

Corona and Private International Law: A Regularly Updated Repository of Writings, Cases and Developments



by Ralf Michaels and Jakob Olbing

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The coronavirus has created a global crisis that affects all aspects of life everywhere. Not surprisingly, that means that the law is affected as well. And indeed, we have seen a high volume of legislation and legal regulations, of court decisions, and of scholarly debates. In some US schools there are courses on the legal aspects of corona. Some disciplines are organizing symposia or special journal issues to discuss the impact of the pandemic on the respective discipline.

For a time Private international law has been vividly discussing the relevance of the crisis for the field, and of the field for the crisis Private international law matters are crucial to countless issues related to the epidemic - from production chains through IP over possible vaccines to mundane questions like the territorial application of lockdown regulations.

Knowledge of these issues is important. It is important for private international lawyers to realize the importance of our discipline. But it is perhaps even more important for decision makers to be aware of both the pitfalls and the potentials of conflicts of law.

This site, which we hope to update continually, is meant to be a place to collect, as comprehensively as possible, sources on the interaction of the new coronavirus and the discipline. The aim is not to provide general introductions into private international law, or to lay out sources that could be relevant. Nor is this meant to be an independent scholarly paper. What we try to provide is a one-stop place at which to find private international law discussions worldwide regarding to coronavirus.

For this purpose, we limit ourselves to the discipline as traditionally understood—jurisdiction, choice of law, recognition and enforcement, international procedure. Coronavirus has other impacts on transnational private law and those deserve attention too, but we want to keep this one manageable.

Please help make this a good informative site. Please share any reference that you have - from any jurisdiction, in any legislation - and we will, if possible, share them on this site. Please contact olbing@mpipriv.de

General

In the early beginning of the Pandemic, contributions from scholars, courts, international institutes and politicians were of a more general character as it was difficult to predict the scope and duration of the new situation.

The European Law Institute for example issued a set of Principles for the COVID-19 Crisis, covering a variety of legal topics such as Democracy (Principle 3) and Justice System (Principle 5) as well as Moratorium on Regular Payments, Force Major and Hardship, Exemption from Liability for simple Negligence (Principles 12 to 14). Ending with something everybody hopes for: Return to Normality (Principle 15).

The Secretary General of the Hague Conference recorded a short online message from his home addressing the most urgent topics. Ensuing, the Permanent Bureau developed a Toolkit for resources and publications relevant to the current global situation.

The university of Oxford's Blavatnik School of Government collects all measures by governments around the world in the "Coronavirus Government Response Tracker".

A German journal is dedicated solely to the topic "COVID-19 and the Law". The journal is interesting for academics and practitioners alike, since it publishes papers on specific COVID-19 related issues, as well as an extensive overview of German judgements.

An open access project by intersentia examines the COVID-19 legislation and its consequences in European states, bringing together contributions from over 85 highly regarded academics and practitioners in one coherent, open access resource.

Matthias Lehmann discusses the role of private international law on a number of issues - the impact of travel restrictions on transportation contracts, contract law issues for canceled events, canceled or delayed deliveries, but also liability for infections.

Online Workshops, Webinars and Conferences

In time of travel restrictions and social distancing the academic exchange is still active and sometimes more diverse than before, since people from all around the world come together, as the great number of workshops and symposiums that are held online shows.

Mid November (17 to 19), the Mexican Academy of Private International and Comparative Law discusses during its XLIV seminar among other topics the impacts of the pandemic on international family as well as aspects surrounding vaccines. Participants will discuss in Spanish and the online participation is free of charge.

Contrary to the regular sessions of The Hague Academy of International Law's Centre for Studies and Research, the upcoming edition is entirely online. The topic will be "Epidemics and International Law" and held from September 2020 to June 2021. The collective works will be published later by the Academy. You will find application and programme here.

The Minerva Center for Human Rights at Tel Aviv University hosted an international socio-legal (zoom-) workshop on 22-23 June 2021 to explore the impact of the Covid-19 crisis and its regulation on cross-border families. A call for papers expired on 28 February 2021.

Another series of events organized by the University of Sydney's Centre for Asian and Pacific Law will regularly discuss topics such as social justice, civil rights, trade and investment in light of (post) pandemic developments. Of that series one webinar on the aftermath of the pandemic in the Asia-Pacific region focussed on commercial dispute resolution and issues related to private international law.

Marc-Philippe Weller discussed in a workshop on December 1, 2020 about "Nationalism, Territorialism, Unilateralism: Managing the Pandemic Through Private International Law?" if the measures enacted due to the pandemic may have an effect on the connecting factors in European private international law. He had a particular focus on the determination of habitual residence.

A comparative analysis of reactions in Japan and Germany on COVID-19 in private and public law with scholars from both jurisdictions was the topic of an online conference (mostly in German) on August 2020. Recordings of the presentations are online.

During a live youtube conference on July 23, 2020 Humberto Romero-Muci presented with several others his views on “Migrantes, pandemia y política en el Derecho Internacional Privado”. The video is still online.

A webinar organized by experts from MK Family Law (Washington) and Grotius Chamber (the Hague) discussed pertinent issues relating to international child abduction in times of COVID-19.

Matthias Lehmann presented his views on the application of force majeure certificates and overriding mandatory provisions in international contracts in an online-workshop on “COVID-19 and IPR/IZVR”.

Another webinar was held on “Vulnerability in the Trade and Investment Regimes in the Age of #COVID19”, which is available online, as part of the Symposium on COVID-19 and International Economic Law in the Global South.

The University of New South Wales held a talk on “COVID-19 and the Private International Law” in May, which you find on youtube.

As a follow-up of a webinar on PIL & COVID-19, Inez Lopez and Fabrício Polido give “some initial thoughts and lessons to face in daily life”

A group of Brazilian scholars organized an online symposium on Private International Law & Covid-19. Mobility of People, Commerce and Challenges to the Global Order. The videos are here.

The Organization of American States holds a weekly virtual forum on “Inter-American law in times of pandemic” (every Monday, 11:00 a.m., UTC-5h). One topic of many will be on “New Challenges for Private International Law” (Monday, June 15, 2020).

State Liability

Some thoughts are given to compensation suits brought against China for its alleged responsibility in the spread of the virus. One main issue here is whether China can claim sovereign immunity.

In the United States, several suits have been brought in Florida (March 12),

Nevada (March 23) and Missouri (April 21) against the Peoples republic of China (PRC), which plaintiffs deem responsible for the uncontrolled spread of the virus, which later caused massive financial damage and human loss in the United States. Not surprisingly officials and scholars in China were extremely critical (see here and here).

But legal scholars, including Chimène Keitner and Stephen L. Carter, also think such suits are bound to fail due to China's sovereign immunity, as do Sophia Tang and Zhengxin Huo. Hiroyuki Banzai doubts that the actions can succeed since it will be difficult to prove a causal link between the damages and the (in-) actions by the Chinese Government. Lea Brilmayer suspects that such a claim will fail since it would be unlikely, that a court will assume jurisdiction. The same conclusion is drawn by Angelica Bonfanti and Chimène Keitner after a thorough analysis of the grounds on which a liability of china could be based. An overview and detailed presentation of many class actions and suits filed by states can be found here.

Until now, only very little has happened concerning the American suits. Some suits were (voluntarily) dismissed or tossed. One suit against the PRC for damages amounting to \$ 800 billion was ordered to be dismissed by the District Court, since the plaintiff failed to state a claim (*James-El v the Peoples Republic of China* (M.D.N.C. 2020) WL 3619870). For a general update on the lawsuits against the PRC from January 22, 2021 see here.

In an interview with a German newspaper Tom Ginsburg lays out the legal issues that will be faced, if the claims of state liability are brought in front of a German court. Fabrizio Marrella discusses the Italian perspective on that issue. Brett Joshpe analyzes more generally China's private and public liability in the domestic and international framework.

A Republican Representative is introducing two House Resolutions urging the US Congress to waive China's sovereign immunity in this regard; such a waiver has also been proposed by a Washington Post author. The claim has also found support by Fox News.

Interestingly, there is also a reverse suit by state-backed Chinese lawyers against the United States for covering up the pandemic. Guodong Du expects this will likewise be barred by sovereign immunity.

Martins Paporinskis shares the concerns about a successful litigation against foreign states. However, he suggests to change the law of state responsibility fundamentally to be prepared for further international catastrophes such as the current pandemic.

In the UK, the conservative Henry Jackson Society published a report suggesting that China is liable for violating its obligations under the International Health Regulations. The report discusses ten (!) legal avenues towards this goal, most of them in public international law, but also including suits in Chinese, UK and US courts (pp 28-30). Sovereign immunity is discussed as a severe but not impenetrable barrier.

Contract Law

Both the pandemic itself and the ensuing national regulations impede the fulfilment of contracts. Legal issues ensue. An overview of European international contract law and the implications of COVID-19 is given here and here. Two chapters of the book *“La pandemia da COVID-19. Profili di diritto nazionale, dell’Unione Europea ed internazionale”* edited by Marco Frigessi di Rattalma are dedicated to jurisdiction and applicable law in contract matters.

The UNIDROIT Secretariat has released a Note on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 health crisis.

Bernard Haftel highlights three different techniques to apply COVID-19 legislation to an international contract: as *lex contractus*, as *lois des polices* and through consideration within the applicable law.

Gerhard Wagner presents COVID caused defaults under the aforementioned ELI principles.

If a contracting party is unable to perform its contractual obligations, incapacity to perform can be based on force majeure or hardship. Some contributions suggest to apply for force majeure certificates which are offered by most countries, for example by China, Russia. How such a certificate can influence contractual obligations under English and New York Law is shown by Yeseung Jang. The German perspective is given by Philip Reusch and Laura Kleiner.

Further the South Korean, French and the Common Law perspective on force majeure have been published. Bruno Ancel compares the French and American approach. The difficulty to implement appropriate force majeure clauses in a contract is shown by Matteo Winkler.

Drawing from recent cases and experiences Franz Kaps analyses the difficulties in the operation within ICC force majeure clauses and suggests how “state-of-the-art force majeure clauses” should be constructed to include an international pandemic.

Victoria Lee, Mark Lehberg, Vinny Sanchez and James Vickery go beyond force majeure implications on contracts in their expert analysis.

William Shaughnessy presents issues which might occur in international construction contracts.

Another crucial aspect is the application of overriding mandatory rules on international contracts. Ennio Piovesani discusses whether Italian decree-laws enacted in view of the pandemic can operate as overriding mandatory rules and whether that would be compatible with EU law. So does Giovanni Zarra on international mandatory rules. Apostolos Anthimos adds the Greek perspective, Claire Debourg the French to the discussion.

The applicability of self-proclaiming mandatory provisions in Italian law in respect to package travels in general and the Directive (EU) 2015/15 on package travel in particular, is discussed by Fabrizio Marongiu Buonaiuti.

Matthias Lehmann considers more broadly possible private international law issues and responses under European law. José Antonio Briceño Laborí and Maritza Méndez Zambrano add the Venezuelan view.

The crisis hits in particular global value and production chains. Impacts are discussed by Tomaso Ferando, by Markus Uitz and Hemma Parsché and by Anna Beckers, though neither focuses specifically on private international law.

Caterina Benini explains a new Italian mandatory rule providing a minimum standard of protection for employees.

Klaus Peter Berger and Daniel Behn in their historical and comparative study on force majeure and hardship, highlight that such remedies are quite regular to find

and fit to distribute the risk emanating from such a crisis evenly.

CISG

The CISG has long been of very little importance in international contract law but now is subject to many discussions. André Janssen and Johannes Wahnschaffe dedicate a detailed analysis to exemptions from liability and cases of hardship under the CISG.

Performance on advance purchase agreements on delivering the COVID-19 vaccines, have been a major political debate recently. While asking which law is applicable on such contracts Ben Köhler and Till Maier-Lohmann suspect, that if CISG is in fact the applicable law, the consequences would be far reaching and could be the very first time the CISG enters the “global centre stage”. Unfortunately, a Belgian court deciding over a claim by the EU against AstraZeneca for the delivery of doses of vaccines, did not even consider the application of the CISG.

Corporate Law

If the questions of purchasing COVID-19 vaccines shifts to buying the entire company the issue at hand becomes more political. Arndt Scheffler analyses the situation in which a foreign investor tries to purchase a company, which is crucial for the domestic battle against the pandemic and the search for a vaccine.

Employment Law

Closed borders and practically everybody working from has its impact on employment law.

In export-oriented economies such as Germany, it is very common, that employees are posted abroad on a long-term basis. COVID-19 legislation shapes and influences the legal relation between employer and employee, but also between employee and host-country. Roland Falder and Constantin Franke-Fahle discuss

these influences with particular attention to the question of the applicable law here.

Tort Law

Damages caused by an infection are mostly subject to tort law but can also arise in a contractual relation. Focusing on the applicable law on non-contractual liability Rolf Wagner explains, that sometimes damages can be claimed both, as contractual and as non-contractual. He stresses that as the substantive law on damages caused by an infection is still to evolve, applying foreign law is a particular challenge.

An extensive overview about the law applicable to damages caused by an COVID-19 infection under Indian international tort law is given by Niharika Kuchhal, Kashish Jaitley and Saloni Khanderia. Khanderia published a second article, concerning the need of a codification of Indian conflict of laws on tort in respect of a foreseeable surge in international tort proceedings, caused by the pandemic.

General implications of the coronavirus on product liability and a possible duty to warn costumers, without specific reverence to conflict of laws.

In Austria, a consumer protection association is considering mass litigation against the Federal State of Tyrolia and local tourist businesses based on their inaction in view of the spreading virus in tourist places like Ischgl. A questionnaire is opened for European citizens. Matthias Weller reports.

Florian Heindler discusses how legal measures to battle the virus could be applicable to a relevant tort case (either as local data or by special connection), by analyzing the hypothetical case of a tourist who gets infected in Austria.

Jos Hoevenars and Xandra Kramer discuss the potential of similar actions in the Netherlands under the 2005 Collective Settlement Act, WCAM.

Family Law

Implications also exist in family law, for example regarding the Hague Abduction Convention.

In an Ontario case (*Onuoha v Onuoha* 2020 ONSC 1815), concerning children taken from Nigeria to Ontario, the father sought to have the matter dealt with on an urgent basis, although regular court operations were suspended due to Covid-19. The court declined, suggesting this was “not the time” to hear such a motion, and in any way international travel was not in the best interest of the child. For the discussion see [here](#).

Further aspects of travel restrictions in international abduction cases are analysed by Gemme Pérez.

A general overview of abduction in times of corona was published by Nadia Rusinova. Another article by Nadia by her covers recent case law and legislation on remote child related proceedings which were conducted during the last weeks around the world. She also highlights, that COVID-19 measures can impact Article 8 ECHR.

Also cases of international surrogacy come into mind which are affected by COVID-19, as Mariana Iglesias shows.

Personal Data

The protection of personal data in transnational environments has always been a controversial topic in conflict of laws. Jie Huang shows, that due to COVID-19 existing tensions between the EU, the USA and China are reflected in their conflict of laws approach.

The European Commission published a “toolbox for the use of technology and data to combat and exit from the COVID-19 crisis”, which was an opportunity for some contributions on the GDPR and Tracing Apps.

Economic Law

The crisis puts stress on global trade and therefore also economic law. Sophie

Hunter discusses developments in the competition laws of various countries (though with no explicit focus on conflict of laws issues).

A list of authors from around the world analyses the interrelation between “Competition law and health crises” in its international context in the current issue Concurrences.

Intellectual Property

Due to lockdowns and school closures, online work and teaching has exorbitantly increased but, as Marketa Trimble stresses, with little notion of transnational copyright issues.

To tackle those a prominently endorsed letter to the World Intellectual Property Organization, emphasizes the need to ensure that intellectual property regimes should support the efforts against the Coronavirus and should not be a hindrance.

Public Certification

In times of lockdown and closed borders notarization and public certification become almost impossible. Therefore, various countries have adjusted their legislation. You will find an overview [here](#).

The electronic Apostille Program (e-APP) experiences a new popularity, as a considerable number of countries have implemented new components of the e-APP. For more information see [here](#).

Dispute Resolution

In Dispute resolution two main questions are being discussed.

On the one hand the question of jurisdiction as such, for example for claims suffered within contractual or non-contractual relationships. Rolf Wagner gives the European and German perspective presenting the possible courts of jurisdiction under Brussel I Regulation (recast), the Lugano Convention and the

German code of civil procedure.

In a recent case by the Supreme Court of Queensland (AUS), the court examined the impact of COVID-19 on a foreign jurisdiction clause. You can find Jie Huang's comments on the decision [here](#).

On the other hand, it is being discussed to what extent the requirement of physical presence in courts can conform with social distancing and travel restrictions. As a more drastic reaction some courts suspended their activities except for urgent matters all together. Developments in Italy are discussed [here](#), developments in English law [here](#).

On the other hand, another possibility is the move to greater digitalization, as discussed comparatively by Emma van Gelder, Xandra Kramer and Eris Themeli. The Hague Conference on Private International Law (HCCH) published a Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention, discussed also with reference to Corona by Mayela Celis.

Using the pandemic, Gisela Rühl analyses why the potential of digitalization is so scarcely used in civil procedure and how it can be improved to serve the needs of a digital society.

Benedikt Windau analyses the German civil procedure and how international digital hearings could be possible within the existing law.

In litigation, virtual hearings become a prominent measure to overcome restrictions on physical presence. While in on some jurisdiction such hearings are possible, Luigi Malferrari discusses the question if such hearings should also be enabled before the CJEU.

Maxi Scherer takes the crisis as an opportunity to analyse virtual hearings in international arbitration. Complications and long-term effects of virtual arbitration are presented [here](#). Mirèze Philippe however sees this development as a positive game changer not just in health aspect but also to protect the environment and saving time as well as travelling costs (further articles covering international arbitration and virtual hearings: [here](#) and [here](#)).

A very broad presentation of legislation in France, Italy and Germany in civil procedure, including cross border service and taking of evidence as well as its

implications on international child abduction and protection, is given by Giovanni Chiapponi.

Jie Huang examines the case of substitute service under the Hague Service Convention during the pandemic in the case *Australian Information Commission v Facebook Inc* ([2020] FCA 531).

A US project guided by Richard Suskind collects cases of so-called “remote courts” worldwide.

The EU gives information about the “impact of the COVID-19 virus on the justice field” concerning various means of dispute resolution.

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Third-party liability of classification and certification societies in the context of conflict of laws and public international

law - a comment on the CJEU's recent 'Rina judgement'

Written by Yannick Morath

Yannick Morath, doctoral candidate at the University of Freiburg, has kindly provided us with his thoughts on the CJEU's judgement in the case of LG and Others v Rina SpA, Ente Registro Italiano Navale (C-641/18 - ECLI:EU:C:2020:349)

(See also the earlier post by Matthias Weller concerning the CJEU's judgement).

1. Introduction

Private-law classification and certification societies play a vital role in modern economies. Especially in the maritime sector, external auditors issue certificates dealing with public tasks such as the seaworthiness and safety of vessels. Not only their contractual partners but also third parties rely on the accuracy of such certificates. Due to cross-border mobility of certificates and certified items, issues of Private International Law have to be taken into account when dealing with a certifiers' liability.

When not applying the appropriate level of care, classification and certification agencies can - according to the CJEU - be sued in the courts of the Member State where the agency is seated. By finding this ruling, the CJEU had to deal with two interesting questions: Firstly, it had to establish whether an action for damages, brought against private certifiers falls within the concept of 'civil and commercial matters', and therefore, within the scope of the Regulation 44/2001 (Brussels I). Secondly, the CJEU had to examine the legitimacy of the certifier's plea based on the principle of customary international law concerning immunity from state jurisdiction.

2. Facts of the 'Rina-case'

In 2006, the *Al Salam Boccaccio '98*, a ship sailing under the flag of the Republic of Panama, sunk in the Red Sea, tragically causing the loss of more than 1,000 lives. Relatives of the victims and survivors have brought an action under Italian law before the Tribunale di Genova (District Court, Genoa, Italy) against two

private law corporations (the Rina companies), that are seated in Genoa and were responsible for the classification and certification of the ship.

The applicants argue that the defendants' operations, carried out under a contract concluded with the Republic of Panama, are to blame for the ship's lack of stability and its lack of safety at sea, which are the causes of its sinking. Therefore, they claim compensation from the Rina companies for the losses they suffered.

The Rina companies counter that the referring court lacks jurisdiction, relying on the international-law principle of immunity from jurisdiction of foreign States. They state that they are being sued in respect of activities, which they carried out as delegates of the Republic of Panama. The activities in question were a manifestation of the sovereign power of a foreign State and the defendants carried them out on behalf of and in the interests of that State.

The applicants, however, argue in favour of the case's civil law nature, within the meaning of Article 1 (1) of Regulation 44/2001. As the Rina companies are seated in Genoa, the Italian courts should have jurisdiction under Article 2 (1) of that regulation. They submit that the plea of immunity from jurisdiction does not cover activities that are governed by non-discretionary technical rules, which are, in any event, unrelated to the political decisions and prerogatives of a State.

The Tribunale di Genova decided to stay the proceedings and consult the CJEU for further clarification under Article 267 TFEU.

3. Background: The dual role of classification and certification societies

When dealing with the classification and certification of ships it is important to be aware of the dual role private-law societies play in this area. Traditionally they are hired by a shipowner to attest that a ship is built in accordance with the standards of a specific ship class. Those 'class rules' are developed by the classification societies themselves. The maritime industry depends on these services, as the classification of a ship is necessary to evaluate its insurability and marketability. Therefore, these voluntary classifications are mainly prompted by private interest. This is referred to as the 'private function' of classification.

On the other hand, the same societies fulfil a 'public function' as well. Under international maritime law, states have a duty to take appropriate measures for

ships flying under their flag to ensure safety at sea (Article 94 (3) of the United Nations Convention of the Law of the Sea). For this purpose ships have to be surveyed by a qualified personnel to make sure it meets all relevant safety and environmental standards. Flag states can perform these tasks themselves; however, most of them delegate executive powers to classification societies. Pursuant to Article 3 (2) of Directive 2009/15 this is also possible under EU law. When executing these powers classification agencies are subject to two contracts: The first one is the agreement on the delegation of powers with the flag state, the second contract is the actual certification agreement with the owner of the ship that is about to be surveyed. Whereas shipowners are free to choose one of the recognized classification societies, the certification itself is compulsory.

It must be noted that the classification according to class rules (private function) is a prerequisite for the statutory inspection and certification (public function). In the case at hand, the Rina companies were responsible for both aspects. They classified the ship in accordance with their class rules and then issued the statutory certificate on behalf of and upon delegation from the Republic of Panama. This public law background caused the need for clarification by the CJEU.

4. The CJEU on the interpretation of ‘civil and commercial matters’

Under Article 1(1) of Regulation 44/2001, the scope of that regulation is limited to ‘civil and commercial matters’. It does not extend, in particular, to revenue, customs or administrative matters. In order to ascertain whether Italian courts have jurisdiction pursuant to Article 2 (1) of that regulation it is necessary to interpret the concept of ‘civil and commercial matters’. This concept is subject to an autonomous European interpretation. By determining whether a matter falls within the scope of the Regulation, the nature of the legal relationships between the parties to the dispute is crucial. It must be noted that the mere fact that one of the parties might be a public authority does not exclude the case from the scope of the Regulation. It is, however, essential whether the party exercises public powers (*acta iure imperii*). These powers are ‘falling outside the scope of the ordinary legal rules applicable to relationships between private individuals’ (para. 34).

Following the Advocate General’s opinion and the CJEU’s judgement in *Pula Parking* (C-551/15 - ECLI:EU:C:2017:193), the Court notes that ‘it is irrelevant

that certain activities were carried out upon delegation from a State' (para. 39). The fact that the operations were carried out on behalf of and in the interest of the Republic of Panama and that they fulfil a public purpose, do not, in themselves, 'constitute sufficient evidence to classify them as being carried out *iure imperii*' (para. 41.).

In fact it must be taken into account that 'the classification and certification operations were carried out for remuneration under a commercial contract governed by private law concluded directly with the shipowner of the *Al Salam Boccaccio '98*' (para. 45). Moreover, it is the responsibility of the flag state to interpret and choose the applicable technical requirements for the certification necessary to fly their flag.

The CJEU continues to examine the agency's decision-making power. If the agency decides to withdraw a certificate, the respective ship is no longer able to sail. It argues, however, that this effect does not originate from the decision of the agency but rather from the sanction which is imposed by law (para. 47). The role of the certifier simply 'consists in conducting checks of the ship in accordance with the requirements laid down by the applicable legislative provisions.' As it is for the States to fix those provisions, it is ultimately their power to decide on a ship's permission to sail.

Whereas the general remarks on the interpretation of 'civil and commercial matters' are convincing and based on settled case law, the findings about the 'decision making power' of recognised organisations give rise to further questions. If a ship does not comply with the relevant requirements, the statutory certificate must not be issued and the shipowner is not allowed to sail under the flag of the respective state. Even though this legal consequence is finally imposed by law, it is the certifier's application of that law that leads to this effect. Whenever a certification agency refuses to issue a certificate, the ship is initially not able to sail. The CJEU's technical perspective in paragraph 47 does not sufficiently appreciate the factual decision making of the certifier. The judgement does unfortunately not explicitly address the issue of legal discretion and its consequences on the concept of 'civil and commercial matters'.

However, there are other grounds to qualify the case a 'civil matter'. As the CJEU pointed out as well, it follows from Regulation 6 (c) and (d) of Chapter I of the International Convention for the Safety of Life at Sea, that the final responsibility

is allocated to the flag state (para. 48). Therefore, the state is subject to far-reaching supervisory duties. Even though this is not expressly regulated by international or EU law, it appears like the flag state can at any time overrule an agency's decision to issue or withdraw the certificate. This would result in a limitation to the finality of the agency's powers and prepare the ground for a civil law qualification. Some further remarks by the CJEU about this aspect would have been interesting.

5. The CJEU on state immunity from jurisdiction

Doubts regarding the jurisdiction of the Italian courts arose from the Rina companies' plea based on the principle of customary international law concerning immunity from jurisdiction. Pursuant to the principle *par in parem non habet imperium*, a State cannot be subjected to the jurisdiction of another State. 'However, in the present state of international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*. By contrast, it may be excluded if the legal proceedings relate to acts which do not fall within the exercise of public powers' (para. 56).

The CJEU held that this principle does not preclude the application of the Regulation in this case, although it is the referring court that has to examine whether the Rina companies had recourse to public powers within in the meaning of international law. It must be noted that a rule of customary international law will only exist where a given practice actually exists that is supported by a firm legal view (*opinio iuris*). Following the Advocate General, the CJEU finds that the case-law cited by the defendants 'does not support the unequivocal conclusion that a body carrying out classification and certification operations may rely on immunity from jurisdiction in circumstances such as those of the present case' (c.f. para. 109 of his opinion).

In regard of state immunity, the CJEU changes its perspective on the case. Whereas the interpretation of 'civil and commercial matters' was driven by EU law, the doctrine of state immunity requires a different methodological approach, as it originates from international law. Nevertheless, the CJEU's overall convincing remarks are in line with its earlier findings, setting a high bar for statutory certification societies to plead for state immunity.

6. Final remarks

The CJEU established legal security for the victims of maritime disasters such as the sinking of the *Al Salam Boccaccio '98*. The judgement indirectly clarified the applicability of the Brussels I Regulation in cases where maritime certifiers operate only in their private function. When statutory certifications are a civil matter, this must *a fortiori* be the case for voluntary classifications. Having consistent results when establishing jurisdiction in such cases, also meets with the principle of foreseeability. The remarks on the applicability of the Brussels I regulation are also of significant relevance when dealing with the Brussels Ibis and the Rome I and II Regulations, as all of them apply the concept of 'civil and commercial matters'.

Moreover, the judgement underlines the responsibility of private-law certifiers and recognises their vital role as regulators that operate in the public interest. Even though the CJEU' findings on the interpretation of 'civil matters' are consistent with its earlier developed broad understanding of the concept, further clarification regarding privatised decision making powers would have been desirable.

Rivista di diritto internazionale privato e processuale (RDIPP) No 1/2020: Abstracts



The first issue of 2020 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Antonietta Di Blase, Professor at the University of Roma Tre, **Sull'interpretazione delle convenzioni e delle norme dell'Unione europea in materia di diritto internazionale privato** ('On the Interpretation of the European Private International Law Conventions and Provisions'; in Italian)

- The paper provides an overview of the practice of international and national Courts relating to the interpretation of private international law conventions and EU rules, where uniform approach and autonomy from the national legal orders of Member States are construed as fundamental criteria. Some elements, especially drawn from the Court and the Italian practice, makes it evident that the national judicial organs have substantially endorsed the interpretation by the Court of Justice of the EU of the acts adopted within the framework of the judicial cooperation in civil matters. Possible gaps in EU rules could be overcome through interpretation - in keeping with the main human rights principles - taking into account that sometimes the legislation in force in the Member States follow a different approach, as in the case of family law. Finally, the paper addresses problems connected to the interpretation of conventions with Third States, also taking into account the consequences of the UK's exit from the European Union.

Gilles Cuniberti, Professor at the University of Luxembourg, **Signalling the Enforceability of the Forum's Judgments Abroad** (in English)

- The aim of this article is to document and assess the efforts made by international commercial courts to signal the enforceability of their judgments abroad. To that effect, three strategies were developed. The

first and most obvious one was to enter into agreements providing for the mutual enforcement of judgments of contracting States which could serve the same function as the 1958 New York Convention for arbitral awards. Yet, as the 2005 Hague Convention has a limited scope and the 2019 Hague Convention is not yet in force, alternative strategies were identified. Several international commercial courts are actively pursuing the conclusion of non-binding documents with other courts or even law firms suggesting that the judgments of the forum would be enforced by the courts of other States. Finally, one international court has also explored how it could convert its judgments into arbitral awards.

Laura Baccaglini, Associate Professor at the University of Trento, **L'esecuzione transfrontaliera delle decisioni nel regolamento (UE) 2015/848** ('Cross-Border Enforcement of Decisions Pursuant to (EU) Regulation 2015/848'; in Italian)

- This paper addresses the cross-border enforcement of insolvency decisions in Europe. Notably, it examines how the claims brought in the interest of an insolvency proceeding opened in one Member State can be pursued in other Member States. The topic refers to EU Regulation 848/2015 that, as of 26 June 2017, replaced EC Regulation No 1346/2000 without introducing any significant new features as regards the circulation of such judgments, which remain subject to a system of automatic recognition. The reference made by such Regulation to Regulation No 1215/2012 makes the enforcement of those judgments equally automatic, without the need for prior exequatur by the court of the State addressed but only requiring the delivery of a certificate of enforceability by the court of the State of origin. The problem is examined by taking the liquidation procedure as a model, assuming that it was opened in a Member State other than Italy, where the insolvency practitioner needs to recover assets that have been disposed of by the debtor, after the opening of the procedure. The question is addressed as to how the insolvency practitioner can prevent the continuation of individual enforcement proceedings still pending and whether he can intervene to have the assets liquidated, withholding the proceeds. More generally, the problem arises as to which rules govern the liquidation of assets located in Italy and belonging to the debtor. In all these cases, the

issue is whether the foreign judgment should be enforced and, if so, how it should be enforced.

The following comment is also featured:

Giovanna Adinolfi, Professor at the University of Milan, **L'accordo di libero scambio tra l'Unione europea e la Repubblica di Singapore tra tradizione e innovazione** ('The Free Trade Agreement between the European Union and the Republic of Singapore between Tradition and Innovation'; in Italian)

- The Free Trade Agreement (FTA) with Singapore entered into force on 21 December 2019. It is one of the so-called new generation treaties negotiated and concluded by the European Union within the framework of the trade policy strategy launched in 2006. The FTA is complemented by the Investment Protection Agreement (IPA), signed in 2018 and whose entry into force requires the ratification by all EU Member States, in addition to the EU and Singapore. The overall purpose of the contribution is to assess to what extent the parties to the two agreements have not overlooked the dense network of other treaties and conventions that already govern their cooperation in economic matters. Indeed, the substantive provisions and the dispute settlement mechanisms established under the FTA and IPA have been inspired by these external sources and by their relevant case law. The analysis focuses, first, on the FTA provisions on trade in goods and services, establishment, subsidies, government procurement and intellectual property rights (para 2-6). Thereafter, the IPA is taken into consideration for the purposes of identifying possible overlaps with the FTA rules on establishment (para 7). Finally, focus is placed on the envisaged dispute settlement mechanisms, in view of the role they may play for a proper safeguard of the businesses' interests (para 7). This issue arises because of the provisions included in both the FTA and the IPA excluding the direct effects of the two agreements in the parties' legal order. Against this framework, the investor-State dispute settlement mechanism established under the IPA is called on to play a crucial role, also in the light of the detailed provisions on the enforcement of awards under art. 3.22 IPA.

In addition to the foregoing, this issue features the following book review by *Angela Lupone*, Professor at the University of Milan: Nora Louisa Hesse, **Die**

Vereinbarkeit des EU-Grenzbeschlagnahmeverfahrens mit dem TRIPS Abkommen, Mohr Siebeck, Tübingen, 2018, pp. XI-274.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2020: Abstracts

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

A. Stein: The 2019 Hague Judgments Convention - All's Well that Ends Well?

The Hague Convention on the Recognition and Enforcement of Foreign Judgments, which was concluded in July 2019, holds the potential of facilitating the resolution of cross-border conflicts by enabling, accelerating and reducing the cost of the recognition and enforcement of judgments abroad although a number of areas have been excluded from scope. As the academic discussion on the merits of this instrument unfolds and the EU considers the benefits of ratification, this contribution by the EU's lead negotiator at the Diplomatic Conference presents an overview of the general architecture of the Convention and sheds some light on the individual issues that gave rise to the most intense discussion at the Diplomatic Conference.

C. North: The 2019 HCCH Judgments Convention: A Common Law Perspective

The recent conclusion of the long-awaited 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the “Judgments Convention”) provides an opportunity for States to

reconsider existing regimes for the recognition and enforcement of foreign judgments under national law. This paper considers the potential benefits of the Judgments Convention from a common law perspective. It does so by considering the existing regime for recognition and enforcement at common law, and providing an overview of the objectives, structure and a number of key provisions of the Judgments Convention. It then highlights some of the potential benefits of the Convention for certain common law (and other) jurisdictions.

P.-A. Brand: **Recognition and enforcement of decisions in administrative law matters**

Whereas for civil and commercial matters there are extensive rules of international and European civil procedural law on mutual legal assistance and in particular on the recognition and enforcement of civil court decisions, there is no similar number of regulations on legal assistance and for the international enforcement of administrative court decisions. The same applies to the recognition of foreign administrative acts. This article deals with the existing rules, in particular with regard to decisions in administrative matters, and concludes that the current system of enforcement assistance in the enforcement of administrative decisions should be adapted to the existing systems of recognition and enforcement of judgments in civil and commercial matters.

B. Hess: **About missing legal knowledge of German lawyers and courts**

This article addresses a decision rendered by the Landgericht Düsseldorf in which the court declined to enforce, under the Brussels Ibis Regulation, a provisional measure issued by a Greek court. Erroneously, in its decision the Landgericht held that applications for refusal of enforcement of foreign decisions (article 49 Brussels Ibis Regulation) are to be lodged with the Landgericht itself. Since the party lodged its application with the Landgericht on the last day of

the time limit, the Oberlandesgericht Düsseldorf eventually held that the application was untimely as it was not lodged with the Oberlandesgericht, instead. The Oberlandesgericht refused to restore the status quo ante because the information about the competent court had been manifestly erroneous, whereas the lawyer is expected to be familiar with articles 49 (2) and 75 lit b) of the Brussels Ibis Regulation. This article argues that jurisdiction over applications for refusal of enforcement is not easily apparent from the European and German

legal provisions and that the legal literature addresses the issue inconsistently. This results in a certain degree of uncertainty as concerns jurisdiction over such applications, making it difficult to establish cases of possibly manifestly incorrect applications.

C.F. Nordmeier: Abuse of a power of attorney granted by a spouse - The exclusion of matrimonial property regimes, the place of occurrence of the damage under Brussels Ibis and the escape clause of art. 4 (3) Rome II

The article deals with the abuse of power of attorney by spouses on the basis of a decision of the Higher Regional Court of Nuremberg. The spouses were both German citizens, the last common habitual residence was in France. After the failure of the marriage, the wife had transferred money from a German bank account of the husband under abusive use of a power of attorney granted to her. The husband sues for repayment. Such an action does not fall within the scope of the exception of matrimonial property regimes under art. 1 (2) (a) Brussels Ibis Regulation. For the purpose of determining the place where the damage occurred (Art. 7 No. 2 Brussels Ibis Regulation), a distinction can be made between cases of manipulation and cases of error. In the event of manipulation, the bank account will give jurisdiction under Art. 7 No. 2 Brussels Ibis Regulation. Determining the law applicable by Art. 4 (3) (2) Rome II Regulation, consideration must be given not only to the statute of marriage effect, but also to the statute of power of attorney. Particular restraint in the application of Art. 4 (3) (2) Rome II Regulation is indicated if the legal relationship to which the non-contractual obligation is to be accessory is not determined by conflict-of-law rules unified on European Union level.

P.F. Schlosser: Governing law provision in the main contract - valid also for the arbitration provision therein?

Both rulings are shortsighted by extending the law, chosen by the parties for the main contract, to the arbitration provision therein. The New York Convention had good reasons for favoring, in the absence of a contractual provision specifically directed to the arbitration provision, the law governing the arbitration at the arbitrators' seat. For that law the interests of the parties are much more predominant than for their substantive agreements.

F. Rieländer: Choice-of-law clauses in pre-formulated fiduciary contracts

for holding shares: Consolidation of the test of unfairness regarding choice-of-law clauses under Art. 3(1) Directive 93/13/EEC

In its judgment, C-272/18, the European Court of Justice dealt with three conflict-of-laws issues. Firstly, it held that the contractual issues arising from fiduciary relationships concerning limited partnership interests are included within the scope of the Rome I Regulation. While these contracts are not covered by the exemption set forth in Art. 1(2)(f) Rome I Regulation, the Court, unfortunately, missed an opportunity to lay down well-defined criteria for determining the types of civil law fiduciary relationships which may be considered functionally equivalent to common law trusts for the purposes of Art. 1(2)(h) Rome I Regulation. Secondly, the Court established that Art. 6(4)(a) Rome I Regulation must be given a strict interpretation in light of its wording and purpose in relation to the requirement “to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence”. Accordingly, this exception is applicable only if the consumer needs to leave the country in which he has his habitual residence for the purpose of enjoying the benefits of the services. Thirdly, the Court re-affirmed that choice-of-law clauses in pre-formulated consumer contracts are subject to a test of unfairness under Art. 3(1) Directive 93/13/EEC. Since the material scope of this Directive is held to apply to choice-of-law clauses, such a clause may be considered as unfair if it misleads the consumer as far as the laws applicable to the contract is concerned.

***U. Bergquist*: Does a European Certificate of Succession have to be valid not only at the point of application to the Land Registry, but also at the point of completion of the registration in the Land Register?**

When it comes to the evidentiary effect of European Certificates of Successions, there are different opinions on whether a certified copy of the certificate has to be valid at the time of the completion of a registration in the Land register. The Kammergericht of Berlin recently ruled that a certified copy loses its evidentiary effect in accordance with art. 69 (2) and (5) of the European Succession Regulation (No. 650/2012) after expiry of the (six-month) validity period, even if the applicant has no influence on the duration of the registration procedure. This contribution presents the different arguments and concludes - in accordance with the Kammergericht - that not the date of submission of the application but the date of completion of the registration has to be decisive for the required proof.

D. Looschelders: International and Local Jurisdiction for Claims under Prospectus Liability

The judgment by the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH) deals with international and local jurisdiction for a claim under prospectus liability. It is mainly concerned with the determination of the place in which the harmful event occurred, as stated in Art. 5(3) of Regulation No 44/2001. Specifying the damage location can pose significant problems due to the fact that prospectus liability compensates pure economic loss. The OGH had stayed the proceedings in order to make a reference to the European Court of Justice (ECJ) for a preliminary ruling on several questions related to this issue. However, the decision by the ECJ left many details unsettled. This article identifies the criteria developed by the OGH in light of the case. The author agrees with the OGH to designate the damage location in this particular case as the injured party's place of residence. Nevertheless, he points out the difficulties of this approach in cases where not all investment and damage specific circumstances point to the investor's country of residence.

W.Voß: U.S.-style Judicial Assistance - Discovery of Foreign Evidence from Foreign Respondents for Use in Foreign Proceedings

In the future, will German litigants in German court proceedings have to hand over to the opposing party evidence located on German territory based on American court orders? In general, under German law, the responsibility to gather information and to clarify the facts of the case lies with the party alleging the respective facts, while third parties can only be forced to produce documents in exceptional circumstances. However, the possibility to obtain judicial assistance under the American Rule 28 U.S.C. § 1782(a) increasingly threatens to circumvent these narrow provisions on document production in transatlantic relations. For judicial assistance under this Federal statute provides parties to foreign or international proceedings with access to pre-trial discovery under U.S. law, if the person from whom discovery is sought "resides or is found" in the American court district. Over the years, the statute has been given increasingly broad applicability - a trend that is now being continued by the recent ruling of the Second Circuit Court of Appeals discussed in this article. In this decision, the Court addressed two long-disputed issues: First, it had to decide on whether the application of 28 U.S.C. § 1782(a) is limited to a person who actually "resides or is found" in the relevant district or whether the statute could be read more broadly

to include all those cases in which a court has personal jurisdiction over a person. Second, the case raised the controversial question of whether 28 U.S.C. § 1782 allows for extraterritorial discovery.

M. Jänterä-Jareborg: Sweden: Non-recognition of child marriages concluded abroad

Combatting child marriages has been on the Swedish legislative agenda since the early 2000s. Sweden's previously liberal rules on the recognition of foreign marriages have been revisited in law amendments carried out in 2004, 2014 and 2019, each reform adding new restrictions. The 2019 amendment forbids recognition of any marriage concluded abroad as of 1/1/2019 by a person under the age of 18. (Recognition of marriages concluded before 1/1/2019 follows the previously adopted rules.) The marriage is invalid in Sweden directly by force of the new Swedish rules on non-recognition. It is irrelevant whether the parties had any ties to Sweden at the time of the marriage or the lapse of time. The aim is to signal to the world community total dissociation with the harmful practice of child marriages. Exceptionally, however, once both parties are of age, the rule of nonrecognition may be set aside, if called upon for "extraordinary reasons". No special procedure applies. It is up to each competent authority to decide on the validity of the marriage, independently of any other authority's previous decision. While access to this "escape clause" from the rule of non-recognition mitigates the harshness of the system, it makes the outcome unpredictable. As a result, the parties' relationship may come to qualify as marriage in one context but not in another. Sweden's Legislative Council advised strongly against the reform, as contrary to the aim of protecting the vulnerable, and in conflict with the European Convention on Human Rights, as well as European Union law. Regrettably, the government and Parliament took no notice of this criticism in substance.

I. Tekdogan-Bahçivanci: Recent Turkish Cases on Recognition and Enforcement of Foreign Family Law Judgements: An Analysis within the Context of the ECHR

In a number of recent cases, the Turkish Supreme Court changed its previous jurisprudence, rediscovered the ECHR in the meaning of private international law and adopted a fundamental-rights oriented approach on the recognition and enforcement of foreign judgements in family matters, i.e. custody and guardianship. This article aims to examine this shift together with the

jurisprudence of the European Court of Human Rights, to find a basis for this shift by analysing Turkey's obligation to comply with the ECHR and to identify one of the problematic issues of Turkish private international law where the same approach should be adopted: namely recognition and/or enforcement of foreign judgements relating to non-marital forms of cohabitation.

ERA: Recent European Court of Human Rights Case Law in Family Matters (conference report)

Report written by Tine Van Hof, researcher at the University of Antwerp

On the 13th and 14th of February 2020, the Academy of European Law (ERA) organized a conference on 'Recent ECtHR Case Law in Family Matters'. This conference was held in Strasbourg and brought together forty participants coming from twenty-one different countries. This report will set out some of the issues addressed at the conference.

The presentation, made by ***Ksenija Turkovi?***, Judge at the European Court of Human Rights, focused on children on the move and more specifically on minors in the context of migration. On this topic the European Court of Human Rights (ECtHR) has developed a child-specific human rights approach. This approach implies taking into account three particular concepts: vulnerability, best interests and autonomy. Judge Turkovi? pointed to the interesting discussion on whether vulnerability could only apply to young migrant children. On this discussion, there is now agreement that the vulnerability applies to all children under the age of 18 and regardless

whether they are accompanied by adults. The ECtHR made very clear in its case law that migrant children are especially vulnerable and that this vulnerability is a decisive factor that takes precedence over the children's migrant status. This vulnerability also plays a role in the cases on the detention of children. The more vulnerable a person is, the lower the threshold for a situation of detention to fall within the scope of Article 3 of the European Convention on Human Rights (ECHR), encompassing the prohibition of torture.

Family unification and the free movement of family status was the second topic of the day. **Michael Hellner**, professor at Stockholm University, discussed several cases of the ECtHR (Ejimson v Germany) and the Court of Justice of the EU (CJEU) (K.A. v Belgium, Coman and S.M.). He concluded that family life does not automatically create a right of residence but it can create such a right in certain circumstances. In the Coman case for example, the CJEU decided that Romania had to recognize the marriage between the two men for the purpose of enabling such persons to exercise the rights they enjoy under EU law (i.e. free movement). Professor Hellner noted that it seems to be quite easy to circumvent national law in the future if one looks at the Coman case. He considered it positive if the consequence was that same-sex marriages and surrogacy arrangements created abroad were recognized. However, he made the interesting observation that it might be a very different story if one thinks about child marriages and the recognition thereof.

Maria-Andriani Kostopoulou, consultant in family law for the Council of Europe, thereafter shared her insights on parental rights, pre-adoption foster care and adoption. She discussed i.a. the evolution in the case law of the ECtHR on the representation of the child before the Court. In the Strand-Lobben case, the Court stated that the issue of representation does not require a restrictive or technical approach and thus made clear that a certain level of flexibility is necessary. In the Paradisio and Campanelli case, the ECtHR provided three criteria that should be taken into account for assessing the representation of the child: the link between the child and the representative, the subject-matter of the case

and any potential conflict of interests between the interests of the child and those of the representative. The latest case, *A. and B. against Croatia*, introduced a security safeguard. In this case, the ECtHR asked the Croatian Bar Association to appoint a legal representative for the child for the procedure before the ECtHR since the Court was not sure that there were no conflict of interests between the child and the mother, who proposed to be the representative.

To end the first conference day, **Dmytro Tretyakov**, lawyer at the Registry of the ECtHR, enlightened us about the misconceptions and best practices of submitting a case to the Court. His most important tips for a submission to the Court are the following:

- Use the current application form and not an old one;
- Submit well in time and certainly within the six-month period;
- Summarize the facts of the case on the three pages provided. This summary has to be clear, readable (for those that do it in handwriting) and comprehensible;
- To state claims, refer to the relevant Article from the ECHR (do not cite it) and explain what the specific problem is with regard to that Article;
- Support each claim with documents; and
- Sign the form in the correct boxes and carefully look where the signature of the applicant and where the signature of the representative is required.

The second day of the conference started with the presentation of **Nadia Rusinova**, attorney-at-law and lecturer at the Hague University of Applied Science, on international child abduction. She discussed i.a. the issue of domestic violence in child abduction cases. Several questions can be raised in this regard, for example: what constitutes domestic violence? When should a court accept the domestic violence to be established? What is adequate protection in light of the Hague Convention on International Child Abduction (1980) and who decides on this? In the case *O.C.I. and others v Romania*, one of the questions was whether there is such a thing as light

violence that does not amount to a grave risk in the sense of Article 13(1)(b) of the Hague Convention. The ECtHR approached this issue very critically and stated that no form of corporal punishment is acceptable. Regarding the adequate measures, the Court stated that domestic authorities have a discretion to decide what is adequate but the measures should be in place before ordering the return of the child. Another point raised by Ms. Rusinova is the time factor that is required. If one looks at Article 11(2) of the Hague Convention and at Article 11(3) of the Brussels IIbis Regulation together, six weeks is the required time period for the return proceedings. The Brussels IIbis Recast clarified that the procedure should take no more than six weeks per instance. However, according to Ms. Rusinova it is hardly possible to do the procedures in six weeks; it will only work when the proceeding is not turned into an adversarial proceeding in which all kinds of claims of both parents are dealt with.

Samuel Fulli-Lemaire, professor

at the University of Strasbourg, addressed the interesting evolution of reproductive rights and surrogacy. In the case of *C. and E. v France*, the French Court of Cassation asked the ECtHR for an advisory opinion on the question whether the current state of the case law in France was compatible with the obligations under Article 8 ECHR (the right to respect for private and family life). The status of the French case law was that the genetic parent was fully accepted but the other intended parent was required to adopt the child if he or she wished to establish parentage links. The ECtHR replied that the obligation under Article 8 entailed that there must be a possibility of recognition of the parent-child relationship but that it is up to the States to decide how to do this. Adoption is a sufficient method of recognizing such relationship, provided that it is quick and effective enough. The Court also refers to the possibility of transcription of the birth certificate as an alternative to adoption. However, professor Fulli-Lemaire pointed out that there is a misconception on what transcription means under French law. The mere transcription of the birth certificate does not establish legal parentage in France. The fact that the ECtHR says that an intended parent can adopt or transcribe the birth certificate is therefore tricky because under French law the effects of the two methods are not at all the same.

The very last presentation of the conference was given by **Gabriela Lünsmann**, attorney-at-law and member of the Executive Board of the Lesbian and Gay Federation in Germany. She spoke about LGBTQI rights as human rights and hereby focused i.a. on transsexuals' gender identity and the case of X. v North-Macedonia. The question raised in that case is whether the state must provide for a procedure to recognize a different gender. The applicant had tried to change their gender but North-Macedonia did not offer any possibility to undergo an operation or to have medical treatment in that regard.

The applicant then went abroad for treatment. Back in North-Macedonia, he had his name changed but it was not possible to change his officially registered gender.

The applicant claimed that this amounted to a violation of Article 8 ECHR and specially referred to the obligation of the state to respect a person's physical and psychological integrity. The Court found that there was indeed a violation. What is as yet unclear, and is thus an interesting point for reflection, is whether states are under an obligation to provide for a procedure for the recognition of a change of gender without the person having had an operation.

The author would like to thank ERA for the excellent organization of the conference and for the interesting range of topics discussed.

Same-sex parentage and surrogacy and their practical implications in Poland

Written by Anna Wysocka-Bar, Senior Lecturer at Jagiellonian University (Poland)

On 2 December 2019 Supreme Administrative Court of Poland (*Naczelny Sąd*)

Administracyjny) adopted a resolution of seven judges (signature: II OPS 1/19), in which it stated that it is not possible – due to public policy – to transcribe into the domestic register of civil status a foreign birth certificate indicating two persons of the same sex as parents. The Ombudsman joined arguing that the refusal of transcription infringes the child’s right to nationality and identity, and as a result may lead to infringement of the right to protection of health, the right to education, the right to personal security and the right to free movement and choice of place of residence. Interestingly, the Ombudsman for Children and public prosecutor suggested non-transcription. The background of the case concerns a child whose birth certificate indicated two women of Polish nationality as parents, a biological mother and her partner to a *de facto* union. Parents applied for such transcription in order to apply subsequently for the issuance of the passport for the child.

The Supreme Administrative Court stated that in accordance with the law on civil status register, the transcription must be refused if contrary to *ordre public* in Poland. The public policy clause protects the domestic legal order against its violation. Such violation would result from the “recognition” of a birth certificate irreconcilable with fundamental principles of public policy. It was underlined that in accordance with Article 18 of the Constitution of Poland marriage is understood as a union between a man and a woman; family, motherhood and parenthood are under protection and guardianship of the State. In accordance with those principles and the whole system of family law, only one mother and one father might be treated as parents of a child. Any other category of “parent” is unknown. The Court underlined, at the same time, that transcription of the birth certificate into the domestic register should not be indispensable for a child to obtain a passport, as the child has, by operation of law, already acquired Polish nationality as inherited from the mother. However, in practical terms this would require challenging administrative authorities’ approach (requesting domestic birth certificate) in another court procedure.

It should be explained here that the resolution was taken on the request of the panel of judges of the Supreme Administrative Court reviewing the cassation appeal brought by the parents, and therefore, in this particular case is binding. In other, similar cases panels of judges should, in general, follow the standpoint presented in such resolution. If the panel of judges is of a different view, it should request another resolution, instead of presenting a view contrary to the previous

one. As a result, it might happen that there are two resolutions of seven judges presenting different views. Given the above, it can be said that the question of transcription is not as definitively answered as might seem at first glance.

A similar justification based on the public policy clause in conjunction with Article 18 of the Constitution has already been presented before in other cases, for example one concerning children born in the US out of surrogacy arrangements with a married woman, whose birth certificates indicated two men as parents, a (biological) father and his partner (identical judgments of 6 May 2015, signature: II OSK 2372/13 and II OSK 2419/13). The implications of these judgments were quite different as the Court refused to confirm that children acquired Polish nationality by birth from their father. In the eyes of the Court and according to fundamental principles of Polish family law, children born out of surrogacy (which is not regulated in Poland) by operation of law have filiation links only with the (biological, surrogate) mother and her husband. The paternity of the biological father (only) might be (at least theoretically) established, once the paternity of the surrogate mother's husband is successfully disavowed in a court proceeding.

Here it should be added that opposite views were presented by the Supreme Administrative Court in other judgments. One of the cases concerned transcription of the birth certificate of a child born in India out of surrogacy arrangement. Such birth certificate indicates only the father (in this case a biological father) and do not contain any information about the (surrogate) mother. This was perceived as contrary to public policy by the administrative authorities, which underlined that in the Polish legal order establishing paternity is always dependent on the establishment of maternity. As a result, the lack of information about the mother raises doubts as to paternity of the man indicated on the birth certificate as father. Interestingly, based on the same birth certificate the acquisition of Polish nationality of the child was earlier confirmed by administrative authorities. In its judgment of 29 August 2018 (signature: II OSK 2129/16), Supreme Administrative Court criticized the way the public policy clause was so far understood. The Court (which hears the case after the refusal of administrative authorities of two instances and administrative court of the first instance - just as in all of the mentioned cases) underlined that this clause must be interpreted having regard to a broader context of the legal issue at hand, in particular it should take into account constitutional values (always prevailing best interest of a child) and international standards on protection of children's rights

and human rights. This allows for the transcription of the birth certificate into civil status records in Poland.

Another interesting case concerned again the question of confirmation that the children acquired Polish nationality by birth after their father (four identical judgments of 30 October 2018, signatures: II OSK 1868/16, II OSK 1869/16, II OSK 1870/16, II OSK 1871/16). Four girls were born in US through surrogacy. The US birth certificates indicated two men as parents, one of them being a Polish national. The Supreme Administrative Court underlined that for the legal status of a child, including the possibility of confirming acquisition of Polish nationality, it should not matter that the child was born to a surrogate mother. What should matter is that a human being with inherent and inalienable dignity was born and this human being has a right to Polish nationality, as long as one of the parents is a Polish national.

The above mentioned cases, where the Supreme Administrative Court presented a conservative approach and approved the refusal of the confirmation that children born out of surrogacy acquired Polish nationality by birth is now pending before European Court of Human Rights (*Schlittner-Hay v. Poland*). The applications raise violation by Poland of Article 8 (respect for private and family life) and Article 14 (discrimination on grounds of parents' sexual orientation) of the European Convention on Human Rights.

This shows that practical implications for children to same-sex parents and from surrogacy arrangements are of growing interest and importance also in Poland. The approaches of domestic authorities and courts seems to be evolving, but are still quite divergent. The view on the issue from the European Court of Human Rights is awaited.

A never-ending conflict: News

from France on the legal parentage of children born through surrogacy arrangements.

As reported previously, the ECtHR was asked by the French *Cour de cassation* for an advisory opinion on the legal parentage of children born through surrogacy arrangement. In its answer, the Court considered that the right to respect for private life (article 8 of ECHR) requires States parties to provide a possibility of recognition of the child's legal relationship with the intended mother. However, according to the Court, a State is not required, in order to achieve such recognition, to register the child's birth certificate in its civil status registers. It also declared that adoption can serve as a means of recognizing the parent-child relationship.

The ECtHR's opinion thus confirms the position reached by French courts: the *Cour de cassation* accepted to transcribe the birth certificate only when the intended father was also the biological father. Meanwhile, the non-biological parent could adopt the child (See for a confirmation ECtHR, C and E v. France, 12/12/2019 Application n°1462/18 and n°17348/18).

The ECtHR advisory opinion was requested during the trial for a review of a final decision in the *Mennesson* case. Although it is not compulsory, the *Cour de cassation* has chosen to comply with its recommendations (Ass. plén. 4 oct. 2019, n°10-19053). Referring to the advisory opinion, the court acknowledged that it had an obligation to provide a possibility to recognize the legal parent-child relationship with respect to the intended mother. According to the *Cour de cassation*, the mere fact that the child was born of a surrogate mother abroad did not in itself justify the refusal to recognize the filiation with the intended mother mentioned in the child's birth certificate.

When it comes to the mean by which this recognition has be accomplished, the *Cour de cassation* recalled that the ECtHR said that the choice fell within the State's margin of appreciation. Referring to the different means provided under French law to establish filiation, the Court considered that preference should be given to the means that allow the judge to exercise some control over the validity

of the legal situation established abroad and to pay attention to the particular situation of the child. In its opinion, adoption is the most suitable way.

However,

considering the specific situation of the Mennesson twins who had been involved in legal proceedings for over fifteen years, the Court admitted that neither an adoption nor an apparent status procedure were appropriate as both involve a judicial procedure that would take time. This would prolong the twins' legal uncertainty regarding their identity and, as a consequence, infringe their right to respect for private life protected by article 8 ECHR. In this particular case, this would not comply with the conditions set by the ECtHR in its advisory opinion: "the procedure laid down by the domestic law to ensure that those means could be implemented promptly and effectively, in accordance with the child's best interest".

As

a result and given the specific circumstances of the Mennessons' situation, the *Cour de cassation* decided that the best means to comply with its obligation to recognize the legal relationship between the child and the intended mother was to transcribe the foreign birth certificate for both parents.

The

Cour de cassation's decision of October 2019 is not only the final act of the *Mennesson* case, but it also sets a *modus operandi* for future proceedings regarding legal parentage of children born through surrogate arrangements: when it comes to the relation between the child and the intended mother, adoption is the most suitable means provided under domestic French law to establish filiation. When such an adoption is neither possible nor appropriate to the situation, judges resort to transcribing the foreign birth certificate mentioning the intended mother. Thus, adoption appears as the principle and transcription as the exception.

Oddly

enough, the Court then took the first chance it got to reverse its solution and choose not to follow its own *modus operandi*.

By two decisions rendered on December 18th 2019 (Cass. Civ. 1^{ère}, 18 déc. 2019, n°18-11815 and 18-12327), *the Cour de cassation* decided that the intended non-biological father must have its legal relationship with the child recognized too. However, it did not resort to adoption as a suitable means of establishing the legal relationship with the intended parent. Instead, the court held that the foreign birth certificate had to be transcribed for both parents, while no references were made to special circumstances which would have justified resorting to a transcription instead of an adoption or another means of establishing filiation.

The Court used a similar motivation to the one used in 2015 for the transcription of the birth certificate when the intended father is also the biological father. It considered that neither the fact that the child was born from a surrogate mother nor that the birth certificate established abroad mentioned a man as the intended father were obstacles to the transcription of the birth certificate as long that they complied with the admissibility conditions of article 47 of the Civil Code.

But

while in 2015 the Court referred to the fact that the certificate “did not contain facts that did not correspond to reality”, which was one of the requirements of article 47, in 2019 this condition is no longer required.

Thus,

it seems that the *Cour de cassation* is no longer reluctant to allow the full transcription of the foreign birth certificate of children born of surrogate arrangements. After years of constant refusal to transcribe the birth certificate for the non-biological parent, and just a few months after the ECtHR advisory opinion accepting adoption as a suitable means to legally recognize the parent-child relationship, this change of view was unexpected.

However,

by applying the same treatment to both intended parents, biological and non-biological,

this reversal of solution put into the spotlight the publicity function of the transcription into the French civil status register. As the *Cour de cassation* emphasized, a claim for the transcription of a birth certificate is different from a claim for the recognition or establishment of filiation.

The transcription does not prevent later proceedings directed against the child-

parent
relationship.

But

the end is still not near! On January 24th, during the examination of the highly sensitive Law of Bioethics, the *Sénat* (the French Parliament's upper house) adopted an article prohibiting the full transcription of the foreign birth certificates of children born through surrogate arrangements. This provision is directly meant to "break" the *Cour de cassation's* solution of December 18th 2019. The article will be discussed in front of the *Assemblée nationale*, the lower house, and the outcome of the final vote is uncertain.

The

conflict over the legal parentage of children born through surrogate arrangements is not over yet. To be continued...

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2020: Abstracts

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

H. Schack: The new Hague Judgment Convention

This contribution presents the new Hague Convention on the recognition and enforcement of foreign judgments in civil or commercial matters adopted on 2 July 2019 by the Hague Conference on Private International Law. This

Convention simple with a positive list of accepted bases for recognition and enforcement supplements the 2005 Hague Convention on choice of court agreements. The benefit of the 2019 Convention, however, is marginal, as its scope of application is in many ways limited. In addition, it permits declarations like the “bilatéralisation” in Art. 29 further reducing the Convention to a mere model for bilateral treaties. If at all, the EU should ratify the 2019 Convention only after the US have done so.

F. Eichel: The Role of a Foreign Intervener in Establishing a Cross-Border Case as a Requirement for the Application of European Legislation on Civil Procedure

The Small-Claims Regulation (No. 861/2007) is only applicable in crossborder cases. The European Court of Justice (ECJ) in its judgment in ZSE Energia has decided that the foreign seat of an intervener does not turn an otherwise purely domestic case into a cross-border case. The IPRax article agrees with this decision, but criticizes the reasons given by the ECJ. Without specific need, the ECJ stated that the participation of an intervener would be inconsistent with the Small-Claims Regulation at all, although general procedural issues are governed by the procedural law of the *lex fori* (cf. article 19 Small-Claims Regulation). In addition, the article analyses the impact of the ECJ’s ruling on other European legal acts such as the European Order for Payment Regulation (No. 1896/2006), the European Account Preservation Order Regulation (No. 655/2014), the Directive on the right to legal aid (RL 2002/8/EC), and the Mediation Directive (RL 2008/52/EC).

C.A. Kern/C. Uhlmann: When is a court deemed to be seised under the Brussels Ia Regulation? Requirements to be met by the claimant and pre-action correspondence

In the aftermath of the VW-Porsche takeover battle, an investor based on the Cayman Islands announced to sue Porsche SE in the High Court of England and Wales. Probably in an attempt to secure a German forum, Porsche initiated a negative declaratory action in the Landgericht Stuttgart. However, the complaint could not be served on the investor for lack of a correct address. The German Federal Supreme Court held that Porsche had not met the

requirements

of Art. 32 no. 1 lit. a of the recast Brussels I Regulation and asked the lower court to determine whether the „letter before claim“ sent by the investor had already initiated proceedings in England so that parallel proceedings in Germany were barred. The authors agree that Art. 32 no. 1 must be interpreted strictly, but doubt that a „letter before claim“ is sufficient to vest English courts with priority under the Brussels Regulation.

C. Thomale: Treating apartment-owner associations at Private International Law

In its recent Brian Andrew Kerr ./ Pavlo Postnov and Natalia Postnova decision, the CJEU has taken a position on how to handle apartment owners' obligations to contribute to their association in terms of international jurisdiction and choice of law. The casenote analyses the decision, notably assessing the relationship of international jurisdiction and choice of law, the concept of “services” as contained in the Brussels I Regulation and the Rome I Regulation respectively, as well as the company law exception according to Art. 1 (2) (f) Rome I Regulation.

H. Roth: The Probative Value of Certificates as per Art 54 Brussels I and Art 53 Brussels Ia

According to the European rules on recognition and enforcement of judgments in civil and commercial matters, the probative value of both certificates is determined as mere information provided by the court of origin. At the second step of assessing whether there are grounds to refuse recognition (appeal or refusal of enforcement), the court of the member state in which enforcement is sought will have to verify itself the factual and legal requirements for service of process.

M. Brosch: Public Policy and Conflict of Laws in the Area of International Family and Succession Law

The public policy-clause is rarely applied in private international law cases. Relevant case law often concerns matters of international family and succession law. This also applies to two recent decisions of the Court of Appeal in Berlin and the Austrian Supreme Court relating, respectively, to the recognition of a Lebanese judgement on the validity of a religious marriage and

the applicability of Iranian succession law. Although systemically coherent, the courts' findings give rise to several open questions. Furthermore, it is argued that two opposite tendencies can be identified: On the one hand, the synchronisation between forum and ius as well as the prevalence of the habitual residence as connecting factor in EU-PIL leave little room for the application of the public policy-clause. On the other hand, its application may be triggered in areas where the nationality principle still prevails, i.e. in non-harmonised national PIL and PIL rules in bilateral treaties.

E.M. Kieninger: Vedanta v Lungowe: A milestone for human rights litigation in English courts against domestic parent companies and their foreign subsidiary

In *Vedanta v Lungowe*, a case involving serious health and environmental damage due to emissions into local rivers from a copper mine in Zambia, the UK Supreme Court has affirmed the jurisdiction of the English courts, in relation to both the English parent company and the subsidiary in Zambia. In the view of the Supreme Court, the claim against the parent company has a real issue to be tried and denying access to the English courts would equal a denial of substantive justice.

The decision is likely to have consequences not only for the appeal against the Court of Appeal's denial of access to the English courts in *Okpabi v Royal Dutch Shell*, but also for the development of a more general duty of care of parent companies towards employees and people living in the vicinity of mines or industrial plants run by subsidiaries.

B. Lurger: How to Determine Foreign Legal Rules in Accelerated Proceedings in Austrian Courts

In a rather lengthy proceeding initiated in 2014 in the district court Vienna Döbling the wife claimed maintenance from her husband. The Austrian Supreme Court (OGH) examined the special conditions of the application of foreign law in accelerated proceedings (motion for injunctive relief). The Court first clarified the construction of Art. 5 Hague Maintenance Protocol in relation to a pending divorce proceeding in which Austrian law applied, whereas the habitual residence of the claimant was situated in the United Kingdom. The

OGH held that in accelerated proceedings, the question of whether foreign law had to be applied (the choice of law question) can regularly be answered without considerable effort. As the next step, the determination of the content of the foreign law must be undertaken by the lower courts with reasonable means and effort. As in ordinary proceedings, the parties do not have any particular duties to assist the court in this determination. Considering the special circumstances of the case, which consisted in the considerable wealth of the parties and the divorce and maintenance proceedings going up and down the instances in Vienna already for years, the Supreme Court arrived at the conclusion that the application of English law by the Austrian courts was appropriate even in the accelerated proceeding at hand.

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Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2019: Abstracts

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

D. Einsele: The Law Applicable to Third-Party Effects of Assignments of Claims - A Critical Interjection Regarding the Commission’s Proposal

Claims are relative rights against the debtor. Therefore, third parties are not legally affected by the assignment of a claim. However, legal systems may protect third parties’ (economic) interest in knowing who the creditor of a claim is. Insofar, essentially two different means of making the assignment public have to be distinguished, i.e. “relative” publicity, in particular by notice of the assignment to the debtor, and “absolute” publicity, in particular by registration of the assignment in a public register. Whereas means of relative publicity usually can be qualified as rules covered by Art. 14(1) and 18(1) Rome I Regulation, means of absolute publicity are generally overriding mandatory provisions. Instead of qualifying different publicity provisions, Art. 4 of the Proposal establishes one single rule for all third-party effects of assignments. Yet it distinguishes, in a conceptually erratic manner, different cases of assignments of claims and allows for party autonomy relating to third-party effects, thereby infringing basic legal principles. The Proposal will also not bring about legal certainty regarding the third-party effectiveness of assignments. This is due to the “super” conflict rules of Art. 4(1) subs. 2, Art. 4(4) of the Proposal and the lack of (explicit) rules

concerning chains of assignments. Requirements for absolute publicity - qualified as overriding mandatory provisions - would in any event not be caught by Art. 4 of the Proposal.

C. Thole: The distinction between EIR and Brussels Ia-reg. with respect to damage claims against third parties based on damages incurred by the general body of creditors

The recent judgment of the ECJ shows, once again, the difficulties in distinguishing between civil matters (falling within the scope of the Brussels Ia Regulation) and actions within the meaning of Art. 6 EIR which derive directly from the insolvency proceedings and are closely linked to them. The Court had to deal with a special action established under Dutch law that allows the insolvency practitioner to pursue a damage claim against third parties on the grounds of them allegedly being party to a misappropriation of assets committed by the debtor. The ECJ concluded that such a claim falls within the scope of the Brussels Ia Regulation, notwithstanding the fact that the action is brought by the liquidator in insolvency proceedings and the proceeds of the action, if the claim succeeds, accrue to the general body of creditors. Christoph Thole analyses the judgment and its consequences for other damage claims based on German law. He also argues that the ECJ is trying to more and more confine the criteria relevant under Art. 6 EIR to a sole criterion, i.e. the legal basis of the action. This shows some similarities with the approach followed by the ECJ with respect to the general distinction between civil and administrative matters under art. 1 Brussels Ia Regulation.

C.A. Kern/C. Uhlmann: International jurisdiction and actio pauliana (avoidance action) in the absence of insolvency proceedings

The ECJ ruled that international jurisdiction for the avoidance action of a Polish creditor against a Spanish third party which had received assets from the Polish co-contractor of the creditor can be based on Art. 7 No. 1 lit. a Brussels I bis Regulation. For the ECJ, international jurisdiction for an avoidance action against the “enriched” third party can be derived from the original contractual relationship between creditor and debtor. The authors criticize the decision of the ECJ and instead argue in favor of the general place of jurisdiction (Art. 4 para. 1 Brussels I bis Regulation).

K. Sirakova/P. Westhoven: Do broadly worded jurisdiction clauses cover actions based on the abuse of a dominant position?

The interpretation of jurisdiction agreements in the private enforcement of EU competition law continues to raise various questions in Member State courts even after the ECJ's decision in CDC Hydrogen Peroxide. The latest ruling of the Luxembourg court in this context was the case Apple Sales International. The judgment clarifies some of the questions that remained open in the aftermath of the CDC-ruling and provides guidance on the interpretation of jurisdiction agreements by proposing a general differentiation between claims resulting from an infringement of Art. 101 TFEU and such based on Art. 102 TFEU. While the judgment will undoubtedly facilitate a swift decision of jurisdiction issues in many private enforcement cases, the approach of the ECJ should not be understood as entirely excluding the discretion of the national courts in interpretation matters. It remains the sole responsibility of the Member State judges to take into account the individual circumstances of each case.

C. Mayer: Pitfalls of public service and of choice of court agreements in international business transactions

In order to guarantee the applicant effective legal protection, the possibility of public service is indispensable, particularly in cross-border legal relations with non- EU Member States. However, in order to protect the defendant's right to be heard, public service is permissible only under strict conditions, otherwise service is ineffective. A hasty recourse to this procedural means can therefore have considerable procedural, but also material legal consequences for an applicant entitled to claim, because ineffective service does not start the course of appeal periods nor the limitation period. The decision of the higher regional court of Hamburg discussed below shows that even small mistakes in allegedly simple procedural steps can be fatal to the plaintiff.

M. Brinkmann: Counterclaims under the Brussels I Regulation

In Petronas Lubricants Italy SpA ./ Livio Guida, the ECJ had the opportunity to refine the Court's understanding of the relationship between claim and counter-claim required by Art. 8 Nr. 3 Brussels Ia Regulation. As in Northartov(C-306/17), a decision which had been published shortly before, the ECJ relied on the wording established in the Kostanjevec-case by asking whether the original claim and the

counter-claim share a “common origin”. Such a common origin exists, according to the ECJ, even if the original claim is based on a contractual relationship and the counter-claim is based on a different contractual relationship as long as they arise from the “same facts”. If this requirement is met, the fact that the claim of the counter-claimant has previously been assigned to him by a third party, is irrelevant. The reasoning of the Court gives cause to revisit the basics of the jurisdiction for counter-claims in European Civil Procedure and to reflect on the admissibility of counter-claims against third parties under the Brussel Ia Regulation.

B. Heiderhoff: The „tricky” subjective element of habitual residence

The concept of habitual residence still poses problems for German courts. While the CJEU strongly favours a fact-based approach, national courts show a tendency to give greater weight to so-called subjective elements, i.e. factors such as attachment to the home state or the vague intention to move „back home“. Based on the analysis of several court decisions, including the CJEU’s UD ./ X judgment, the article aims at clarifying the rather limited role of subjective criteria within the concept of habitual residence.

D. Looschelders: Waiving an inheritance before German courts in cases of international successions

Accepting or waiving an inheritance may pose considerable practical difficulties to heirs with habitual residence in a Member State different from the one in which the succession according to the European Succession Regulation is settled. In order to facilitate the acceptance or waiver of the succession, Article 13 of the European Succession Regulation assigns special jurisdiction to the court at the habitual residence of the person making the declaration. However, the interpretation of this provision raises some unresolved issues. The present decisions of the Higher Regional Courts of Düsseldorf and Koblenz are the first statements by higher German courts in relation to this matter. Specifically, they deal with local jurisdiction, the effects of a waiver before a court at the habitual residence of the person making the declaration on the inheritance procedure of the competent court at the last habitual residence of the deceased and the necessity of court approval for waivers of minors. The article presents by means of these judgments that waivers of succession before German courts in cases of international successions lead to significant imponderability. Yet the author

opines that the person making the declaration can counteract most of the uncertainties by following a careful approach.

C. Möllnitz: Violation of the national public policy by the registration of a noble name changed by deed poll and its effects on European fundamental rights

The current decision of the German Federal Court restricts the European right of freedom of movement by proscribing the registration of a name in Germany containing a former title of nobility due to a violation of the national public policy, even if the name is lawfully registered in another member state of the European Union. While the arguments on a violation of the national public policy are convincing, the justification of the restriction of the freedom of movement is questionable in the light of the European jurisprudence. The fact that former titles of nobility, as part of a name, are not completely banned in Germany raises doubts as to the necessity of this restriction.

B. Lurger: The Hypothetical Violation of EU Fundamental Freedoms Leads to a New Rule: Non-Possessory (German) Security Ownership Finally Survives the Transport to Austria

In its judgment of 23 January 2019 (3 Ob 249/18s), the Austrian Supreme Court (OGH) changed its line of decisions concerning the validity of nonpossessory security rights in movables which are brought to Austria. Before 2019, the Supreme Court (3 Ob 126/83) held that the (German) non-possessory security ownership („Sicherungseigentum“) of a German creditor in a movable became extinct the moment the movable (transported by the debtor) crossed the border from Germany to Austria. This was due to the Austrian “principle of possession of security objects”: Under Austrian law, pledges and security ownership are only valid when the security object rests in the “fists” of the creditor (= “Faustpfandprinzip” = “principle of fist pledge”). This principle was determined to apply as soon as the security object - in the hands of the debtor - entered Austrian territory. According to the judgment of 23 January 2019 the opposite is now correct: The non-possessory (German) security ownership now survives the transgression of the Austrian frontier. The Austrian “fist principle” does not apply. The validity of the foreign security right is solely based on the foreign (German) rules for security rights which applied due to the *lex rei sitae* when the security right was created (§ 31 Austrian IPRG) and which continue to apply. The main

argument of the court for this about turn is the Austrian accession to the EU in 1995 which led to application of the fundamental freedoms of the TFEU. The (former pre-EU) application of the Austrian fist principle to imported security objects constituted (from 1995 onwards) an unjustified violation of the EU fundamental freedoms in most cases, according to the court. This argumentation is plausible and in line with major literature. The 2019 judgment establishes the recognition of non-possessory security rights in movables in Austria once these rights were validly created under the law of another EU Member State. This leads to less transparency and security on the credit security market in Austria with respect to movables. The question of whether the new PIL rule also applies to relations with Non-Member States can be answered in the affirmative.

M. Makowsky: The limitation of succession proceedings in cases of assets located in a third State pursuant to Art. 12 EU Succession Regulation

In principle, the EU Succession Regulation grants the courts of the member states jurisdiction to rule on the succession as a whole regardless of the location of the estate. If assets are located in a non-EU state, however, Art. 12 of the Regulation allows the court, at the request of the parties, to decide not to rule on these assets if it may be expected that its decision will not be recognised or declared enforceable in that third state. The Austrian Supreme Court has approved the limitation of succession proceedings in a case where part of the estate was located in Switzerland and the Swiss authorities had already issued a certificate of inheritance and appointed an executor. The Court argues that, due to these prior acts, a later decision by the Austrian probate court in respect of the Swiss estate could not be recognised in Switzerland. The article points out that firstly, it has to be determined whether the acts in the Swiss succession proceedings need to be recognised and therefore have a (*res judicata*) effect on the proceedings held in Austria. If the Swiss authorities' acts, especially the certificate of inheritance, do not qualify as „decisions“ capable of recognition, they can hardly constitute a ground for non-recognition.

F. Fuchs: Cross-border effects of third-party notices and actions on a warranty with a special regard to the Portuguese Code of Civil Procedure

Under the Brussels Ia Regulation, a person domiciled abroad may be invited to join proceedings before the courts of a Member State pursuant to that Member State's rules on third-party notice. The third-party notice enables the claimant, if

he loses the case, to have a recourse against the third party with that third party being bound by the outcome of the first proceedings. Instead of rules on third-party notice, some Member States allow actions on a warranty. Both concepts aim to protect the interest of that party whose claim would be dismissed twice if the proceedings against two or more adversaries could not be combined. The situation in Portugal is quite interesting, given that its national law provides for both, third-party notices and actions on a warranty. This article offers an insight into the Portuguese Code of Civil Procedure. Moreover, it examines how the effects of a German third-party notice are recognized in other Members States and how a judgment on a warranty rendered in Portugal is recognized in Germany.