“To trust or not to trust – this is the question of private international law”. M. Weller on Mutual Trust, Recueil des Cours, vol. 423 (2022)

A. Introduction

During the Summer of 2019, I attended one of the two flagship courses organised by the Hague Academy of International Law – the annual Summer Courses on Private International Law.

I quite vividly recall that, during the opening lectures, one of the Professors welcomed the participants at the premises of the Academy, a few steps from the Peace Palace itself, and made an observation that, at that time, seemed as captivating as remote.

As my precise recollection of his words may be far less accurate than the memory of the impression they made on me, I paraphrase: when it comes to education in general, in years to come – he noted – it will be a privilege to be able to benefit from a physical presence of a teacher or professor, being there, in front of you, within the reach of your hand and of your questions.

At that time, just a few months prior to the beginning of the worldwide spread pandemics, even the Professor himself most likely did not realize the extent to which his words would soon prove prophetic.

That was, however, not the sole lecture that I recall vividly.

Among others, Professor Matthias Weller (University of Bonn, one of two general editors of CoL.net) presented his course titled ‘Mutual Trust’: A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?

The present post is not, however, an account of this Hague experience. It is an account of a different and more recent one that resulted from the lecture of the freshly published Volume 423 of Recueil des Cours of the Hague Academy of International Law and of the Course by M. Weller within its pages.

B. Structure of the Course

The Course, in its just published incarnation, is composed of eight chapters.

Details about the Course and the Volume within which it is contained can be found here, on the website of its publisher, Brill. I can also refer the readers to the post on EAPIL by Elena Alina Otanu who also reported about the publication.

Thus, in this post, I will refrain from detailing the content of every Chapter and rather present and discuss its main and/or most interesting themes. Please be warned though that their selection is highly subjective, as there is far more to uncover within the pages of the Volume.

Chapter I ("Introduction") sets the scene for the analysis provided for in the following Chapters. Here Weller also builds up the main hypothesis of his work (see section C below).

I digress but from a methodological standpoint, the Course is very thoughtful and may serve as an example of how to deal with a matter of comparative private international law that is highly difficult to conceptualise.

The methodological awareness is most visible in Chapter I, as well as in Chapter III ("Regional integration communities and their private international law"), which furtherly explains how the analysis is conducted through the text.

Between those two, lies Chapter II ("Private international law: a matter of trust management"), where the Author explores one of his core ideas that private international law may be conceived as a matter of "trust management". As this is an innovative paradigm with which the Author approaches his main hypothesis, it calls for some additional exposition and discussion (see section D below).

The Author devotes next four chapters (Chapters IV – VII) to the specific regional integration communities, namely: Association of Southeast Asian Nations

(ASEAN), Central African Economic and Monetary Community (OHADA), El Mercado común del sur (MERCOSUR) and EU. Here, I found the Chapter on EU to be highly innovative – at least to my knowledge, this is the first comprehensive attempt to look at the plethora of heavily-discussed private international law mechanics from "trust"-oriented perspective (see section E below).

Chapter VIII ("General conclusions") closes the book, recaps the Author's findings and provides food-for-thought for future research in the field.

C. Hypothesis under scrutiny in the Course

The Course starts off with a series of references showing the relevance of "mutual trust" for various aspects of functioning of the EU and its legal framework, in particular – for its private international law.

Quoting J. Basedow who stated that the EU is the "experimental laboratory of private international law", Weller sets the main hypothesis of his work (para. 5): **there might be a fundamental relevance of mutual trust to the private international law of any regional community**.

To test this hypothesis, the Author delves into analysis of selected "regional integration communities". Doing so, Weller aims to examine **whether and to what extent mutual trust is of relevance for the private international law of those communities, be it as a foundation or guiding principle, triggering more intensive cooperation (in presence of mutual trust) or preventing it (in the lack of it)**.

The Author also hints the possibility to take his main hypothesis even further, although this aspect does not constitute the focal point of the Course: there might even be something fundamental in "mutual trust" for private international law as it is, also where it does not operate within a framework explicitly created for the purposes of regional integration communities (to use the term employed by the Author, also where it comes to "extracommunity efforts on private international law", para. 127). Indeed, I would argue that, at present, no system of private international law should be conceived as operating in isolation, blind to the global reach of the situations that it aims to govern.

Back to the Course itself and the hypothesis:

Weller explores and employs, as he puts it, an EU "product" – the notion of "mutual trust" (para. 8), to verify his main hypothesis in the context of various regional integration communities.

The readers should not be misled though. **The Course is not built around the idea that the EU private international law, with its concept of 'mutual trust', constitutes an ultimate form of private international law system or a pinnacle of achievement of some sorts, and that any other regional integration communities efforts have to be benchmarked against the "EU model"**. Far from that.

In fact, Weller uses the concept of "trust", and its qualified form of "mutual trust" as a tool that allows him to research the main hypothesis of his Course.

Doing so, the Author explicitly refrains from adopting a solely EU-oriented perspective. He goes so far as to state that "not everything that comes from experiments ends up in good results, let alone the best solution for everyone". "Not even 'integration' as such may be considered a priori the most suitable avenue for all states and regions in the world" (para. 8). This becomes even clearer if we read into the Chapter III. Here, the Author goes so far as to call "naive" the belief according to which "progress" boils down to increasing degrees of mutual trust (para. 126).

Also, even where Weller refers to notion of "mutual trust" and calls it at some instances an EU "product", he also makes it clear that "mutual trust" is not an EU invention: rather, he roots it in the German regional economic community of the nineteenth century, the German Union (paras. 432 and 482).

D. Paradigm of the Course: Private international law as a matter of "trust management"

In Chapter II ("Private international law: a matter of trust management") the Author exposes and explores the paradigm that he proposes and researches in the following Chapters, with regards to selected regional integration communities.

In order to do so, he divides the Chapter into two sections.

In the first section of this Chapter, Weller explores the concept of "trust": what it is and what purpose it serves, not only in the field of private international law.

The Author manages to seamlessly transit from "trust" as a societal phenomenon, deeply researched and explained both by sociological and economic (think: risk management) theory, with its qualified form ("mutual trust") that became so crucial for the EU and beyond.

Within the first section, Weller also juxtaposes "trust" to "knowledge" arguing, in essence, that the former allows to act (even) where information is deficient. Trust relates, he explains, to the predictability of the actions of another. He builds up another dichotomy on that observation: in the lack of information, there is a choice between "trust" and "control", and it is the former that appears to be a better candidate for governance of private international law issues.

In the second section Weller exposes the paradigm he proposes: for him, as mentioned above, private international law may be conceived as a matter of "trust management". In other terms, as he puts it: **to trust or not to trust – this is the question of private international law** (para. 123).

To make his point, the Author looks closely at what J. Basedow called the "ultimate and most far-reaching form of judicial cooperation between States" – the recognition and enforcement of foreign judgments (para. 40).

He elaborates on various tools of "trust management" with regards to foreign judgments: from "total control" (no effects of foreign judgments at all), through revision au fond, doctrine of obligation, letter rogatory and far-reaching trust with residual control via exequatur proceedings to full faith and credit among federal states and, finally,"full trust". **He argues that all of them represent a specific amount of "trust" that is given to the judicial system of another State, complemented by "control" mechanics of some sorts.**

Furthermore, Weller does not shy away from exploring other aspects of private international law through the mutual trust-tinted lens. He addresses also, inter alia, authentication of foreign documents and their service or taking evidence abroad (paras. 85 et seq.), as well as application of foreign law (paras. 104 et seq.).

I digress again: reading initially into first section of Chapter II, I had a (false)

impression that the views on trust are too one-sided and do not take into account that both “trust” and “mutual trust” are not (and cannot be) blind to the various circumstances that occur within the framework to which the trust applies.

Trust is first and foremost a societal phenomenon and not a religious one. In this perspective, there is something to say about what distinguishes “trust” from “faith” – the latter is not (or at least should not be) undermined by lack of feedback; it can even “fuel” more faith and intensify it. By contrast, when it comes to “trust”, a systematic lack of positive feedback, replaced by feedback that calls for concern, needs to results into reconsideration as to whether the trust must still be given and the control waived.

My initial false impression was, however, quickly dispersed. Weller recognizes the dynamics of trust too. In the paragraphs that follow, he quotes and comments extensively on one of the key elements of this research, building up on the consideration of K. Lenaerts according to which “mutual trust cannot be confused with blind trust” (para. 90). This becomes even clearer when we read into Chapter VII on EU private international law.

E. “Trust management” in EU private international law and beyond

I turn now to aforementioned Chapter VII, devoted to EU private international law or, if we read into this Chapter more attentively, to EU law in general.

Here, Weller discusses extensively the “mutual trust” and human/fundamental rights dynamics and argues that the balance between the former and the latter is nothing else but trust management (para. 360).

He shows, next, that private international law-inspired mechanics of trust management may apply beyond the field of EU private international law. This may seem as an even more perverse turn if we take into account that, as Weller observes, in the context of EU integration, judicial cooperation in civil matters developed in the shadows of judicial cooperation in criminal matters (para. 377).

Interestingly, Weller recognizes that even within the context of EU integration, the EU legislator does not cap the pre-existing trust with legislative framework

within which this trust operates. By contrast, at least in some instances (he cites E-commerce and Service Directives), the EU legislator diagnosed a lack of mutual trust and then imposed an obligation of the Member States for mutual recognition as a cure (para. 371).

Then, he goes through various EU private international law provisions and case law pertaining to them in order to explore how the "trust management" is dealt with under EU law.

I mention just one piece of this exploration on public policy, operating under the Brussels I regime as a ground four refusal of enforcement.

Weller mentions the case that resulted in the German Federal Supreme Court judgment of 2018, which accepted the application of public policy exception with regards to a Polish judgment condemning ZDF to publish an apology on its main webpage after it described two concentration camps as being "Polish". The Supreme Court considered that the obligation for ZDF to publish a preformatted text on its website contradicted freedom of speech and freedom of press as guaranteed under Article 5(1) of the German Basic Law. The enforcement was rejected on the basis of public policy exception.

The case has been extensively discussed in the literature before. However, faithful to the paradigm of the Course, Weller examines the case from trust management perspective.

Adopting this perspective, Weller argues that the German court "could have and would have better enforced just the enforceable parts of the Polish judgment" and "it seems that it would have been under an obligation from EU law to do so in order to maintain the movement of judgment within the EU as far as possible, an obligation that emanates from the effet utile of the Brussels regime (para. 405).

I might add, in line with this contention: if the right of enforcement of a foreign judgment is conceptualized as a right protected under the Charter (and – to be more specific – under its Article 47), then any interference to that right, although "provided for by law" [see: public policy exception of Article 34(1) of the Brussels I Regulation/Article 45(1)(a) of the Brussels I bis Regulation], must respect the requirement resulting from Article 52(1) of the Charter. Thus, if I follow Weller paradigm, also Article 52(1) of the Charter is a "trust management" tool, that calls for proportionate and restricted (only when it is "necessary") refusal of

“trust” in the EU.

F. So again, why do I need “mutual trust” when I already have “comity”?

I close this post with another recollection of the Summer Course of 2019: during one of his intervention at the Hague Academy, Weller mentioned that when he had shared with one of his colleagues about this “mutual trust” research, the said colleague had asked: so again, what is the difference between “mutual trust” and “comity”?

According to my account of that conversation, Weller provided, if I recall correctly, an answer that boiled down to the following statement, I paraphrase: **while “comity” allows for cooperation between States, over the heads of individuals, the concept of “mutual trust” enables the cooperation between States but with paying a particular attention to the individual; it elevates the individual and his/hers interests to the attitude, where they become a matter of true concern also to the States**.

The difference between “mutual trust” and “comity” is furtherly explored in the Course, although I might be accused of reading too much in-between the lines.

On the one hand, in Chapter II, commenting on various tools of “trust management”, the Author mentions the concept of “comity” again. He explains that one of it aspects can be seen as “an abstract trust in the administration of justice by the foreign state from where the judgment emerged – it results from the acknowledgment of the sovereignty and such equality of the foreign state is concretized by the presumption that the administration of justice in the foreign state is equally well placed to produce justice in the particular case at hand”.

On the other hand, in another part of the book, he makes an interesting point: the individuals push a State towards trust, so the States cooperate on behalf of those individual when they enable and supervise judicial cooperation (paras 35 and 72). In yet another part of the book, pertaining to the application of foreign law, the Author even juxtaposes trust-based mechanics, concerned with the rights of the individuals, with the sovereignty-based (“outdated”) concepts of comity (para. 111).

Furthermore, **States are, Weller argues, in obligation to optimize their trust management – doing so, they optimize the chances of the individuals when it comes to the enforcement of their rights in cross-border contexts** (para. 122).

I concur. But why such obligation exists? Under Weller's paradigm, the general concept of "comity" cannot be the justification, at least not the "outdated" one. Besides, if we follow Weller on that point, from the perspective of interest of individual, "comity" may be seen as a construct inferior to "mutual trust".

If we read into text, the Author provides an answer though: **the obligation to optimise trust management results from the imperatives of rule of law and of the fundamental right to effective access to justice; as such, it is a matter of constitution guarantees** (para. 123 and 444). I might add that there is also something to say about effective protection of fundamental/human rights that underlie the substance of specific rights and/or legal situations shaped under foreign law or within foreign territory. In essence, it is necessary to optimise trust management system also because it allows to ensure recognition and enforcement of rights and legal situations that are rooted in fundamental/human rights.