conditional fee arrangement (with its clear significance for the likely recovery of defence costs and a resulting impact upon the need to fund your own lawyers in each jurisdiction). It must be presumed that, despite manifest breaches of EU law and human rights standards, most ordinary persons would simply have had to pay-up. Whether this has already occurred, or occurs regularly, are each difficult to ascertain; what can though be said is that the design and rationale of the EEO Regulation facilitate each possibility.

Lee was fortunate indeed to face an incomplete EEO certificate and to find

English judges who, successively, were favourably disposed towards his applications despite a Regulation drafted to dismiss them. Though some may be disposed to regard the judiciary of *that* ex-Member State as 'constitutionally' predisposed to effect such interpretative developments, this would be a mistake, particularly in the present context of applications to the Masters in question (members of the judiciary who deal with incoming foreign enforcement applications). In any case, judicial willingness to extemporise a solution when faced with a defective EEO certificate to avert an immediate cross-border injustice seems a slender thread indeed from which to hang the conformity of the operation of the EEO Regulation with the basic human rights that should have been, but were not, associated with the treatment of Lee throughout these proceedings.

It is suggested that the circumstances of *Lee* demonstrate the failure of both the EEO Regulation, and of EU PIL in general, to protect the rights of an unserved and officially unnotified defendant to object to a cross-border enforcement despite the grossest of failings in the Member State of origin that, given the existence of Article 24 of the Spanish Constitution, proved astonishingly unsusceptible to Spanish appeal procedures. Had the judgment creditor been compelled to proceed to enforcement under the Brussels I Regulation (or later under the Recast of that Regulation) the service defects would probably have been more evident whether in the assumption of jurisdiction and / or at the point of enforcement outside Spain: the judgment debtor would also have had the option to raise the public policy exception to defend the enforcement proceedings plus better stay options in the enforcement venue.

Further it is suggested that *Lee* indicates that the EEO Regulation is no longer fit for purpose and should be recast or repealed. *Lee*, like *Krombach*, illustrates the danger of relying on the Member State of origin when drafting cross-border procedures of a non-neutral nature, i.e. reflecting assumptions that certified claims sent abroad by the 'creditor' will be 'good'. It is not always correct that all will remain 'fixable' in the Member State of origin such that objections to enforcement in the Member State addressed and a public policy exception are unnecessary. *Krombach* and *Lee* may be exceptional cases, but it is for such cases that we require the equally exceptional use of a public policy exception in the enforcement venue.

From anti-suit injunctions to ‘quasi’ anti-suit injunctions and declaratory relief for breach of a choice of court agreement: a whiter shade of pale?

Nearly a year ago I reported on a Greek judgment refusing execution of two English orders issued on the basis of a High Court judgment which granted declaratory relief to the applicants. This came as a result of proceedings initiated in Greece, in breach of the settlement agreements and the exclusive jurisdiction clauses in favor of English courts. A recent judgment rendered by the same court confirmed the incidental recognition of the same High Court judgment, which resulted in the dismissal of the claim filed before Greek courts due to lack of jurisdiction.

Piraeus Court of Appeal Nr. 89/31.01.2020

THE FACTS

The facts of the case are clearly presented in the case *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] EWHC 3068 (Comm) (26 September 2014). The UK defendants invoked before the Piraeus first instance court the judgment aforementioned, and requested incidental recognition in Greece. The Piraeus court granted recognition, and dismissed the claim. The plaintiffs appealed, seeking reversal on two grounds: Lack of res iudicata and violation of Article 34 (1) Brussels I Regulation.

THE RULING

The Piraeus CoA founded its ruling on point 39 of the English judgment:

39. *So far as the Hellenic settlement agreement is concerned, clause 2 expressly provides that the payment of U.S.\$4.8 million is “in full and final settlement of all and any claims they may have under the Policy in relation to the loss of [the vessel] against the Underwriters and/or against any of its servants and/or agents..” As with the CMI and LMI settlement agreements, that wording settles claims under the policy in relation to the loss of the vessel. Accordingly, by application of the reasoning of Longmore LJ in the Court of Appeal, as set out at [32] to [35] above, **the claims against Hellenic in Greece are within the settlement and indemnity provisions in the Hellenic settlement agreement and in breach of the exclusive jurisdiction clause in the Hellenic settlement agreement and the arbitration clause in the underlying Policy...***

Res iudicata and public policy

The Piraeus court had no difficult task in establishing the finality of the English judgment: It simply referred to the certificate issued by the English court.

The public policy defence was also considered as unfounded, by reference to Article 35 (2 and 3) Brussels I Regulation.

No anti-suit injunction order

It then stressed out that the foreign judgment solidifies the exclusive international jurisdiction of English courts, without ordering the claimants/appellants to refrain from filing an action or moving ahead with the proceedings before Greek courts, by imposing any measures for this purpose. Hence, the court continues, the foreign judgment in question fulfils the criteria under Article 32 Brussels I Regulation, and therefore it is not considered as an anti-suit injunction, because it does not hinder the Greek court to examine their jurisdiction. For the above reasons, the English judgment may be incidentally recognized, which means that the Greek court is bound by its findings on the international jurisdiction issue. Finally, it should be underlined that no reference to the *Gothaer* ruling of the CJEU was made by the Piraeus court.

Clarifications

Finally, the Piraeus court explained the reasons which led to a different outcome from that of the judgment issued by the same court a year ago. First of all, the court was not bound by the *res iudicata* of the 2019 judgment, because the defendants were not the same. Secondly, the 2019 judgment examined an application for the enforcement of the English orders, whereas in the present case the subject matter was the existence or non-existence of the choice of court clause.

For all the above reasons, the appeal was dismissed.

SHORT COMMENT

Following the case law of the CJEU on anti-suit injunctions, and the non-recognition of the orders, which were labelled by the 2019 judgment as ‘quasi’ anti-suit injunctions, the defendants used the seemingly sole remaining tool for avoiding a re-examination of international jurisdiction on the merits by the Greek courts; the outcome proves them right. The question however remains the same: Are declaratory orders stating that English courts have exclusive jurisdiction and that proceedings in other Member States are in breach of an English exclusive jurisdiction agreement in line with the mutual trust principle? In his thesis [pp. 146 et seq.], Mukarrum Ahmed argues that those orders are at odds with the above principle.

The Greek Supreme will have the final word.

Of course, a preliminary request remains a possibility.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2020: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts

(IPRax)“ features the following articles:

E. Schollmeyer: The effect of the entry in the domestic register is governed by foreign law: Will the new rules on cross-border divisions work?

One of the most inventive conflict-of-law rules that secondary law of the European Union has come up with, can be discovered at a hidden place in the new Mobility Directive. Article 160q of the Directive assigns the determination of the effective date of a cross-border division to the law of the departure Member State. The provision appears as an attempted clearance of the complicated brushwood of the registration steps of a cross-border division of a company. This article explores whether the clearance has been successful.

F. Fuchs: Revolution of the International Exchange of Public Documents: the Electronic Apostille

The Apostille is of utmost importance for the exchange of public documents among different nations. The 118 states currently having acceded to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents issue, altogether, several millions of Apostilles per year in order to certify the authenticity of public documents emanating from their territory. Some years ago, the electronic Apostille was implemented, which allows states to issue their Apostilles as an electronic document. Interested parties may verify the authenticity of such an electronic document via electronic registers which are accessible on the internet. Whereas Germany has not yet acceded to that new system, 38 other jurisdictions already have done so.

G. Mäscher: Third Time Lucky? The ECJ decides (again) on the place of jurisdiction for cartel damages claims

In three decisions now the ECJ has dealt with the question of where the “place of the causal event” and the “place where the damage occurred” are to be located in order to determine, based on the ubiquity principle enshrined in Article 7(2) of the Brussels Ibis Regulation, the place of jurisdiction for antitrust damages (tort) claims. In this paper the overall picture resulting from the ECJ decisions in CDC Hydrogen Peroxides, flyLAL-Lithuanian Airlines and now Tibor-Trans is analysed. The place of the “conclusion” of a cartel favoured by the ECJ to determine the place of the causal event is not only unsuitable in the case of infringements of Art. 102 TFEU (abuse of a dominant market position), but also in cases of

infringement of Art. 101 TFEU (prohibition of cartels). The same criticism applies to the ECJ's localisation of the place where the damage occurred at the place where the competition is impaired and the victim of the cartel or the abuse of the dominant market position (claimant) sustained the financial loss. In this paper it is suggested to dock the place of the causal event to the actual seat(s) of the cartel offender(s) and the place where the damage occurred exclusively to the affected market.

J. Kleinschmidt: Jurisdiction of a German court to issue a national certificate of succession ('Erbschein') is subject to the European Succession Regulation

The European Succession Regulation provides little guidance as to the relationship between the novel European Certificate of Succession and existing national certificates. In a case concerning a German "Erbschein", the CJEU has now clarified an important aspect of this relationship by holding that jurisdiction of a Member State court to issue a national certificate is subject to the harmonised rules contained in Art. 4 et seq. ESR. This decision deserves approval because it serves to avoid, as far as possible, the difficult problems ensuing from the existence of conflicting certificates from different Member States. It remains, however, an open question whether the decision can be extended to national certificates issued by notaries.

K. Thorn/K. Varón Romero: The Qualification of the Lump-Sum Compensation for Gains in the Event of Death Pursuant to Section 1371 (1) of the German Civil Code (BGB) in Accordance with the Regulation (EU) No. 650/2012

In "Mahnkopf" the CJEU had to decide whether the material scope of application of the Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4/7/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession also covers national provisions which, like Section 1371 (1) of the German Civil Code (BGB), grant the surviving spouse a lump-sum compensation for gains after the death of the other spouse by increasing his or her inheritance. Hence, this was a question of the qualification of Section 1371 (1) BGB, which had been discussed controversially in Germany for a long time and had only been clarified on a

national level in 2015. The CJEU decided in favour of a qualification under inheritance law at the level of Union law, and thus took a view which contradicts that of the Federal Court of Justice (BGH) for national conflict of laws. The authors agree with the result of the CJEU but criticise the methodical approach to the implementation of the functional qualification. The article identifies the new questions and problems that will now have to be clarified by the German courts as a result of the CJEU decision and in this context analyses two recent decisions of Higher Regional Courts. The authors note that in the context of Section 1371 (1) BGB, the question of the (temporal) scope of application of the Regulation is likely to become more important in the future, as otherwise, in their opinion, the BGH case law will still have to be considered. Accordingly, in the opinion of the authors, for future German jurisdiction much will depend on whether the BGH adapts its previous case law to that of the CJEU.

P. Mankowski: Recognition and free circulation of names ‘unlawfully’ acquired in other Member States of the EU

The PIL of names is one of the strongholds of the recognition principle. The touchstone is whether names “unlawfully” acquired in other Member States of the EU must also be recognised. A true recognition principle implies that any kind of *révision au fond* is interdicted. Yet any check on the “lawfulness” or “unlawfulness” of acquiring a certain name abroad amounts to nothing else than a *révision au fond*.

M. Gernert: Termination of contracts of Iranian business relations due to US sanctions and a possible violation of the EU Blocking Regulation and § 7 AWV

US secondary sanctions are intended to subject European economic operators to the further tightened US sanctions regime against Iran. In contrast, the so-called Blocking Regulation of the European Union is intended to protect European companies from such extraterritorial regulations and prohibits to comply with certain sanctions. In view of the great importance of the US market and the intended uncertainty in the enforcement of US sanctions, many European companies react by terminating contracts with Iranian business partners in order to rule out any risk of high penalties by US authorities. This article examines if and to what extent the Blocking Regulation and § 7 AWV influence the effectiveness of such terminations.

B. Rentsch: Cross-border enforcement of provisional measures - lex fori as a default rule

Titles from provisional measures are automatically recognised and enforced under the Brussels I-Regulations. In consequence, different laws will apply to a title's enforceability (country of the rendering of the provisional measure) and its actual enforcement (country where the title is supposed to take effect). This sharp divide falls short of acknowledging that questions of enforceability and the actual conditions of enforcement are closely entangled in preliminary measure proceedings, especially the enforcement deadline under Sec. 929 para. 2 of the German Code of Civil Procedure (ZPO). The European Court of Justice, in its decision C-379/17 (*Societ Immobiliare Al Bosco Srl*) refrained from creating a specific Conflicts Rule for preliminary measures and ruled that the deadline falls within the scope of actual enforcement. This entails new practical problems, especially with regard to calculating the deadline when foreign titles are involved.

A. Spickhoff: "Communication torts" and jurisdiction at the place of action

Communication torts in more recent times are mostly discussed as "internet torts". Typically, such torts will be multi-state torts. In contrast, the current case of the Austrian Supreme Court concerns the localisation of individual communication torts. The locus delicti commissi in such cases has been concretised by the Austrian Supreme Court according to general principles of jurisdiction. The locus delicti commissi, which is characterised by a falling apart of the place of action and place of effect, is located at the place of action as well as at the place of effect. In the event of individual communication torts, the place of effect is located at the victim's place of stay during the phone call or the message arrival. The place of action has to be located at the sending location. On the other hand, in case of claims against individual third parties, the place of effect is located at the residence of the receiver. The Austrian Supreme Court remitted the case to the lower court for establishing the relevant facts for jurisdiction in respect of the denial of the plaintiff's claim. However, the court did not problematise the question of so-called "double-relevant facts". The European Court of Justice, in line with the judicial practice in Austria and Germany, has accepted a judicial review of the facts on jurisdiction only with respect to their conclusiveness.

R. Rodriguez/P. Gubler: Recognition of a UK Solvent Scheme of

Arrangement in Switzerland and under the Lugano Conventions

In recent years, various European companies have made use of the ability to restructure their debts using a UK solvent scheme of arrangement, even those not having their seat in the UK. The conditions and applicable jurisdictional framework under which the scheme of arrangement can be recognised in jurisdictions outside the UK are controversial. In Switzerland doctrine and jurisprudence on the issue are particularly scarce. This article aims to clarify the applicable rules of international civil procedural law as well as the requirements for recognition of a scheme of arrangement in Switzerland. It is held that recognition should be generally granted, either according to the 2007 Lugano Convention or, in a possible “no-deal Brexit” scenario, according to the national rules of private international law, or possibly even the 1988 Lugano Convention.

T. Helms: Foreign surrogate motherhood and the limits of its recognition under Art. 8 ECHR

On request of the French Court of Cassation the Grand Chamber of the European Court of Human Rights has given an advisory opinion on the recognition of the legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and its intended mother who is not genetically linked to the child. It held that Art. 8 ECHR requires that domestic law provides a possibility of recognition of a legal parent-child relationship with the intended mother. But it falls within states’ margin of appreciation to choose the means by which to permit this recognition, the possibility to adopt the child may satisfy these requirements.