Does the occurrence of purely financial damage in a Member State justify in itself the jurisdiction of the courts of that State pursuant to Article 5 (3) of Regulation No 44/2001?

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

Universal Music, a record company established in the Netherlands, acquired the Czech company B&M in the course of 1998. The contracts providing for the sale and delivery of B&M's shares were drawn up by a Czech law firm. Because of negligence by an associate of the Czech law firm the contracts provided a much higher sale price for B&M shares than intended by Universal Music. This led to a dispute between Universal Music and B&M's shareholders which was brought before an arbitration board in the Czech Republic, following a settlement between the parties in 2005. Because of this settlement Universal Music allegedly suffered financial damage of some 2.5 million EUR. Subsequently Universal Music has brought proceedings against the Czech lawyers before the Dutch courts. The Dutch courts have requested the CJEU to answer the question, whether Article 5 (3) of Regulation No 44/2001 must be interpreted as meaning that the *place where the harmful event occurred* can be construed as being the place, in a Member State, where the damage occurred, if that damage consists exclusively of financial damage which is the direct result of an unlawful act committed in another Member State. However the only connecting factor to the Netherlands, besides Universal Music being established in that state, was that the bank account from which Universal Music paid the settlement amount was situated in *Baarn* (The Netherlands). Thus the CJEU now finds that such "purely financial damage which occurs directly in the applicant's bank account can not, in itself, be qualified as a 'relevant connecting factor', pursuant to Article 5(3) of Regulation No 44/2001". Obviously in order not to contradict its ruling in *„Kolassa*"

(C-375/13) the CJEU clarifies that only where "other circumstances specific to the case also contribute to attributing jurisdiction to the courts for the place where a purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place". Referring to „*Kronhofer*" the CJEU further states that the *place where the harmful event occurred* "does not refer to the place where the applicant is domiciled and where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State". As a consequence the place where the loss of the claimant´s assets occurs and the place where his assets are concentrated only can be qualified as the *place where the harmful event occurred*, pursuant to Article 5 (3), if other circumstances specific to the case also contribute to attributing jurisdiction to the courts for these places.

The full judgment is available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=180329&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1

CJEU Rules on the Recognition of Names in the EU: Bogendorff von Wolfersdorff

On 2 June 2016 the CJEU came down with its long awaited judgment in Nabiel Peter Bogendorff von Wolfersdorff v. Standesamt der Stadt Karlsruhe. Dealing (once more) with the question whether the freedoms conferred under Article 21 TFEU require Member States to recognize names of private individuals registered in another Member State the Court held that the refusal, by the authorities of a Member State, to recognise the forenames and surname of a national of that Member State, as determined and registered in another Member State of which he also holds the nationality, constitutes a restriction on the freedoms conferred under Article 21 TFEU on all citizens of the EU. However, the Court also found

that such a restriction may be justified by considerations of public policy.

David de Groot from the University of Bern (Switzerland) has kindly prepared the following note:

Mr Bogendorff von Wolffersdorff was born as a German national named Nabiel Bagadi. After an adoption his name changed to Peter Nabiel Bogendorff von Wolffersdorff. He moved to Britain and acquired, while being habitually resident there, the British nationality and subsequently changed his name by deed poll to 'Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff'. The German authorities did not want to recognise his new name as it contained the words 'Graf' and 'Freiherr', which used to be titles of nobility in Germany. According to Article 109 of the Weimar Constitution – which is still applicable based on Article 123 Basic Law – any creation of new titles of nobility is prohibited in Germany. However, the titles of nobility at the time of abolition became an integral part of the surname. Thus in Germany there are still persons who have a former title of nobility in their name. The same issue his daughter had where the German authorities did not want to recognise her name 'Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff'. In that case, though, the *Oberlandesgericht Dresden* had decided that the German authorities had to recognise the name established in the United Kingdom.

The District Court of Karlsruhe referred the following question to the CJEU:

> *Are Articles 18 TFEU and 21 TFEU to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is at the same time a national of another Member State and has acquired in that Member State, during habitual residence, by means of a change of name not associated with a change of family law status, a freely chosen name including several tokens of nobility, where it is possible that a future substantial link with that State does not exist and in the first Member State the nobility has been abolished by constitutional law but the titles of nobility used at the time of abolition may continue to be used as part of a name?*

A refusal by the authorities of a Member State to recognise a name of its national established while the person exercised his free movement rights in another Member State is likely to hinder the exercise of the free movement rights enshrined in Article 21 TFEU. Furthermore confusion and serious inconvenience

at administrative, professional and private levels are likely to occur. This is due to the fact that the divergence between documents gives rise to doubt to the person's identity and the authenticity of the documents and the necessity for the person to each time dispel doubts as to his identity. Therefore, it is a restriction of Article 21 TFEU which can only be justified by objective considerations which are proportionate to the legitimate objective of the national provisions.

The German authorities had brought several reasons to justify the restriction on the recognition of the name. The first justification brought forward was the immutability and continuity of names. The Court stated that although it is a legitimate principle, it is not a that important principle that it can justify a refusal to recognise a name established in another Member State. The second justification concerned the fact that it was a singular name change, meaning that the name changed independent of another civil status change. Therefore, the name change was dictated on personal reasons.

The Court referred to the case *Stjerna v. Finland* from the European Court of Human Rights of 1994 where it was stated that there may exist genuine reasons that might prompt an individual to wish to change his name, however that legal restriction on such a possibility could be justified in the public interest. The Court, however also stated that the voluntary nature of the name change does not in itself undermine the public interest and can therefore not justify alone a restriction of Article 21 TFEU. Concerning the personal reasons to change the name the Court also referred to the *Centros* ruling on abuse of EU law, but did not state whether it actually applied to the case. Concerning the German argument that the name was too long, the Court stated that "such considerations of administrative convenience cannot suffice to justify an obstacle to freedom of movement."

The most important point made by the German authorities concerned the fact that the name established in the UK entailed former German titles of nobility. The Government argued that the rules on abolishment of nobility and therefore refusal to recognise new titles of nobility were a part of the German public policy and intended to ensure equal treatment of all German citizens. Such an objective consideration relating to public policy could be cable of justifying the restriction; however it must be interpreted strictly. This means that it can only apply when it is a genuine and sufficiently serious threat to a fundamental interest of society.

In *Sayn-Wittgenstein* the Court had held that it was not disproportionate for Austria to attain the objective of the principle of equal treatment "by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such rank." However the German legal system is different in that there is not a strict prohibition on maintaining titles of nobility as a part of the family name and it is also possible to acquire it through adoption. It would though not be in the interest of the German legislature if German nationals could under application of the law of another Member State adopt abolished titles of nobility and that these would automatically have to be recognised by the German authorities.The Court was though not sure whether the practice of the German authorities to refuse a name including former titles of nobility, while allowing some persons in Germany to bear such a name, is appropriate and necessary to ensure the protection of the public policy and the principle of equality before the law of all German citizens. As this is a question of proportionality it would be for the referring court to decide upon this.

The Court however marked certain factors that have to be taken into consideration while not being justifications themselves. First of all that Mr Bogendorff von Wolffersdorff exercised his free movement rights and holds double German and British nationality. Secondly, that the elements at issue do not formally constitute titles of nobility in either Germany or the United Kingdom. Thirdly, that the *Oberlandesgericht Dresden* in the case of the daughter of Mr Bogendorff von Wolffersdorff did not consider the recognition of a name including titles contrary to public policy. However, the court would also have to take into consideration that it concerned a singular name change which is based purely on personal choice and that the name gives impression of noble origins. The Court concluded, however, that even if the surname is not recognised based on the objective reason of public policy, it cannot apply to the forenames, which would have to be recognised.

As such it is not that much a surprise that the Court referred the case back as it concerned a matter of proportionality. But still the Court's judgment is a bit disappointing as some issues of the referred question are unsolved. For example the Court did never go into the part of the referred question concerning "the future substantial link" of the British nationality. The Court states that Mr Bogendorff von Wolffersdorff is dual German and British national, but it could

also have stated that the future substantial link does not matter due to the *Micheletti* case. Also Article 18 TFEU got lost after the rephrasing of the question and the Court then only concentrated on Article 21 TFEU.

What is though very surprising is that the Court only mentions the case law on abuse of law, but then leaves it open whether it is applicable or not. Considering that Mr Bogendorff von Wolffersdorff lived in the United Kingdom for four years and even acquired British citizenship makes it rather doubtful whether one could consider it an abuse; especially if one compares it for example to the facts of the *Torresi* case.

It is thus now up to the national court to decide whether all German citizens are equal, or whether some are more equal than others – and all of these are former nobility.

Summer Schools 2016, Greece

The Jean Monnet Center of Excellence and the UNESCO Chair at the Department of International and European Studies, University of Macedonia, Thessaloniki, Greece, is organising a Summer academy on European Studies and Protection of Human rights in Zagora, on Mount Pelion, Greece, consisting of two summer schools in English. The academic faculty in both summer schools are University professors and experts from all over Greece and the EU (Great Britain, Spain and Poland).

The first summer school is on **"Freedom, Security and Justice in the EU**". It will be held **from Friday July 8, afternoon until Monday, July 11, 2016, afternoon.** In particular, the summer school will last **25 hours.** The main areas of study will be:

- Institutional Structure and Development (EU institutions, Frontex,

Eurojust, European Attorney) which will be analyzed by Prof. Chrysomallis,
- European Citizenship and the protection of fundamental rights in the Area of Freedom Security and Justice by D. Anagnostopoulou,
- Internal and External Security by Prof. F. Bellou,
- Immigration and asylum policies by Prof. V. Hatzopoulos and I. Papageorgiou,
- EU Private International Law by M. Gardenes – Santiago (Autonomous University of Barcelona),
- European criminal law (N. Vavoula, Queen Mary)

For further information in this summer school click here.

The second summer school will begin on **Thursday, July 14 afternoon and will end on Tuesday, July 19.** It will last **40 hours** with a focus on the **protection of human rights in Europe**:

- International human rights protection mechanisms (International Covenants and International Conventions), taught by f. Professor P. Naskou Perraki (University of Macedonia)
- European Convention on Human Rights by Dr. Dagmara Dajska, expert of the Council of Europe, who will discuss the right for fair trial and the right to asylum,
- Freedom of Expression by Prof. I. Papadopoulos (University of Macedonia),
- Protection of Personal Data by Prof. E. Alexandropoulou (University of Macedonia),
- EU Charter of Fundamental Rights by Prof. L. Papadopoulou (Aristotle University of Macedonia),
- Prohibition of discrimination by Prof. D. Anagnostopoulou (University of Macedonia),
- LGBT Rights by Prof. Alina Tryfonidoy (Reading University),
- Protection of minorities and cultural rights by Dr. Nikos Gaitenidis, Head of the Observatory on Constitutional Values of the Jean Monnet Centre of Excellence, and
- Workshop on intercultural skills by Prof. I. Papavasileiou (University of Macedonia)

For further information on this summer school click here.

A Certificate of attendance will be issued to all while a Certificate of Graduation will be awarded to all those passing a multiple choice examination.

For additional information and applications to any of the schools, please refer to the links below or contact:

Assistant Professor Despina Anagnostopoulou, danag@uom.gr

or *Ms. Chrysothea Basia, chrybass@yahoo.com*

Fictitious Service of Process in the EU – Requiem for a Nightmare?

An article by A. Anthimos, Czech Yearbook of International Law 2017 volume VIII (Forthcoming), accessible at SSRN.

Abstract. Fictitious forms of service have dominated for decades the notification of documents abroad. The insecurity caused by these means of service led to the ratification of the 1965 Hague Service Convention by a significant number of countries. Still, the problem has not been solved, because the Convention did not dare to take the steps towards abolition of fictitious service. The sole exception being, stipulated under Article 19, for documents instituting proceedings. The EU-Service Regulation followed the same path. For nearly 10 years, fictitious service was not discarded by national courts in all cases. However, a recent judgment of the ECJ interpreted the Service regulation as banning all forms of fictitious service. This ruling led to a shift in national jurisprudence. However, at the same time it triggered reactions.

The purpose of this paper is to contribute to the discussion surrounding the ECJ ruling, by highlighting its repercussions both within the framework of the Service Regulation, and potentially in the ambit of the multilateral Hague Service

Convention.

The application of foreign law under constitutional and treaty-based review (Paris, 23 September 2016)

In cooperation with the *Centre de droit privé fondamental* of the University of Strasbourg and the *Centre d'études sur l'efficacité des systèmes juridiques continentaux* of the University of Reims Champagne-Ardenne, the *Société de législation comparée* organises an international conference entitled:

The application of foreign law under constitutional and treaty-based review

(Le droit étranger à l'épreuve des contrôles de constitutionnalité et de conventionnalité)

Scholars and practitioners in the fields of private international law from different backgrounds will meet in Paris to identify new models of control in the application of foreign law within Western legal systems and compare them with a view to understanding the place of the Otherness today in Europe and in Americas.

Date: 23 September 2016

Venue: Cour de Cassation, Grand'Chambre, 5, Quai de l'Horloge, 75001 – Paris.

Conference Directors:

Gustavo Cerqueira, Senior Lecturer at the University os Reims (France)

Nicolas Nord, Senior Lecturer at the University of Strasbourg, Vice-Dean of the Faculty of Law (France)

With the participation of :

Bertrand Louvel, First-President of the French Cour de cassation

Dominique Hascher, Chairman of the Société de législation comparée

Jean Massot, Honorary Section's President at the French Conseil d'Etat

Danièle Alexandre, Emeritus Professor at the University of Strasbourg

Paul Lagarde, Emeritus Professor at the University of Paris I Panthéon-Sorbonne

Sylvaine Poillot-Peruzzetto, Councillor at the Cour de cassation in extraordinary service

Guillaume Drago, Professor of the University of Panthéon-Assas Paris II

Prolegomena :

Jean-Sylvestre Bergé, Professor at the University of Jean Moulin Lyon 3

Julien Boudon, Professor at the University of Reims, Dean of the Faculty of Law

French Perspectives :

Alice Meier-Bourdeau, Attorney at the French Conseil d'État and Cour de cassation

Hugues Fulchiron, Professor at the University of Jean Moulin Lyon 3

Pascal de Vareilles-Sommières, Professor at the University of Paris I Panthéon-Sorbonne

Comparative Perspectives :

Serena Forlati, Associate Professor at the University of Ferrara

Fernanda Munschy, Attorney at the Bar of Strasbourg

Gustavo Cerqueira, Senior Lecturer at the University of Reims Champagne-Ardenne

Alejandro Garro, Associate Professor at the University of Columbia

Patrick Kinsch, Professor at the University of Luxembourg

Gustavo Monaco, Professor at the University of São Paulo

Didier Opertti-Bádan, Former Ministry of Foreign Affaires of Uruguay

See whole program here.

No participation fee.

Registration and further information:

Gordon Choisel / gordon.choisel@legiscompare.com

Request for a preliminary ruling from the Riigikohus (Estonia) on Cyberspace Violations of a Legal Person's Rights

The Estonian Riigikohus has requested, on 7 April 2016, a preliminary ruling from the CJEU on a case concerning violations of a legal person's rights committed on the internet: *Bolagsupplysningen OÜ, Ingrid Ilsjan v. Svensk Handel AB*, Case C-194/16). The Estonian court has asked the following questions:

1. Is Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that a person who alleges that his rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to that information can bring an action for rectification of the incorrect information and removal of the harmful comments before the courts of any Member State in which the information on the internet is or was accessible, in respect of the harm sustained in that Member State?

2. Is Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that a legal person which alleges that its rights have been infringed by the publication of incorrect information concerning it on the internet and by the failure to remove comments relating to that information can, in respect of the entire harm that it has sustained, bring proceedings for rectification of the information, for an injunction for removal of the comments and for damages for the pecuniary loss caused by publication of the incorrect information on the internet before the courts of the State in which that legal person has its centre of interests?

3. If the second question is answered in the affirmative: is Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that:

— it is to be assumed that a legal person has its centre of interests in the Member State in which it has its seat, and accordingly that the place where the harmful event occurred is in that Member State, or

— in ascertaining a legal person's centre of interests, and accordingly the place where the harmful event occurred, regard must be had to all of the circumstances, such as its seat and fixed place of business, the location of its customers and the way and means in which its transactions are concluded?

Many thanks to Dr. Christina Mariottini (HCCH/ILA) and Meeli Kaur for the tip-

off!

Ontario Court Enforces American Judgments Against Iran

Under the *State Immunity Act*, foreign states are generally immune from being sued in Canada. This includes being sued on a foreign judgment. However, in 2012 Canada enacted legislation to give victims of terrorism the ability to sue a foreign state that sponsored the terrorism. It also made it easier for foreign judgments against such a state to be enforced in Canada.

In *Tracy v The Iranian Ministry of Information and Security*, 2016 ONSC 3759 (released June 9, 2016; likely to be posted in the week of June 13, 2016, in CanLII) the Ontario Superior Court of Justice had to consider these legislative reforms and how they applied to a series of American judgments rendered against Iran in favour of American victims of terrorist acts which Iran was found to have sponsored. The court held that Iran was not immune from the enforcement proceedings and that accordingly the American judgments were enforceable against certain assets of Iran in Ontario.

The decision is reasonably detailed. It involves interpretation of the *State Immunity Act* and the *Justice for Victims of Terrorism Act*. It also considers issues relating to the limitation period and the enforcement of punitive damages awards (in this case, in the hundreds of millions of dollars). Not all of the analysis resonates as convincing and there is considerable scope for a possible appeal. For example, Iran's argument that the loss or damage suffered by the victim had to have been, on the language of s 4(1) of the *JVTA*, suffered after January 1, 1985, did not prevent the enforcement of American decisions in respect of acts of terror which happened before that date because, the court held, the victims continued to suffer harm on an ongoing basis. This seems vulnerable to challenge. In addition, the court's reasoning as to why the enormous punitive damages awards were not contrary to public policy is extremely brief.

However, on any appeal, Iran does have a significant procedural problem to overcome. It did not defend the enforcement actions when they were initially brought in Ontario. All of the immunity arguments were canvassed by the court as part of Iran's motion to have the resulting default judgments set aside, on the issue of whether Iran might have a viable defence on the merits. But at no point did Iran offer any explanation for the initial failure to defend. While not conclusive, this weighs against setting the judgments aside even if Iran can show merit to its position on immunity.

The timing of the court's decision against Iran could pose challenges for the current Canadian government, which is currently working to re-engage with Iran after the previous government cut ties in 2012 (see news story here). In addition, a Montreal-based professor has recently been jailed in Iran and this has caused considerable concern in Canada (see news story here).

Save the date: Conference in Lucerne on the Hague Choice of Law Principles on 8/9 September

The University of Lucerne and the Hague Conference on Private International Law (HCCH) will be co-organizing a conference on the implementation of the Hague Choice of Law Principles ("*Towards a Global Framework for International Commercial Transactions: Implementing the Hague Principles on Choice of Law in International Commercial Contracts*") on 8/9 September 2016. The conference serves to analyze the impact and prospects of the 2015 Principles on Choice of Law in International Commercial Contracts (the Hague Principles) in the context of other relevant legal instruments applicable to international commercial transactions. It brings together distinguished academics, experts, private practitioners and representatives from various international institutions.

Scholars and practitioners in the fields of private international law and

commercial law and dispute resolution are encouraged to participate.

Conference Directors: Prof. Dr. Daniel Girsberger, University of Lucerne (Switzerland), Dr. Christophe Bernasconi, Secretary-General (HCCH)

Venue: University of Lucerne, Auditorium 9, Frohburgstrasse 3, CH-6002 Lucerne (Switzerland)

Speakers: Jürgen Basedow, Neil B. Cohen, Andrew Dickinson, Roberto Echandi, José Angelo Estrella Faria, Franco Ferrari, Lauro Da Gama e Souza Jr, Thomas Kadner Graziano, Peter Mankowski, Jan L. Neels, Emily O'Connor, J.A. Moreno Rodríguez, Geneviève Saumier, Linda Silberman, Renaud Sorieul

Participation fee: CHF 250.– (including documentation, catering and dinner on Thursday, 8 September 2016; accommodation not included)

Registration and further information: https://regis.buchertravel.ch/event/HCCH_2016

Contact: Mrs. Lisbeth Meule (lisbeth.meule@unilu.ch)

UNCITRAL – Heading for an International Insolvency Convention?

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

UNCITRAL Working Group V (Insolvency Law) has issued a report on the work of its forty-ninth session, which took place in New York from 2 – 6 May 2016. The Working Group continued its deliberations on the cross-border insolvency of multinational enterprise groups, the recognition and enforcement of insolvency-

derived judgments and the obligations of directors of enterprise group companies in the period approaching insolvency. Furthermore the report communicates that a meeting of an open-ended informal group established to consider the feasibility of developing a convention on international insolvency issues has taken place. This is rather exciting, as the development of an international insolvency convention by UNCITRAL would constitute the next big step in international insolvency law leaving behind the defiencies of soft law. The report is available at: http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.

Reminder: ILA 77th Biennial International Conference 2016

The International Law Association (ILA) invites you to join the ILA 77th Biennial International Conference 2016 which will take place from **7 to 11 August 2016** at the Sandton Convention Centre in Johannesburg, South Africa.

The main theme of the conference will be **'International Law and State Practice: Is there a North – South Divide?'**

The keynote address at the opening session will be given by **Judge Navi Pillay**, the former UN High Commissioner for Human Rights. Programme details as well as further information on the illustrious panel of renowned speakers from across the globe are available at the conference website.

The regular registration closes **30 June 2016**. If you have not yet registered you can do so by clicking here.

The ILA looks forward to seeing you in Johannesburg!