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Burkhard Hess | Koen Lenaerts (eds.)

The 50th Anniversary of the European Law of Civil Procedure

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Volume 22

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Signing of the Brussels Convention on 27 September 1968

Top line, from left to right: Pierre Harmel, Minister for Foreign Affairs, Belgium; Willy Brandt, Vice-Chancellor, Minister for Foreign Affairs, Germany; Michel Debré, Minister for Foreign Affairs, France

Bottom line, from left to right: Giuseppe Medici, Minister for Foreign Affairs, Italy; Pierre Grégoire, Minister for Foreign Affairs, Luxembourg; J.M.A.H. Luns, Minister for Foreign Affairs, Netherlands.

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Foreword

On 27 September 1968, the six foreign ministers of the European Economic Community convened in Brussels to sign the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. In what would later prove to be a truly historic moment, they signed one of the most successful instruments of the European Communities to come. Fifty years later, on 27–28 September 2018, an international conference organised by the Court of Justice of the European Union and the Max Planck Institute Luxembourg for Procedural Law took place in the Grande Salle d'Audience of the Court. Prominent academics from different EU Member States and distinguished members of the Court discussed the impact of the case law of the Court of Justice on the development of the "Brussels Regime" during the last decades. The discussions held within the conference demonstrated the impact and acceptance of the Brussels Regime and the case law of the Court in the legal practice of the EU Member States.

However, the conference did not only assess the former and the present state of the Brussels Regime as it transpires from the case law of the Court of Justice. It also took a critical view to the dialogue between the Luxembourg Court and the judges of the EU Member States. Moreover, in a pre-conference colloquium, young scholars met at the Max Planck Institute Luxembourg for Procedural Law to discuss the wider perspective of the current regime, especially in the context of the crises that the European Union is currently facing.

The present volume comprises the presentations delivered during both the conference and the pre-conference colloquium. The joint organisation of this event by the Max Planck Institute Luxembourg for Procedural Law and the Court of Justice of the European Union exemplifies the mutually fruitful exchanges between the Court and the academia in Luxembourg. As this volume demonstrates, this cooperation includes critical debates on the current and future regime on EU judicial cooperation in civil and commercial matters. The editors are grateful to their respective collaborators for their support in the organisation of the conference and the publication of this volume. They also wish to express their gratitude to all the speakers of the conference who submitted their manuscripts for this publication.

Finally, they would like to thank Dr. Vincent Richard, Senior Research Fellow at the MPI Luxembourg, for editing this publication.

Luxembourg, 10 June 2020

Koen Lenaerts Burkhard Hess

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Seminal Judgments (les Grands Arrêts) in the Case Law of the European Court of Justice

Burkhard Hess[*]

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1. Introduction

When the foreign ministers of the (then) six EEC Member States met on 27 September 1968 in Brussels, they were certainly not aware that they were signing one of the most successful and popular instruments of EU law for the years to come. The Convention they signed was conceived as an international treaty concluded among the EEC Member States in the framework of Article 220 of the Rome Treaty. From the perspective of European Law, the Brussels Convention had only a complementary role, as it should alleviate cross-border debt recovery in the wider framework of the Rome Treaty.[1] However, from a perspective of private international law, the Convention was one of the most modern instruments of its time: it took up experiences of the Hague Conference and provided for a double convention. It addressed not only the recognition of judgments but also established a uniform system of jurisdiction applicable to civil litigation within the European Economic Community.[2]

The most important innovation introduced with the Brussels Convention was the 1971 Protocol on its interpretation by the European Court of Justice. This Protocol made a vast difference to all existing instruments in private international law as it provided for a supranational instance to interpret the Convention in a uniform way. Of course, the ECJ at that time was not familiar with instruments on private international and procedural law. However, there was a positive attitude within the Court to address these issues. Since the mid-1970s, the ECJ decided almost 4 to 5 cases on

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1 In its first judgment on the interpretation of the Convention, the ECJ explicitly stressed this relation. "… The Convention was established to implement Article 220 [of the EEC Treaty] and was intended according to the express terms of its preamble to implement the provisions of that article on the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and to strengthen in the Community the legal protection of persons therein established. In order to eliminate obstacles to legal relations and to settle disputes within the sphere of intra-Community relations in civil and commercial matters the Convention contains, inter alia, rules enabling the jurisdiction in these matters of courts of Member States to be determined and facilitating the recognition and execution of courts' judgments. *Accordingly the Convention must be interpreted having regard both to its principles and objectives and to its relationship with the Treaty*", ECJ, 6.10.1976, case C-12/76, *Tessili*, EU:C:1976:133, para 9 (emphasis added by B.H.).

2 The function of coordinating the autonomous judicial systems of the EU-Member States by uniform rules on jurisdiction, pendency and recognition and enforcement still applies today.

the Brussels Convention per year.[3] Overall, this case law was well received in the EC Member States,[4] and it paved the way for a uniform and more and more expansive competence of the Union in matters of private international law.[5]

The title of this presentation borrows from the French legal culture of "les grands arrêts" insofar as it intends to present the development of EU procedural law by referring to important judgments of the ECJ.[6] Similar to the presentation of "les grands arrêts" I would like to address judgments that marked the development of this area of law or even changed the pre-existing situation.[7] The underlying assumption is that the case law of the Court is as influential as the legal texts of European procedural law.

As this presentation addresses seminal judgments of the ECJ regarding the Brussels system that were rendered in the course of the last 50 years, I will first briefly address different phases of the development of European procedural law (2). These were mainly marked by law-making activities the Union and by the general development of European integration. The following part (3) shall address the case law of the Court on the guiding principles of the Brussels I system (internal view) before I address the wider context, especially the relationship of the Brussels I system with general

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3 *Kutscher*, Abschied vom Gerichtshof der Europäischen Gemeinschaften, EuR 1981, 1, 4. At present, the Court decides around 30 cases on civil co-operation per year (around 4 % of all incoming cases), *Düsterhaus*, Konstitutionalisiert der EuGH das Internationale Privat- und Vefahrensrecht der EU?, ZEuP 2018, 10, 30.

4 Cf. *Hess/Pfeiffer/Schlosser*, The Heidelberg Report on the Application of the Brussels I Regulation (2008), para 1, fn. 2. According to the statement of a presiding judge of the Landgericht Traunstein, the Brussels I Regulation was "the best piece of legislation we ever got from Brussels."

5 This development ended in a generic competence of the Union: in Art. 65 of the 1998 Treaty of Amsterdam, *Hess*, Europäisches Zivilprozessrecht (2010), § 2, paras 20 *et seq*.

6 *Gonod*, A propos des Grands arrêts de la jurisprudence administrative, Mél. Labetoulle (2007), p. 441 *et seq*. The first "recueil des grands arrêts de la jurisprudence civile" was just published in 1934.

7 According to French authors: "On appelle un arrêt de principe celui dans lequel le juge, à propos d'une question nouvelle, ou à la suite du renouvellement d'une question ancienne, énonce la règle qu'il entend appliquer à cette espèce, et à toutes celles qui poseront le même problème. L'arrêt de principe ne se distingue par aucun signe extérieur, sinon parfois par l'autorité de la formation de jugement dont il émane; c'est sa rédaction, éclairée par les conclusions du commissaire du gouvernement et les commentaires de la doctrine qui le rend reconnaissable", Jean Rivero et Jean Waline, Droit administratif; Précis Dalloz, 15ème édition, 1994, p. 66; *Cossalter,* Les grands arrêts de la jurisprudence administrative (thèse Paris II 1999), p. 6.

Union law (4) with conflict of laws rules, with the procedural laws of the EU Member States and the international dimension. Finally, I will assess the interpretation of the Brussels regime by the Court of Justice (5).

2. *Different Phases of the Legal Evolution*

2.1. The Brussels Convention (1973–1980)

After 1973, when the Convention entered into force, its interpretation (and explanation) by the Court of Justice was most important. The Court started in a homogenous environment, as the procedural laws of the six original EEC-Member States were structurally similar (all belonging to continental law).[8] The starting phase was marked by the first decisions of the ECJ where the Court became familiar with the new topic (private international and procedural law): such decisions were instrumental in bringing the Convention in line with general EU law[9]. However, in the starting period, the Convention was mainly regarded as an instrument of private international law and the case law of the ECJ was discussed from this perspective.[10]

2.2. Cross-border Proceedings in the Internal Market (1980–1998)

From its very beginning, the Brussels Convention was conceived as an instrument to strengthen the judicial protection in the Common Market.[11] When the concept of the Internal Market was implemented, the ECJ trans-

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8 However, it must be mentioned that the Court looked from the very beginning at the different solutions in the United Kingdom – and Her Majesty's Government took actively part in the proceedings on the BC before the ECJ. Example: Opinion of AG Capetorti in case C-21/76, *Bier*, EU:C:1976:147, of 10 November 1976, No. 5.

9 ECJ, 6.10.1976, case C-12/76 *Tessili*, EU:C:1976:133.

10 *Schlosser*, Gedächtnisschrift Bruns (1980), p. 45; Report *Droz* summarizing the discussion during the Colloquium on the Brussels Convention at the ECJ, in: EuGH (Hrsg.), Internationale Zuständigkeit und Urteilsanerkennung in Europa (1992), p. 235, 237 *et seq*.

11 *Hess*, Europäisches Zivilprozessrecht (2010), § 1, paras 1 and 2 quoting the Letter of the EC Commission to the EC Member States of 22.10.1959, *Droz*, Compétence judiciaire et effets des jugements dans le marché commun (1972), No. 11.

ferred the approach to procedural law and applied the principle of non-discrimination to the national civil procedures.[12] This case law of the Court considerably affected the national procedures which were mostly based on a model distinguishing between domestic (national) and foreign parties (by discriminating the latter). A second development related to the growing competences of the Union in private international and procedural law under Article K.1 (6) of the Maastricht Treaty.[13] Judicial co-operation in civil matters was the new keyword of this development. At this stage, the close relationship between international procedural law and EU law became evident.[14]

2.3. Judicial Co-operation under the Treaty of Amsterdam (1999–2009)

The most important step was the establishment in the Amsterdam Treaty of a full competence of the Union to institute an Area of Freedom, Security and Justice (AFSJ). The Tampere program of 1999 immediately implemented the new competence for judicial co-operation in civil matters.[15] Between 2001 and 2009 eleven new instruments on procedural law were adopted: some of these enlarged the Brussels regime, while others regulated family matters and insolvency.[16] Eventually, secondary law instruments covered the whole range of the competence on civil justice established with the Amsterdam Treaty. This enlargement changed the area of law considerably: The ECJ decides on issues including insolvency, child abduction, divorce, maintenance, succession, payment orders, mediation. In 2002, Regulation No. 44/2001 replaced and reformed the Brussels Convention. From its side, the ECJ made clear that the communitarization of

12 ECJ, 1.7.1993, case C-20/92, *Hubbard./.Hamburger*, EU:C:1993:280. In this judgment, the Court argued that the Brussels Convention had established a framework for cross-border litigation away the EC-Member Status and, therefore, the provision of German law (former Section 917 (2) ZPO) which permitted an arrest order in all situation where enforcement measure would be necessary abroad amounted to an (indirect) discrimination based on nationality.

13 *Hess*, Europäisches Zivilprozessrecht (2010), § 2, para 4.

14 Although it was strongly contested by the legal literature, cf. *Schack*, Rechtsangleichung mit der Brechstange des EuGH, ZZP 108 (1995), 47 ff.

15 *Hess*, Europäisches Zivilprozessrecht (2010), § 2, para 38.

16 The complexity and the legal fragmentation of civil procedural law is criticized by the legal doctrine, see *Frackowiak-Adamska*, CMLR 2015, 191, 193.

the area of law reinforced the (autonomous) interpretation of the Brussels regime and adopted a more comprehensive and systematic approach.[17]

2.4. Consolidation and Challenges under the Lisbon Treaty (2009 until today)

The latest developments coincided with the entry into force of the Lisbon Treaty. While, per se, the Lisbon Treaty did not amend the competences of the Union regarding the cross-border co-operation in civil and commercial matters, the Charter of Fundamental Rights (CFR) influences more and more the case law of the CJEU. Article 47 CFR has become important for the interpretation of EU-procedural law.[18] On the other hand, the present crises of the European Union also affect the judicial co-operation.[19] Eventually, the law making processes have slowed down considerably.[20] During the recast of the Brussels I Regulation, the EU Commission had to give up its ambitious endeavour of abolishing the public policy exception.[21] At present, no major law-making project is envisaged; the Commission is mainly working on the consolidation and improvement of the existing instruments.[22] Finally, Brexit confronts European procedural law with a perspective of a Member State leaving the system – a situation which has never been addressed before.[23]

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17 ECJ, 8.11.2005, case C-443/03 *Leffler*, EU:C:2005:665, paras 43 *et seq*.; *Hess*, Europäisches Zivilprozessrecht (2010), § 4, para 73.

18 See infra at. Current example: ECJ, 9.6.2018, case C-21/17, *Catlin Europe SE*, EU:C:2018:341, para 33, stressing the right of defence in civil proceedings as protected by Article 47 of the CFR.

19 *Hess*, Le droit international privé européen en temps de crise, Travaux du Comité Français du Droit International Privé 2016-2018 (2019), 329 *et seq*.

20 More important law-making activities relate to data protection (Regulation (EU) 2016/679) and to collective redress, cf. COM (2018) 184 final.

21 *Dickinson*, in: Dickinson / Lein (ed.), The Brussels I Regulation Recast (2015), paras 1.23–1.35.

22 Current reforms relate to the amendment of the Service Regulation (Reg. 1393/2007) and of the Evidence Regulation (Reg. 1206/2001), Proposals of the EU Commission of 5/31/2018, COM(2018) 378 and 379 final.

23 *Sonnentag*, Die Konsequenzen des Brexit für das Internationale Privat- und Verfahrensrecht (2017); *Requejo Isidro/Dutta/de Miguel*, The future relationship between the UK and the EU following the UK's withdrawal from the EU in family law (study for the European Parliament, October 2018).

3. The Systemic Interpretation of the Brussels Regime by the Court of Justice

If one looks at the most influential, seminal judgments of the ECJ regarding the Brussels Convention and Regulations, a basic distinction must be drawn: firstly, there are judgments which are important for the "inner" understanding of the EU instruments. Secondly, there are judgments which place these instruments in the larger context of European Union law, in the context of the national procedures and, finally, in the international context. The next parts will address both circumstances.

3.1. Autonomous Interpretation

According to the constant case law of the ECJ, the terms of the Brussels Ibis Regulation are to be interpreted autonomously, according to its system and objectives.[24] This case law was established in the judgment C-29/76 *LTU./.Eurocontrol* of October 14, 1976.[25] In this case, *Eurocontrol*, an International Organization for the air safety navigation in Europe, had obtained a judgment against the air carrier LTU before the Commercial Court in Brussels for unpaid route charges. When *Eurocontrol* sought the enforcement of the judgment, the Court of Appeals of Düsseldorf asked the ECJ whether the interpretation of the term "civil and commercial matters" in Article 1(1) of the Convention should be based on the law of the court of origin or on the law of the court of enforcement. While Advocate General Reischl proposed to apply the law of the court of origin,[26] the ECJ held that Article 1 of the Brussels Convention (BC) defines its scope and that rights and obligations of the parties under the Convention should be equally and uniformly determined and applied. A reference to the internal laws of the Contracting States would not be in line with this objective. The Court stated:

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24 *Rösler*, Autonomous Interpretation, in EPIL (2018), p. 1006, 1008 f. stressing the (thin) differences between uniform and autonomous interpretation.

25 ECJ, 14.10.1976, case C-29/76 *LTU./.Eurocontrol*, EU:C:1976:137.

26 Opinion *Reischl*, case C-29/76, EU:C:1976:121, referring to the divergent delineations of public and private law in the EU Member States.

> "The concept in question must therefore be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems."[27]

This statement triggered the constant jurisprudence of the Court on the autonomous interpretation of the Brussels' instruments although the term "autonomous" was not yet used in *Eurocontrol*.[28] However, it is interesting to see that the Court did not refer to general Community law but based the judgment mainly on considerations related to the proper functioning of the Convention.[29] The first judgments used the term "independent interpretation", the term autonomous interpretation appeared for the first time in the judgment in case C-125/92, *Mulox*.[30]

Under the Amsterdam Treaty, the scope of application of this concept was further enlarged. In case C-443/03, *Leffler*[31], the Grand Chamber stated that, since the entry of the Treaty of Amsterdam, the autonomous interpretation of the EU instruments generally prevails. The Court held:

> "The objective pursued by the Treaty of Amsterdam of creating an area of freedom, security and justice, thereby giving the Community a new dimension, and the transfer from the EU Treaty to the EC Treaty of

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27 ECJ, 14.10.1976, case C-29/76, *LTU./.Eurocontrol*, EU:C:1976:137, para 9; ECJ, 14.7.1977, joint cases C-9 and 10/77, *Bavaria Fluggesellschaft u.a../.Eurocontrol*, EU:C:1977:132, para 4 stressing the "independent concept of civil matter" and the need of a uniform application of the Convention providing for legal certainty and equal objects of the parties.

28 According to the elder case-law the convention had to be interpreted "independently, in order to ensure that it is applied uniformly in all Contracting States, cf. ECJ, 21.6.1978, case C-150/77, *Ott*, EU:C:1978:137, ECJ, 19.1.1993, case C-89/91, *Shearson Lehman Hutton./.TVB*, EU:C:1993:15, para 13.

29 In this respect, the argument comes very close to "effet utile", *Lenaerts & Stapper*, RabelsZ 78 (2014), 252, 254, and to the primacy of EU law, *Rösler*, Autonomous Interpretation, in EPIL (2018), p. 1006, 1008.

30 The Court did not make this change explicitly. It simply stated: "It is settled case-law that, as far as possible, the Court of Justice will interpret the terms of the Convention autonomously so as to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty, for the implementation of which it was adopted." ECJ, 13.7.1993, case C-125/92, *Mulox*, para 10. AG Tesauro used the term in his opinion of 20.11.1991, case C-214/89, *Powell Duffryn*, para 4. It seems that the use of the term in other language versions started earlier, especially in the French language versions.

31 ECJ, 8.11.2005, case C-443/03, *Leffler*, EU:C:2005:665, paras 39 *et seq*. On substance, *Leffler* mainly addressed the interpretation of Article 8 of the Service Regulation (Reg. no 1346/2000).

> the body of rules enabling measures in the field of judicial co-operation in civil matters having cross-border implications to be adopted testify to the will of the Member States to establish such measures firmly in the Community legal order and thus to lay down the principle that they are to be interpreted autonomously".

Consequently, the Court held that a text adopted before 1998 could not overcome the result of an autonomous interpretation by a historic argument.[32] This was a fundamental change: The autonomy and the prevalence of EU law were fully applied to the Brussels regime. Today, the autonomous interpretation permeates European procedural law and permits the implementation of *effet utile* and the integrative function of European procedural law within the Internal Market and in the Area of Security, Freedom and Justice.[33]

3.2. Jurisdiction: Access to Justice and Legal Certainty

As a double convention, the Brussels Convention (BC) provided not only for rules on recognition, but also for a set of heads of jurisdiction. In the early case law, the interpretation of Article 5 of the Convention (now Article 7 of the Regulation) was of great importance.[34] The Court developed a jurisprudence according to which predictability and legal certainty were of great importance for the interpretation of the heads of jurisdiction.[35] Therefore, the Court considered the specific heads of jurisdiction as exceptions from the general rule (Article 4 Judgments Regulation (JR)) that the defendant shall be sued at his or her domicile.[36] In *Owusu*, the Court held that national procedural law could not restrict the general jurisdiction

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32 ECJ, 8.11.2005, case C-443/03, *Leffler*, EU:C:2005:665, para 45; cf. para 47: "It follows that although the comments in the explanatory report on the Convention, an instrument adopted before the Treaty of Amsterdam entered into force, are useful, they cannot be relied upon to contest an autonomous interpretation of the Regulation".

33 Recently, ECJ, 16.6.2016, case C-511/14, *Pebros Servizi*, EU:C:2016:448, paras 35 *et seq*.: the term "uncontested claim" (Article 3 (b) of Regulation No. 805/2004) must be interpreted autonomously, not by reference to national (Italian) law.

34 One must be aware that the ECJ was the first international body competent to develop its own and self-standing case law in this regard.

35 See *Pontier/Burg*, EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (2004), p. 69 *et seq*.

36 ECJ, 27.9.1988, case C-189/87, *Kalfelis*, EU:C:1988:459, para 19.

under the Convention. Consequently, *forum non conveniens* was not applicable,[37] legal certainty prevailed.[38] Conversely, the Court has stated constantly that the specific heads of jurisdiction should be narrowly construed as they are exceptions from the general rule of (now) article 4 JR.[39]

In practice, however, the ECJ never applied this principle without exceptions as it limits, to some extent, the right of the plaintiff to get effective access to justice.[40] The most pertinent example of a structurally broad interpretation relates to jurisdiction based on tort. Already in 1976, in the seminal case C-21/76, *Bier v. Mines de potasse d'Alsace*, the Court had to the "place where the harmful event occurred".[41] In the case at hand, Dutch nursery gardeners brought an action for damages they had sustained because the French defendants, producers of Kali salt, discharged 10.000 tons of chloride every day into the river Rhine. The river transported the wasted chlorides to the Netherlands where, eventually, the salted water damaged the crops of the gardeners. Seen from the factual background, *Bier* was an easy case as the casual link between the harmful event and the place of damage was clearly established. In *Bier*, the Court construed Article 5 no. 3 BC broadly and held that the place where the harmful event occurred should be considered to cover both: the place of the event giving raise to the damage and the place where the damage occurred. Furthermore, the Court held that the plaintiff could choose between the two heads of jurisdiction. As a result, Article 5 no. 3 BC (today: 7 no. 2 JR) opened up alternative different heads of jurisdiction.[42]

20 years later, *Shevill* enlarged the scope of the provision even further when the ECJ stated that, in the case of infringements of personality rights

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37 *Owusu* had broad implications on the scope of the Brussels regime: On the one hand, the ECJ clarified that the Convention applied to lawsuits brought by plaintiffs from third states against defendants domiciled within the EU Member States. On the other hand, discretionary powers under national procedural law were discarded from the regime. The English doctrine criticized the judgment harshly.

38 ECJ, 1.3.2005, case C-281/02 *Owusu*, EU:C:2005:120.

39 ECJ, 27.9.1988, case C-189/87, *Kalfelis*, EU:C:1988:459, para 19; ECJ, 15.2.1989, case C-32/88, *Societé Six Constructions./.Humbert*, EU:C:1989:68, para 18 – constant jurisprudence.

40 In cases of tortious liability, the procedural situation of the plaintiff is structurally weak as a contractual designation of the competent court (by a jurisdiction clause) is impossible: according to the case-law of the ECJ, jurisdiction based on tort presupposes that there is no contractual relationship among the parties, ECJ, 13.3.2014, Rs. C-548/12, *Brogsitter,* EU:C:2014:148.

41 ECJ, 30.11.1976, case C-21/76, *Bier*, EU:C:1976:166, paras 20/23.

42 ECJ, 30.11.1976, case C-21/76, *Bier*, EU:C:1976:166, paras 24 and 25. It must be noted that the legal literature largely supported this judgment.

by the press, the affected person can bring an action either at the publisher's domicile (being the place of conduct) or (alternatively) at all places where the article had been distributed. However, aware that this interpretation would entail a multitude of heads of jurisdiction, the court limited jurisdiction at the place of the harm to the partial harm, which occurred at the different places.[43] *Bier* and *Shevill* are interesting in the sense that they demonstrate how the context of a case influences the interpretation of the instrument. When deciding *Bier*, the court was certainly not aware of the possibility of a libel suit brought in many different jurisdictions. The mosaic theory of *Shevill* was a judicial innovation.

However, *Shevill* was not the end of the case law of the Court of Justice. As you all know, in *eDate advertising*[44] and in *Bolagsupplysniggen*[45] the Court expanded this case law further to internet infringements and held that the (potential) victim of a violation of privacy can bring his or her claim either at the place where content was placed on the internet (place of conduct) or at the place where the harm was sustained. In the two later judgments, the Court nevertheless limited the jurisdiction at the place of the harm to the court of the plaintiff's main centre of interest. This place corresponds to the place where his or her reputation is mainly affected.[46] Here, the case law of the Court demonstrates a willingness to balance the interests of the parties and to limit forum shopping.[47] However, *eDate Advertising*[48] and *Bolagsupplysniggen*[49] also demonstrate the Court's reluctance to change its former case law: although both judgments clearly deviate from the mosaic approach, they still refer to *Shevill*. Therefore, it is still

43 ECJ, 7.3.1995, case C-68/93, *Fiona Shevill*, EU:C:1995:61, esp. paras 29–31, 33.

44 ECJ, 25.10.2011, joined cases C-509/09 and C-161/10, *eDate Advertising and Martinez*, EU:C:2011:685, commented by *Hess*, in: Hess & Mariottini, Protection of Privacy (2016), p. 81 *et seq*.

45 ECJ, 17.10.2017, case C-194/16, *Bolagsupplysningen*, EU:C:2017:766.

46 ECJ, 25.10.2011, joined cases C-509/09 and C-161/10, *eDate Advertising and Martinez*, EU:C:2011:685, para 52; ECJ, 17.10.2017, Case C-194/16, *Bolagsupplysningen*, EU:C:2017:766, paras 41 *et seq*.

47 *Hau*, Klagemöglichkeiten juristischer Personen nach Persönlichkeitsrechtsverletzungen im Internet, GRUR 2018, 163 *et seq*.

48 ECJ, 25.10.2011, joined cases C-509/09 and C-161/10, *eDate Advertising and Martinez*, EU:C:2011:685, para 52.

49 ECJ, 17.10.2017, case C-194/16, *Bolagsupplysningen*, EU:C:2017:766, para 31. In his Opinion of 13.7.2017, AG Bobek had proposed to discard the mosaic principle, EU:C:2017:554, paras 73–90.

unclear whether the mosaic has been given up or whether it still exists in some instances.[50]

3.3. Protection of the Rights of Defence

The protection of the rights of defence belongs to the most significant principles of European procedural law. The ECJ stated the importance of fair proceedings in case C-125/79, *Denilauler*, where it said:

> "All the provisions of the Convention, both those contained in Title II on jurisdiction and those contained in Title III on recognition and enforcement, express the intention to ensure that, within the scope of the objectives of the Convention, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed. It is because of the guarantees given to the defendant in the original proceedings that the Convention, in Title III, is very liberal in regard to recognition and enforcement."[51]

Denilauler was about the recognition of a French *saisie conservatoire* (an arrest order) rendered without any hearing of the defendant. The ECJ held that the recognition of an *ex parte* order was not possible under the Convention and that the protection of the rights of the defendant had to prevail.[52] Functionally, the Court balanced the need of protecting the defendant against the objective of the Convention to provide for the efficient recognition of judgments.[53] At the same time, it avoided a one-sided interpretation of the instrument permitting the creditor a direct attachment of

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50 In both cases, the AG proposed to give up the mosaic principle, Opinion Cruz Villalón, 25.10.2011, case C-509/09, *eDate Advertising*, EU:C:2011:192, paras 49 *et seq*.; Opinion Bobek, 13.07.2017, case C-194/16, *Bolagsupplysningen,* EU:C:2017:554, paras 73 *et seq*.

51 ECJ, 21.5.1980, case C-125/79, *Denilauler*, EU:C:1980:130, para 13 (taking up the foundation of the conclusions). It must be noted that neither the AG nor the Court referred to the fair trial guarantee of Article 6 of the ECHR.

52 Today, this situation has been remedied by Regulation (EU) No. 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, which permits the direct enforcement of bank accounts in other EU Member States but provides for rules, which protect the defendant's rights.

53 ECJ, 21.5.1980, case C-125/79, *Denilauler*, EU:C:1980:130, para 14.

the debtor's assets in other EU Member States without any prior hearing.[54] In *Denilauler*, the Court set a strict limit to the unilateral enforcement of the creditor's rights without a sufficient protection of the debtor. *Denilauler* also implied that the free movement of judgments requires a set of procedural norms guaranteeing this protection.[55]

The respect of the rights of the defence has become an overarching principle of European cross-border procedural law. The Court invoked it in different instances of cross-border litigation, especially in the context of the service of documents,[56] regarding the translation of documents,[57] necessary information of the defendant about remedies against the decision[58] and the right of the defendant to be represented by a lawyer.[59]

3.4. Free Movement of Judgments

The main objective of the Brussels regime is the establishment of a system guaranteeing the free movement of judgments.[60] Already stated in the Preamble of the Brussels Convention, the Court took this objective up in *Hoffmann v. Krieg*[61] and reinforced it in the following case law as "one of

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54 Obviously, the Court was concerned by *ex parte* provisional measures of English procedural law, and especially the "Mareva injunction", cf. Opinion AG Mayras of 26.3.1980 (at p. 1580).

55 In 2012, the EU legislator explicitly endorsed this concept in Articles 2 a) and 41 (2) of the Brussels I^{bis} Regulation, *Hess,* in: Schlosser/Hess, Europäisches Zivilprozessrecht (Commentary, 4th ed. 2015), Article 42 EuGVVO, para 5; *Wiedemann*, Vollstreckbarkeit (2017), p. 74–75.

56 In this context, the case law on the Service Regulations completes the case law on the ground of non-recognition regarding the proper information of the defendant in the court of origin, cf. ECJ, 2.3.2017, case C-354/15, *Henderson,* EU:C:2017:157, paras 50 *et seq*.

57 ECJ, 8.5.2008, case C-14/07, *Weiss & Partner*, EU:C:2008:264.

58 ECJ, 14.12.2006, case C-283/05, *ASML*, EU:C:2006:787, paras 26 *et seq*.; ECJ, 16.9.2015, case C-519/13, para 49; ECJ, 2.3.2017, case C-354/15, *Henderson,* EU:C: 2017:157, para 55; ECJ, 6.9.2018, Case C-21/17, *Catlin Europe*, EU:C: 2018:675, paras 32 *et seq*.

59 ECJ, 19.12.2012, case C-325/11, *Alder,* EU:C:2012:824; *Mayr*, in: Mayr (ed), Europäisches Zivilverfahrensrecht, paras 14, 34 *et seq*.

60 *Pontier/Burg*, EU Principles (2004), p. 27 *et seq*.; *Dickinson*, in Dickinson / Lein (ed), The Brussels I Regulation Recast (2015), para 1.59.

61 ECJ, 4.2.1988, case C-145/86, *Hoffmann./.Krieg,* EU:C:1988:61, para 10: "In that regard it should be recalled that the Convention 'seeks to facilitate as far as possible the free movement of judgments, and should be interpreted in this spirit'. Recognition must therefore 'have the result of conferring on judgments the

the fundamental principles of the Brussels Convention."[62] Later judgments made the free movement of judgments a cornerstone of the Convention, similar to the other freedoms of the EU Treaty on the free movement of goods, capitals, persons and services.[63] The free movement of judgments was impacted by the development of the Brussels instruments themselves as the EU lawmaker reinforced and streamlined the regime of cross-border enforcement by different reforms.[64]

The Court clarified the regime on several occasions, especially with regard to Courts of new EU Member States. In this regard, *Trade Agency* appears as a seminal decision[65] where the Court summarized the existing regime, explained the different tasks of the court of origin and the requested court in the recognition process[66] and put the Regulation in context with the overarching principles of the free movement of judgments and the protection of the rights of defence. Judging by its results, *Trade Agency* is not innovative but it assesses and explains the state of affairs, including the relationship of the Brussels I Regulation to the Charter of Fundamental Rights.[67] Finally, it reinforced the importance of the free movement of judgments by limiting and fine-tuning the control of the foreign judgment by the requested courts in the Member State of enforcement.[68]

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authority and effectiveness accorded to them in the State in which they were given'" (referring to the Jenard Report).

62 ECJ, 4.10.1991, case C-183/90, *Van Dalfsen./.Van Loon*, EU:C:1991:379, para 21; ECJ, 2.6.1994, case C-414/92, *Solo Kleinmotoren./.Boch*, EU:C:1994:221, para 20; ECJ, 17.6.1999, *Unibank./.Christensen*, EU:C:1999:312, para 16.

63 *Hess*, Europäisches Zivilprozessrecht (2010), § 3, paras 13 *et seq*.

64 For a short summary of the development, cf. *Wiedemann*, Vollstreckbarkeit (2017), p. 42 *et seq*. and p. 118 *et seq*.; *Frackowiak-Adamska*, CMLR 52 (2015), 191, 194 *et seq*., distinguishing three different models of recognition and enforcement in the current EU-instruments.

65 ECJ, 6.9.2012, case C-619/10, *Trade Agency*, EU:C:2012:531, cf. *Lenaerts/Stapper*, RabelsZ 78 (2014), 252, 272 *et seq*. This judgment was given in a preliminary reference coming from the Latvian Supreme Court. It concerned the recognition and enforcement of an English default judgment given without grounds.

66 ECJ, 6.9.2012, case C-619/10, *Trade Agency*, EU:C:2012:531, paras 26 *et seq*.

67 ECJ, 6.9.2012, case C-619/10, *Trade Agency*, EU:C:2012:531, paras 49 *et seq*. The judgment is a good example of the dialogue between the ECJ and the national judge about the interpretation of the Brussels regime.

68 *Lenaerts/Stapper*, RabelsZ 78 (2014), 252, 274.

4. The Wider Context

The Brussels regime has never operated in a vacuum. Closely embedded in the general law of the Union, developments of the European integration directly influence its expansion. In this respect, two interfaces can be distinguished: On the one hand, vertical impacts coming from superior principles like the principle of mutual trust (4.1) and the Charter of Fundamental Rights (4.2). On the other hand, the Brussels regime has been aligned by several EU-instruments enacted under Article 81 TFEU (4.3). Finally, the interfaces with the autonomous laws of the EU Member States (4.4) need to be addressed.

4.1. Mutual Trust – a Transversal Principle of the Area of Freedom, Security and Justice

The embeddedness of EU procedural law in the general law of the Union is best demonstrated by the principle of mutual trust. According to recitals 16 and 17 of the Brussels I Regulation and recital 26 of the Brussels I^{bis} Regulation, the principle is the basis of judicial co-operation.[69] Despite these evocations in the non-operational texts, the ECJ developed mutual trust as a foundational principle of judicial co-operation, not only in civil matters, but in the Area of Freedom, Security and Justice and in general EU law.[70]

The starting point in procedural law was a much-discussed case, C-116/02, *Gasser./.Misat*.[71] An Austrian salesperson had entered into an exclusive jurisdiction clause with his Italian commercial partner, designating the Austrian courts. When the Italian partner failed to pay the price of the goods, the Austrian intended to initiate proceedings in Austria (as agreed) but learned that the other party had already launched proceedings for a negative declaration in Italian courts (in breach of the jurisdiction

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69 Articles 67 (4) and 81 (1) TFEU only mention mutual recognition (not trust), the same wording is found in Article 82 TFEU regarding the judicial co-operation in criminal matters.

70 *Prechal*, Mutual Trust Before the Court of Justice of the European Union, European Papers 2 (2017), 75 *et seq*.; *Lenaerts*, La vie après l'avis: exploring the principle of mutual but not blind trust, CMLR 54 (2017), 805 *et seq.*

71 ECJ, 9.12.2003, case C-116/02, *Gasser,* EU:C:2003:657, for a summary of the doctrinal debate of *Schmidt*, Rechtssicherheit im europäischen Zivilverfahrensrecht (2015), p. 186–202.

clause). As *Gasser* had filed his claim six months after the start of the Italian proceedings, the Austrian court asked whether, relying on Article 6 ECHR, it could decide the case despite the pendency in Italy. The Court of Justice decided that the rules of pendency literally did not foresee any exception.[72] It noted that the respect of the priority rule should avoid a later non-recognition of the foreign judgment according to Article 27 No. 3 BC/45 I lit c) JR. It stated:

> "…it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments."[73]

The ECJ noted that Article 6 of the ECHR imposed a duty on the national courts to proceed in an efficient way. However, the Convention had established a system of close co-operation, which was based on mutual trust in the proper functioning of the court systems of the Member States. Providing for an exception in case of lengthy proceedings would not be compatible with the system.[74] As a result, the ECJ established a strict principle of mutual trust prevailing over concerns on the efficiency of the court systems not meeting the requirements of Article 6 ECHR. One might argue that the case at hand was not severe enough to raise fundamental concerns regarding an abuse of the system.[75] Eventually, *Gasser* clearly rejected any

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72 ECJ, 9.12.2003, case C-116/02, *Gasser,* EU:C:2003:657, paras 41 *et seq*. Since 2015, Article 31 (2) of Regulation No. 1215/2012 provides for an exception from pendency in case of a mandatory jurisdiction clause: The designated court shall decide on the validity of the clause and on its jurisdiction; all other courts must stay the proceedings until the designated court has made its decision.

73 ECJ, 9.12.2003, case C-116/02, *Gasser,* EU:C:2003:657, para 72.

74 ECJ, 9.12.2003, case C-116/02, *Gasser,* EU:C:2003:657, para 72, *Düsterhaus*, ZEuP 2018, 10, 22. The Jenard Report (OJ 1979 C 59/1, 46) has already referred to mutual trust as a reason to reduce the control of foreign decisions at the recognition stage.

75 *Hess*, Europäisches Zivilprozessrecht (2010), § 4, para 4.75.

idea of an exception within the system based on mutual trust.[76] In a similar way, *Turner*[77] and *Allianz (West Tankers)* clearly limited the powers of English courts under national law to issue anti-suit injunctions against parties litigating in the courts of other Member States.[78] Mutual trust implies that courts can expect that the courts of other Member States fully apply EU law.

In the Area of Freedom, Security and Justice, mutual trust has become an overarching ("constitutional") principle of judicial (and administrative) co-operation.[79] Seminal judgments were not only given in civil co-operation, but in criminal matters and in asylum cases.[80] Co-operation has become the genuine concept of Union law of cross-border collaboration. It aims at avoiding parallel controls and proceedings in several Member States. A judicial decision made in one Member State shall be recognized by the others without further control. Consequently, recognition requires trust in the handling of the proceedings in the Member State of origin. Judicial co-operation in the Union is based on the presumption that all EU Member States share the same values and comply, in particular, with fundamental human rights. However, mutual trust is not blind trust and the presumption can be rebutted in extreme cases. As a result, the public policy exception appears as an inherent limitation of mutual trust.

In case C-681/13, *Diageo Brands*,[81] the ECJ clarified the operation of mutual trust in the framework of the Brussels regime. In this case, the Dutch party contested the recognition of a Bulgarian judgment in the Netherlands by asserting that the court of origin had misapplied the EU trademark directive without referring the legal issues to the ECJ under

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76 Different opinion *Lenaerts/Stapper*, RabelsZ 78 (2014), 252, 276: The Court decided that Article 21 BC had to be interpreted in a way that it did not provide for an exception when court proceedings in an EU Member State were *generally* ("allgemein") too slow (highlighted by B.H.). Yet, *Gasser* does not make this differentiation.

77 ECJ, 27.4.2004, case C-159/02, *Turner*, EU:C:2004:228; *Fentiman*, International Commercial Litigation (2nd ed 2015), paras 16.131 *et seq*.

78 ECJ, 10.2.2009, case C-185/07, *Allianz*, EU:C:2009:69, paras 29 and 30.

79 *Prechal*, European Papers 2 (2017), 75, 84 *et seq*.; *Lenaerts*, La vie après l'avis: exploring the principle of mutual but not blind trust, CMLR 54 (2017), 805 *et seq*.

80 ECJ, 21.12.2011, joint cases C-411/10 and 493/10, *N.S*., EU:C:2011:865, and to ECJ, 25.11.2017, joint cases C-404/15 and 659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198 and, especially ECJ, 18.12.2014, Opinion 2/13 *Adhésion de l'Union à la CEDH*, EU:C:2014:2454, paras 163, 192–193.

81 ECJ, 16.7.2015, case C-681/13, *Diageo Brands*, EU:C:2015:471.

Article 267 TFEU. The Dutch party had not lodged an appeal against the Bulgarian judgment that had become final. The Court said:

> "[63] (…) the rules on recognition and enforcement laid down by Regulation No 44/2001 are based on mutual trust in the administration of justice in the European Union. It is that trust which the Member States accord to one another's legal systems and judicial institutions which permits the inference that, in the event of the misapplication of national law or EU law, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals (…). [64] It follows that Regulation No 44/2001 must be interpreted as being based on the fundamental idea that individuals are required, in principle, to use all the legal remedies made available by the law of the Member State of origin."

Under the current Brussels regime, parties cannot simply avoid proceedings in the Member State where the original action was brought and invoke at the enforcement stage severe deficiencies of the process before the court of origin under the public policy exception.[82] To the contrary, they must use the remedies in the Member State of origin in order to prevent a breach of public policy.[83] Otherwise, there is no "manifest" breach of public policy.[84]

The principle of mutual trust does not only impose procedural obligations upon the parties. In addition, the Member States are required to provide for judicial systems protecting effectively the individual rights of litigants.[85] As a result, mutual trust as the overarching principle of the judicial co-operation has reshaped the interplay between the court of origin and

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82 According to recent judgments, courts in the Member States must thoroughly apply the minimum standards in the Brussels instruments of the 2nd generation in order to protect the right of defence as these instruments do not provide for a review in the Member State of enforcement. ECJ, 28.2.2018, case C-289/17, *Collect Inkasso OÜ*, EU:C:2018:133, paras 36–37; ECJ, 9.3.2017, case C-484/15, *Zulfikarpašić*, EU:C:2017:199, para 48; ECJ, 16.6.2016, *Pebros Servizi*, C-511/14, EU:C:2016:448, para 44.

83 ECJ, 6.9.2012, case C-619/10, *Trade Agency*, EU:C:2012:531, para 64; ECJ, 16.7.2015, case C-681/13, *Diageo Brands*, EU:C:2015:471, para 63. The Court decided that public policy (Article 34 No 1 JR) was not infringed as the applicant had not exhausted the available remedies in Bulgaria.

84 *Prechal*, European Papers 2 (2017), 75, 81 *et seq*.

85 The first judgment was ECJ, 14.12.2006, case C-283/05, *ASML*, EU:C:2006:787, paras 31–32. Article 19 (1)(2) TEU imposes on EU Member States a duty to pro-

the court of enforcement and the role of the parties in cross border disputes.[86] Finally, mutual trust also encourages the dialogue among justices in cross border circumstances.[87] In extreme cases, mutual trust permits exceptions from recognition.[88]

4.2. The Growing Role of the Charter of Fundamental Rights

The development of mutual trust already showed the impact of fundamental rights on the Brussels regime. In the early stage of the development, fundamental rights were not explicitly mentioned. They became mostly visible in the context of public policy, especially in cases C-7/98, *Krombach*[89], C-394/07, *Gambazzi*[90], C-420/07, *Apostolides* and C-681/13, *Diageo Brands*.[91] The seminal decision was *Krombach* where the Court explicitly held that the right to a fair trial as enshrined by Article 6 ECHR directly impacted the Brussels regime.[92] By this jurisprudence, the Court of Justice developed a specific concept of public policy (Article 27 no. 1 BC, 34 no. 1/45 I lit. a) JR) consisting of two different layers: At its core, public

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vide effective legal remedies, *Safjan/Düsterhaus*, A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the lens of Article 47 CFREU, Yb EuL 33 (2014), 3, 4.

86 *Prechal*, European Papers 2 (2017), 75, 82 *et seq*.; different opinion *Düsterhaus*, ZEuP 2018, 10, 23 (arguing that the protection of legitimate expectation is only of minimal importance within the detailed rules on recognition provided by the Brussels I^{bis} Regulation).

87 *Lenaerts*, CMLR 54 (2017), 805, 836 (referring to judicial co-operation in criminal matters). Article 29 (2) JR requires direct information among different courts seized in the same case.

88 Example: ECJ, 26.4.2018, case C-34/17, *Donnellan*, EU:C:2018:282, see *Hess*, Travaux du Comité Français du Droit International Privé 2016-2018, (2019), p. 329, 345 *et seq*.

89 In case C-7/98, *Krombach*, EU:C:2000:164, paras 24–26, 38–39, 42, the Court stated that public policy could, in exceptional circumstances, cover the fundamental right to a fair hearing, cf. Magnus/Mankowski/*Franq*, Article 45 Brussels I^{bis} Regulation (Commentary 2015), paras 13 and 29.

90 ECJ, 2.4.2009, case C-394/07, *Gambazzi*, EU:C:2009:219.

91 ECJ, 16.7.2015, case C-681/13, *Diageo Brands*, EU:C:2015:471, described *supra* in fn 83.

92 ECJ, 28.3.2000, case C-7/98, *Krombach*, EU:C:2000:164, paras 24–27. In *Krombach*, the Court stressed that the Convention was part of the legal order of the European Community and that human rights were recognized as general principles of EU law. At para 39, the ECJ directly referred to the case law of the ECtHR regarding "contumace" proceedings.

policy refers to the fundamental values of the requested EU Member State – and it is up to the Member States to determine these core values. However, it is up to the Court to review the limits of public policy which, finally, bars the free movement of judgments. In addition, EU law provides for a threshold of human rights protection which is found in the common constitutional values of the EU Member States, the ECHR and – since 2009 – in Article 47 of the CFR. These European standards[93] have expanded continuously as they overlap national standards.[94] As a result, they have limited the "national core" of public policy.[95]

According to the current case law of the Court, Article 47 of the Charter of Fundamental Rights reshapes the Brussels regime in the sense that almost all provisions of the procedural instruments have to be interpreted according to the fundamental right of a fair trial.[96] In case C-112/13 *A v B and others* the Court stated:

> "…the provisions of EU law, such as those of Regulation No. 44/2001, must be interpreted in the light of fundamental rights which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures and which are now set out in the Charter (…)[97]. In that respect, it must be borne in mind that all the provisions of Regulation No. 44/2001 express the intention to

93 *Lenaerts*, CMLR 54 (2017), 805, 824 *et seq*. distinguishes national and European public policy.

94 The interplay of the public policy exception of the Brussels regime and the application of the Charter seems to be unsettled: The Brussels regime is an area of full harmonized Union law where the fundamental rights of the Charter are fully applicable according to article 53 CFR, cf. ECJ, 26.2.2013, case C-399/11, *Melloni*, EU:C:2013:107, para 60; Opinion Bobek, 25.7.2018, case C-310/16, *Dzivev*, EU:C:2018:623, paras 85–90. However, the public policy exception in Article 45 (1) (a) of Reg. 1215/2012 refers back to the public policy of the Member States and brings national constitutional law into play again.

95 As a result, it is difficult to find decisions where national courts apply the national public policy exception in a convincing way. A telling example is a decision of the German Federal Court of 7/19/2018, where the 11th Senate refused to recognise a Polish judgment ordering a German television agency to publish the text of a statement on its front website. The Federal Court held that the publication of the pre-formulated text would infringe the freedom of speech under Article 5 of the German Constitution. However, the Court did not consider adapting the foreign decision in a way that would have conformed to German constitutional law.

96 This follows from Article 51 CFR, ECJ, 26.2.2013, case C-617/10, *Åkerberg Fransson*, EU:C:2013:105.

97 The Court referred to *Google Spain and Google*, C-131/12, EU:C:2014:317, para 68 and the case-law cited.