Update: Repository HCCH 2019 Judgments Convention

In preparation of the Conference on the HCCH 2019 Judgments Convention on 9/10 June 2023, taking place on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

Update of 4 April 2023: New entries are printed bold.

Please also check the "official" Bibliography of the HCCH for the instrument.

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III. Recordings of Events Related to the HCCH 2019 Judgments Convention

ASADIP; HCCH	“Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras”, 3 December 2020 (full recording available here and here)
ASIL	“The Promise and Prospects of the 2019 Hague Convention”, 25-26 June 2020 (full recording available here and here)
CILC; HCCH; GIZ; UIHJ	“HCCH 2019 Judgments Convention: Prospects for the Western Balkans”, Regional Forum 2022, 30 June-1 July 2022 (short official video available here)
CIS Arbitration Forum	“CIS-related Disputes: Treaties, Sanctions, Compliance and Enforcement, Conference, Keynote 2: Russia’s accession to the Hague Convention on Recognition and Enforcement of Foreign Judgments”, 25-26 May 2021 (recording available here)
CUHK	“Latest Development of Hague Conference on Private International Law and the Hague Judgments Convention”, Online Seminar by Prof. Yun Zhao, 25 March 2021 (full recording available here)
Department of Justice Hong Kong; HCCH	“Inaugural Global Conference – 2019 HCCH Judgments Convention: Global Enforcement of Civil and Commercial Judgments”, 9 September 2019 (recording available here)
GIAS	“Arbitration v. Litigation: Can the Hague Foreign Judgments Convention Change the Game?, Panel 2, 10th Annual International Arbitration Month, Commercial Arbitration Day”, 25 March 2022 (full recording available here)
HCCH	“HCCH a|Bridged: Innovation in Transnational Litigation – Edition 2021: Enabling Party Autonomy with the HCCH 2005 Choice of Court Convention”, 1 December 2021 (full recording available here)

HCCH	"22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention", 2 July 2020 (short documentary video available here)
JPRI; HCCH; UNIDROIT; UNCITRAL	"2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments", 12 November 2020 (recording available here)
Lex & Forum Journal; Sakkoula Publications SA	« The Hague Conference on Private International Law and the European Union – Latest developments », 3 December 2021 (full recording available here)
UIHJ; HCCH	"3rd training webinar on the Hague Conventions on service of documents (1965) and recognition and enforcement of judgements (2019)", 15/18 March 2021 (full recording available here in French and here in English)
University of Bonn; HCCH	"Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries", 29 October 2020 (full recording available here)

Update: Repository HCCH 2019 Judgments Convention

In preparation of the Conference on the HCCH 2019 Judgments Convention on 9/10 June 2023, taking place on campus of the University of Bonn, Germany, registration now open, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

Update of 15 February 2023: New entries are printed bold.

Please also check the "official" Bibliography of the HCCH for the instrument.

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III. Recordings of Events Related to the HCCH 2019 Judgments Convention

ASADIP; HCCH	"Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras", 3 December 2020 (full recording available here and here)
ASIL	"The Promise and Prospects of the 2019 Hague Convention", 25-26 June 2020 (full recording available here and here)
CILC; HCCH; GIZ; UIHJ	**"HCCH 2019 Judgments Convention: Prospects for the Western Balkans", Regional Forum 2022, 30 June-1 July 2022 (short official video available here)**
CIS Arbitration Forum	**"CIS-related Disputes: Treaties, Sanctions, Compliance and Enforcement, Conference, Keynote 2: Russia's accession to the Hague Convention on Recognition and Enforcement of Foreign Judgments", 25-26 May 2021 (recording available here)**
CUHK	**"Latest Development of Hague Conference on Private International Law and the Hague Judgments Convention", Online Seminar by Prof. Yun Zhao, 25 March 2021 (full recording available here)**
Department of Justice Hong Kong; HCCH	"Inaugural Global Conference – 2019 HCCH Judgments Convention: Global Enforcement of Civil and Commercial Judgments", 9 September 2019 (recording available here)
GIAS	**"Arbitration v. Litigation: Can the Hague Foreign Judgments Convention Change the Game?, Panel 2, 10th Annual International Arbitration Month, Commercial Arbitration Day", 25 March 2022 (full recording available here)**

HCCH	“HCCH a|Bridged: Innovation in Transnational Litigation – Edition 2021: Enabling Party Autonomy with the HCCH 2005 Choice of Court Convention”, 1 December 2021 (full recording available here)
HCCH	“22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention”, 2 July 2020 (short documentary video available here)
JPRI; HCCH; UNIDROIT; UNCITRAL	“2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments”, 12 November 2020 (recording available here)
Lex & Forum Journal; Sakkoula Publications SA	« The Hague Conference on Private International Law and the European Union – Latest developments », 3 December 2021 (full recording available here)
UIHJ; HCCH	“3rd training webinar on the Hague Conventions on service of documents (1965) and recognition and enforcement of judgements (2019)”, 15/18 March 2021 (full recording available here in French and here in English)
University of Bonn; HCCH	“Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries”, 29 October 2020 (full recording available here)

Return of the anti-suit injunction: parallel European proceedings and English forum selection clauses

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In two recent English cases, the High Court has granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. This article compares the position on anti-suit injunctive relief under the Brussels I Regulation Recast and the English common law rules, and the operation of the latter in a post-Brexit landscape. It considers whether anti-suit injunctions to protect forum selection clauses will become the new norm, and suggests that there is Supreme Court authority militating against the grant of such injunctive relief as a matter of course. Finally, it speculates as to the European response to this new English practice. In particular, it questions whether the nascent European caselaw on anti anti-suit injunctions foreshadows novel forms of order designed to protect European proceedings.

Anti-suit injunctions under the Brussels I Regulation Recast

In proceedings commenced in the English courts before 1 January 2021, it is not possible to obtain an anti-suit injunction to restrain proceedings in other EU Member States.

In Case 159/02 Turner v Grovit [2004] ECR I-3565, the Full Court of the European Court of Justice found that it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country. That is so even where that party is acting in bad faith in order to frustrate existing proceedings. The Court stated that the Brussels I Regulation enacted a compulsory system of jurisdiction based on mutual trust of Contracting

States in one another's legal systems and judicial institutions:

> It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them… Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

In the subsequent Case 185/07 Allianz v West Tankers [2009] ECR I-00663, the question arose as to whether it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country on the basis that such proceedings would be contrary to an English arbitration agreement. In its decision, the Grand Chamber of the European Court of Justice found that notwithstanding that Article 1(2)(d) excludes arbitration from the scope of the Brussels I Regulation, an anti-suit injunction may have consequences which undermine the effectiveness of that regime. An anti-suit injunction operates to prevent the court of another Contracting State from exercising the jurisdiction conferred on it by the Brussels I Regulation, including its exclusive jurisdiction to determine the very applicability of that regime to the dispute. The decision in Allianz v West Tankers represents an extension of Turner v Grovit insofar as it prohibits the issue of anti-suit injunctions in support of English arbitration as well as jurisdiction agreements.

Anti-suit injunctions under the common law rules

The Brussels I Regulation Recast rules govern proceedings commenced in the English courts before 1 January 2021. The regime governing jurisdiction in proceedings commenced after 1 January 2021 comprises the Hague Choice of Court Convention and, more pertinently for present purposes, the common law rules.

At common law, a more flexible approach to parallel proceedings is taken. Anti-suit injunctions may be deployed to ensure the dispute is heard in only one venue. Section 37 of the Senior Courts Act 1981 empowers courts to grant an anti-suit injunction where it appears just and convenient to do so. The ordinary

justification for injunctive relief is protection of the private rights of the applicant by preventing a breach of contract. Where parties have agreed to a forum selection clause, either in the form of a jurisdiction or arbitration agreement, anti-suit injunctions may be available to prevent a breach of contract.

In two recent cases, the English courts have granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. These cases demonstrate clearly the change of position as compared with Allianz v West Tankers and Turner v Grovit, respectively.

Proceedings in violation of English arbitration agreement

In QBE Europe SA/NV v Generali España de Seguros Y Reaseguros [2022] EWHC 2062 (Comm), a yacht allegedly caused damage to an underwater power cable which resulted in hydrocarbon pollution. The claimant had issued a liability insurance policy to the owners in respect of the yacht. That policy contained a multi-faceted dispute resolution and choice of law clause, which provided *inter alia* that any dispute arising between the insurer and the assured was to be referred to arbitration in London.

The defendant had issued a property damage and civil liability insurance policy with the owners of the underwater power cable. The defendant brought a direct claim against the claimant in the Spanish courts under a Spanish statute. The claimant responded by issuing proceedings in England, and applied for an anti-suit injunction in respect of the Spanish proceedings brought by the defendant.

The court found that the claims advanced by the defendant in the Spanish proceedings were contractual in nature, as the Spanish statute provided the defendant with a right to directly enforce the contractual promise of indemnity created by the insurance contract. The matter therefore concerned a so-called 'quasi-contractual' anti-suit injunction application, as the defendant was not a party to the contractual choice of jurisdiction in issue. Nevertheless, the right which the defendant purported to assert before the Spanish court arose from an obligation under a contract (the claimant's liability insurance policy) to which the arbitration agreement is ancillary, such that the obligation sued upon is said to be 'conditioned' by the arbitration agreement.

That the defendant was seeking to advance contractual claims without respecting the arbitration agreement ancillary to that contract provided grounds for granting

an anti-suit injunction. As such, the position under English conflict of laws rules is that the court will ordinarily exercise its discretion to restrain proceedings brought in breach of an arbitration agreement unless the defendant can show strong reasons to refuse the relief (see Donohue v Armco Inc [2001] UKHL 64). The defendant advanced several arguments, which were dismissed as failing to amount to strong reasons against the grant of relief. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining Spanish proceedings brought by the defendants.

Proceedings in violation of exclusive English jurisdiction agreement

In Ebury Partners Belgium SA/NV v Technical Touch BV [2022] EWHC 2927 (Comm), the defendants were interested in receiving foreign exchange currency services from the claimant company. The claimant submitted that the parties had entered into two agreements in early 2021.

The first agreement was a relationship agreement entered into by the second defendant Mr Berthels as director of the first defendant Technical Touch BV. Mr Berthels completed an online application form for currency services, agreeing to the claimant's terms and conditions. These terms and conditions were available for download and accessible via hyperlink to a PDF document, though in the event Mr Berthels did not access the terms and conditions by either method. The terms and conditions included an exclusive jurisdiction agreement in favour of the English courts.

The second agreement was a personal guarantee and indemnity given by Mr Berthels in respect of the defendant company's obligations to the claimant. This guarantee also included an exclusive English jurisdiction agreement.

When a dispute arose in April 2021 as to the first defendant's failure to pay a margin call made by the claimant under the terms of the relationship agreement, the defendants initiated proceedings in Belgium seeking negative declaratory relief and challenging the validity of the two agreements under Belgian law. The claimant responded by issuing proceedings in England, and applied for an interim anti-suit injunction in respect of Belgian proceedings brought by the defendants. The claimant submitted that the Belgian proceedings were in breach of exclusive jurisdiction agreements in favour of the English court.

An issue arose as to whether there was a high degree of probability that the English jurisdiction agreement was incorporated into the relationship agreement, and which law governed the issue of incorporation. It is not within the scope of this article to consider this choice of law issue in depth. For present purposes, it is sufficient to note that the court decided that it was not unreasonable to apply English law to the issue of incorporation, and that on this basis, there was a high degree of probability that the clause was incorporated into the relationship agreement.

As in QBE Europe, the court approached the discretion to award injunctive relief on the basis that the court will ordinarily restrain proceedings brought in breach of a jurisdiction agreement unless the defendant can show strong reasons to refuse the relief. No sufficiently strong reasons were shown. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining the Belgian proceedings.

Anti-suit injunctions to protect forum selection clauses: the new norm?

It is plainly important to the status of London as a litigation hub in Europe that English forum selection clauses maintain their security and enforceability. The Brussels I Regulation Recast provided one means of managing parallel proceedings contrived to circumvent such clauses. Absent the framework provided by the Brussels I Regulation Recast; the English courts appear to be employing anti-suit injunctions as an alternative means of protecting English forum selection clauses. This ensures that litigants are still equipped to resist parallel proceedings brought to 'torpedo' English proceedings.

Proceedings in which there is an exclusive English forum selection clause represent among the most compelling circumstances in which the court might grant an anti-suit injunction. In those circumstances, the court is likely to grant injunctive relief to protect the substantive contractual rights of the applicant. The presence of an exclusive forum selection clause is a powerful ground for relief which tends to overcome arguments as to comity and respect for foreign courts. As noted in the joint judgment of Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed) in Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38, citing Millett LJ in Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87, a foreign court is unlikely to be offended by the grant of an injunction to restrain a party from

invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.

Nevertheless, it is not to be assumed that injunctive relief will always be granted to enforce English forum selection clauses. As Lord Mance (with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Toulson agreed) stated in Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35, at paragraph [61]:

> In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum. But in the present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC.

It is too early to say whether anti-suit injunctions will be granted as a matter of course in circumstances such as those in QBE Europe and Ebury Partners. The judgment of Lord Mance indicates that there is a residual role for comity and respect for foreign courts even in cases of breach of a forum selection clause. The English court should not necessarily assume that its own view as to the validity, scope and interpretation of a forum selection clause is the only one. In some instances, it will be appropriate to allow a foreign court to come to its own conclusion, and consequently to refuse injunctive relief. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 117-124] It is clear, at least, that anti-suit injunctions have returned to the toolbox.

The European response: anti anti-suit injunctions?

It seems likely that English anti-suit injunctions will be met with resistance by European courts who find their proceedings obstructed by such orders. As a matter of theory, it is now possible for European courts to issue anti-suit injunctions to restrain English proceedings: the inapplicability of Allianz v West

Tankers and Turner v Grovit vis-à-vis England cuts both ways. However continental European legal systems have traditionally regarded anti-suit injunctions as being contrary to international law on the basis that they operate extraterritorially and impinge on the sovereignty of the State whose legal proceedings are restrained.

It is more plausible that European courts would deploy anti anti-suit injunctions to unwind offending English orders. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 50] Assuming that the grant of anti-suit injunctions becomes a regular practice of the English courts in these circumstances, this could provide the impetus for legal developments in this direction across the Channel. In recent years both French and German courts have issued orders of this kind in the context of patent violation. In a December 2019 judgment, the Higher Regional Court of Munich issued an anti anti-suit injunction to prevent a German company from making an application in US proceedings for an anti-suit injunction (see Continental v Nokia, No. 6 U 5042/19). In a March 2020 judgment, the Court of Appeal of Paris issued an anti anti-suit injunction ordering various companies of the Lenovo and Motorola groups to withdraw an application for an anti-suit injunction in US proceedings (see IPCom v Lenovo, No. RG 19/21426).

However, neither decision endorses the general availability of anti anti-suit injunctions outside of the specific circumstances in which relief was sought in those cases. It remains to be seen whether European courts will be willing to utilise anti anti-suit injunctions in circumstances wherein parties have agreed to English forum selection clauses. At this stage, it can only be said that there is a possibility of an undesirable tussle of anti-suit injunctions and anti anti-suit injunctions. This would expose litigants to increased litigation costs, wasted time and trouble, uncertainty as to which court will ultimately hear their case, and the spectre of coercive consequences in the event of non-compliance. Furthermore, a move towards relief of this kind would have a profound impact on the security of English jurisdiction and arbitration agreements. Developments in this area should be watched with interest.

Third Issue for Journal of Private International Law for 2022

The third issue for the *Journal of Private International Law* for 2022 was published today. It contains the following articles:

K Takahashi, "Law Applicable to Proprietary Issues of Crypto-Assets"

Crypto-assets (tokens on a distributed ledger network) can be handled much in the same way as tangible assets as they may be held without the involvement of intermediaries and traded on a peer-to-peer basis by virtue of the blockchain technology. Consequently, crypto-assets give rise to proprietary issues in the virtual world, as do tangible assets in the real world. This article will consider how the law applicable to the proprietary issues of crypto-assets should be determined. It will first examine some of the cases where restitution was sought of crypto-asset units and consider what issues arising in such contexts may be characterised as proprietary for the purpose of conflict of laws. Finding that the conventional connecting factors for proprietary issues are not suitable for crypto-assets, this article will consider whether party autonomy, generally rejected for proprietary issues, should be embraced as well as what the objective connecting factors should be.

GV Calster, "*Lis Pendens* and Third States: the Origin, DNA and Early Case-Law on Articles 33 and 34 of the Brussels Ia Regulation and its "*forum non conveniens*-light" Rules"

The core European Union rules on jurisdiction have only in recent years included a regime which allows a court in an EU Member State temporarily or definitively to halt its jurisdiction in favour of identical, or similar proceedings pending before a court outside the EU. This contribution maps the meaning and nature of those articles, their application in early case-law across Member States, and their impact among others on business and human rights litigation, pre and post Brexit.

F Farrington, "A Return to the Doctrine of *Forum Non Conveniens* after Brexit and the Implications for Corporate Accountability"

On 1 January 2021, the European Union's uniform laws on jurisdiction in cross-border disputes ceased to have effect within the United Kingdom. Instead, the rules governing jurisdiction are now found within the Hague Convention 2005 where there is an exclusive choice of court agreement and revert to domestic law where there is not. Consequently, the doctrine of forum non conveniens applies to more jurisdictional issues. This article analyses the impact forum non conveniens may have on victims of human rights abuses linked to multinational

enterprises and considers three possible alternatives to the forum non conveniens doctrine, including (i) the vexatious-and-oppressive test, (ii) the Australian clearly inappropriate forum test, and (iii) Article 6(1) of the European Convention on Human Rights. The author concludes that while the English courts are unlikely to depart from the forum non conveniens doctrine, legislative intervention may be needed to ensure England and Wales' compliance with its commitment to continue to ensure access to remedies for those injured by the overseas activities of English and Welsh-domiciled MNEs as required by the United Nation's non-binding General Principles on Business and Human Rights.

A Kusumadara, "Jurisdiction of Courts Chosen in the Parties' Choice of Court Agreements: An Unsettled Issue in Indonesian Private International Law and the way-out"

Indonesian civil procedure law recognises choice of court agreements made by contracting parties. However, Indonesian courts often do not recognise the jurisdiction of the courts chosen by the parties. That is because under Indonesian civil procedure codes, the principle of actor sequitur forum rei can prevail over the parties' choice of court. In addition, since Indonesian law does not govern the jurisdiction of foreign courts, Indonesian courts continue to exercise jurisdiction over the parties' disputes based on Indonesian civil procedure codes, although the parties have designated foreign courts in their choice of court agreements. This article suggests that Indonesia pass into law the Bill of Indonesian Private International Law that has provisions concerning international jurisdiction of foreign courts as well as Indonesian courts, and accede to the 2005 HCCH Choice of Court Agreements Convention. This article also suggests steps to be taken to protect Indonesia's interests.

Mohammad Aljarallah, "The Proof of Foreign Law before Kuwaiti Courts: The way forward"

The Kuwaiti Parliament issued Law No. 5/1961 on the Relations of Foreign Elements in an effort to regulate the foreign laws in Kuwait. It neither gives a hint on the nature of foreign law, nor has it been amended to adopt modern legal theories in ascertaining foreign law in civil proceedings in the past 60 years. This study provides an overview of the nature of foreign laws before Kuwaiti courts, a subject that has scarcely been researched. It also provides a critical assessment of the law, as current laws and court practices lack clarity. Furthermore, they are overwhelmed by national tendencies and inconsistencies. The study suggests new

methods that will increase trust and provide justice when ascertaining foreign law in civil proceedings. Further, it suggests amendments to present laws, interference of higher courts, utilisation of new tools, reactivation of treaties, and using the assistance of international organisations to ensure effective access and proper application of foreign laws. Finally, it aims to add certainty, predictability, and uniformity to Kuwaiti court practices.

CZ Qu, "Cross Border Assistance as a Restructuring Device for Hong Kong: The Case for its Retention"

An overwhelming majority of companies listed in Hong Kong are incorporated in Bermuda/Caribbean jurisdictions. When these firms falter, insolvency proceedings are often commenced in Hong Kong. The debtor who wishes to restructure its debts will need to have enforcement actions stayed. Hong Kong does not have a statutory moratorium structure for restructuring purposes. Between 2018 and 2021, Hong Kong's Companies Court addressed this difficulty by granting cross-border assistance, in the form of, inter alia, a stay order, to the debtor's offshore officeholders, whose appointment triggers a stay for restructuring purposes. The Court has recently decided to cease the use of this method. This paper assesses this decision by, inter alia, comparing the stay mechanism in the UNCITRAL Model Law on Cross Border Insolvency. It concludes that it is possible, and desirable, to continue the use of the cross-border assistance method without jeopardising the position of the affected parties.

Z Chen, The Tango between the Brussels Ia Regulation and Rome I Regulation under the beat of directive 2008/122/EC on timeshare contracts towards consumer protection

Timeshare contracts are expressly protected as consumer contracts under Article 6(4)(c) Rome I. With the extended notion of timeshare in Directive 2008/122/EC, the question is whether timeshare-related contracts should be protected as consumer contracts. Additionally, unlike Article 6(4)(c) Rome I, Article 17 Brussels Ia does not explicitly include timeshare contracts into its material scope nor mention the concept of timeshare. It gives rise to the question whether, and if yes, how, timeshare contracts should be protected as consumer contracts under

Brussels Ia. This article argues that both timeshare contracts and timeshare-related contracts should be protected as consumer contracts under EU private international law. To this end, Brussels Ia should establish a new provision, Article 17(4), which expressly includes timeshare contracts in its material scope, by referring to the timeshare notion in Directive 2008/122/EC in the same way as in Article 6(4)(c) Rome I.

Review Article

CSA Okoli, The recognition and enforcement of foreign judgments in civil and commercial matters in Asia

Many scholars in the field of private international law in Asia are taking commercial conflict of laws seriously in a bid to drive harmonisation and economic development in the region. The recognition and enforcement of foreign judgments is an important aspect of private international law, as it seeks to provide certainty and predictability in cross-border matters relating to civil and commercial law, or family law. There have been recent global initiatives such as The Hague 2019 Convention, and the Commonwealth Model Law on Recognition and Enforcement of Foreign Judgments. Scholars writing on PIL in Asia are making their own initiatives in this area. Three recent edited books are worthy of attention because of their focus on the issue of recognition and enforcement of foreign judgments in Asia. These three edited books fill a significant gap, especially in terms of the number of Asian legal systems surveyed, the depth of analysis of each of the Asian legal systems examined, and the non-binding Principles enunciated. The central focus of this article is to outline and provide some analysis on the key contributions of these books.

CJEU on Lugano II Convention and

choice of court through a simple reference to a website, case Tilman, C-358/21

In its judgment handed down today, the Court of Justice clarifies in essence that, under the Lugano II Convention, an agreement of choice of court meets the requirements set in Article 23(1) and (2) of the Convention in the scenario where that choice of court agreement is contained in the general terms and conditions set out on a web page, to which the contract signed by the parties contains a reference to, with no box-ticking being mechanism being implemented on the said web page.

Doing so, the Court ruled that the relevant requirements provided for in the Lugano II Convention are drafted in essentially identical terms to those of the Brussels I bis Regulation (para. 34). Thus, the relevance of the judgment may not confine itself to the framework of the aforementioned Convention, but could possibly also extend to the Regulation.

Interestingly enough, earlier this week, thanks to the post made by Geert van Calster on his blog, I learned about the EWHC judgment concerning, inter alia, the choice of court and law included in general terms and conditions, by inclusion in email and /or e-mailed click-wrapeable hyperlink. While the facts and issues discussed in those cases are not identical, both of them illustrate that there is still something to say about choice of court agreements in online environment, despite their widespread use.

Context of the request for a preliminary ruling and the legal issue at hand

A company established in Belgium enters into a contract with a Swiss company.

The contract states that it is subject to the general terms and conditions for the purchase of goods set out on a specific web page (with the address to the website being precisely indicated in the agreement).

The aforementioned general terms and conditions provide that the English courts have jurisdiction to hear and determine any dispute in connection with the contract, and that contract is governed by, and to be interpreted in accordance with, English law.

A dispute arises and the Belgian company initiates proceedings against its Swiss contractor before the courts in Belgium.

The dispute concerns whether that agreement on choice of court was properly concluded between the parties and, therefore, whether it is enforceable in the main proceedings.

Through the proceedings, up to the Court of Cassation, the Belgian company argues that it signed a contract which contained merely a reference to it contractor's general terms and conditions, which are available on the latter's website. It claims that it was in no way prompted to accept the general terms and conditions formally by clicking on the corresponding box on the website. It therefore follows that the guidance provided by case-law cannot be transposed to the present proceedings. The situation in which a party signs a document which contains a reference to general terms and conditions that are accessible online (as in the present case) differs from that in which that party formally and directly agrees to those general terms and conditions by ticking a relevant box (see judgments in Estasis Saloti di Colzani, 24/76, and El Majdoub, C-322/14).

Faced with this argument, the Court of Cassation brought its request for a preliminary ruling before the Court of Justice, asking:

"Are the requirements under Article 23(1)(a) and (2) of the [Lugano II Convention] satisfied where a clause conferring jurisdiction is contained in general terms and conditions to which a contract concluded in writing refers by providing the hypertext link to a website, access to which allows those general terms and conditions to be viewed, downloaded and printed, without the party against whom that clause is enforced having been asked to accept those general terms and conditions by ticking a box on that website?

Findings of the Court and its answer

Before addressing the preliminary question itself, the Court notes that is being called to interpret the Lugano II Convention in order to allow the Belgian courts to decide whether the parties to the main proceedings have conferred jurisdiction to set their disputes to the English courts. The Court recognizes that Brexit may have affected the admissibility of the request for a preliminary ruling and addresses that issue (paras. 28-31).

Indeed, under Article 23 of the Lugano II Convention, the parties may choose a court or the courts of a State bound by this Convention to set their disputes.

Seen from today's perspective, the choice of court made by the parties to the main proceedings relate to the courts of a State not-bound by the Convention (and, I digress, still looking from that perspective: even where the Belgian court declines jurisdiction in favour of the English prorogated court, the latter would not be bound by the Convention).

However, the Court notes that the main proceedings were initiated before the end of the transition period provided for in the Withdrawal Agreement (i.e. before 31 December 2020), during which the Lugano II Convention applied to the UK. As the choice of court agreement produces its effect at the time where the proceedings are brought before a national court (para. 30), and – in the present case – at that time the UK applied the Convention, it cannot be concluded that the interstation thereof is not necessary for the referring court to decide on the dispute before it (para. 31).

Concerning the substance, it stems from the request for a preliminary ruling that the argumentation of the Belgian company that led to the preliminary reference boiled down to the contention that the interpretation of the Lugano II Convention under which the choice of law agreement in question is enforceable against that company ignores the requirement of genuine consent. For the said company, observance of genuine consent should be an overriding interpretative policy with regard to Article 23.

The Court addresses this line of argumentation in a detailed manner in paras. 32-59. Thus, I just confine myself to mention only some of its findings.

In particular, the Court seems to stress the commercial/professional nature of the

relationship that gave rise to the dispute in the main proceedings and distinguishes those proceedings from the situations that call for consumer-oriented protection (para. 55).

Following this approach the Court addresses, by extension, Article 23(1)(b) and (c) of the Lugano II Convention, which concern, respectively, the agreements concluded "in a form which accords with practices which the parties have established between themselves" and the agreements "in [a form regular for] international trade or commerce" (para. 56).

Ultimately, without necessarily distinguishing between the three scenarios described in (a), (b) and (c), the Court indicates that the requirements stemming from Article 23(1) and (2) can be met by a choice of court agreement, contained in general terms and conditions to which a contract concluded in writing refers by providing the hypertext link to a website, access to which allows those general terms and conditions to be viewed, downloaded and printed, even without the party against whom that clause is enforced having been asked to accept those general terms and conditions by ticking a box on that website (para. 59).

The judgment is available here (for now only in French).

What is an international contract within the meaning of Article 3(3) Rome I? – Dexia Crediop SpA v Provincia di Pesaro e Urbino

[2022] EWHC 2410 (Comm)

The following comment has been kindly provided by Sarah Ott, a doctoral student and research assistant at the University of Freiburg (Germany), Institute for Comparative and Private International Law, Dept. III.

On 27 September 2022, the English High Court granted summary judgment and declaratory relief in favour of the Italian bank Dexia Crediop SpA ("Dexia") in its lawsuit against the Province of Pesaro and Urbino ("Pesaro"), a municipal authority in the Marche region of Italy. This judgement marks the latest development in a long-running dispute involving derivative transactions used by Italian municipalities to hedge their interest rate risk. Reportedly, hundreds of Italian communities entered into interest rate swaps between 2001 and 2008 having billions of Euros in aggregate notional amount. It is also a continuation of the English courts' case law on contractual choice of law clauses. Although the judgments discussed in this article were, for intertemporal reasons, founded still on Art. 3(3) of the Rome Convention, their central statements remain noteworthy. The Rome Convention was replaced in almost all EU member states, which at the time included the United Kingdom, by Regulation (EC) No 593/2008 ("Rome I"), which came into effect on 17 December 2009. Article 3 Rome I Regulation contains only editorial changes compared to Article 3 of the Rome Convention. As a matter of fact, Recital 15 of the Rome 1 Regulation explicitly states that despite the difference in wording, no substantive change was intended compared to Article 3(3) of the Rome Convention.

In the case at hand, Pesaro and Dexia entered into two interest rate swap transactions in 2003 and 2005. Each of the transactions was subject to the 1992 International Swap Dealers Association ("ISDA") Master Agreement, Multicurrency – Cross Border and a Schedule therto. During the 2008 financial crisis, the swaps led to significant financial burdens for Pesaro. In June 2021, Pesaro commenced legal proceedings in Italy seeking to unwind or set aside these transactions. Dexia then brought an action in England to establish the transactions were valid, lawful and binding on the parties.

A central question of the dispute was the law applicable to the contract. Pesaro claimed breaches of Italian civil law in its proceedings, while Dexia argued that only English law applies. As correctly stated by the court, the applicable law is

determined by the Rome Convention, as the transactions between the parties took place in 2003 and 2005. According to Article 3(1) Rome Convention, a contract is governed by the law chosen by the parties. The ISDA Master Agreement in conjunction with the Schedule contained an express choice of law clause stating that the contract is to be governed by and construed in accordance with English law. Of particular importance therefore was whether mandatory provisions of Italian law could nevertheless be applied via Article 3(3) Rome Convention. This is the case if "*all the [other] elements relevant to the situation at the time of the choice are connected with one country only […]*". In order to establish weather Article 3(3) applied, the court referred to two decisions of the English Court of Appeal. Both cases also concerned similar interest rate swap transactions made pursuant to an ISDA Master Agreement with an expressed choice of English law.

In *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, the Court of Appeal extensively discussed the scope of this provision in connection with the principle of free choice of law, more precisely, which factors are to be considered as "*elements relevant to the situation*". This was a legal dispute between the Portuguese Santander Bank and various public transport companies in Portugal. First, the Court of Appeal emphasised that Article 3(3) Rome Convention is an exception to the fundamental principle of party autonomy and therefore is to be construed narrowly. Therefore, "*elements relevant to the situation*" should not be confined to factors of a kind which connect the contract to a particular country in a conflict of laws sense. Instead, the Court stated that it is sufficient if a matter is not purely domestic but rather contains international elements. Subsequently the court assessed the individual factors of the specific case. In so far, the Court of Appeal confirmed all factors the previous instance had taken into account. Relevant in the case was the use of the "Multi-Cross Border" form of the 1992 ISDA Master Agreement instead of the "Local Currency-Single Jurisdiction" form, that the contract included the right to assign to a foreign bank and the practical necessity for a foreign credit institution to be involved, as well as the foreseeability of the conclusion of hedging arrangements with foreign counterparties and the international nature of the swap market. These factors were found sufficient to establish an international situation.

In *Dexia Crediop S.P.A. v. Comune di Prato* [2017] EWCA Civ 428, the Court of Appeal addressed the issue again and concluded that already the fact that the

parties had used the "Multi-Cross Border" form of the 1992 ISDA Master Agreement in English, although this was not the native language of either party, and the conclusion of back-to-back hedging contracts in connection with the international nature of the derivatives market was sufficient.

In the present case, Dexia again relied on the use of the ISDA Master Agreement, Multicurrency – Cross Border and on the fact that Dexia hedged its risk from the transactions through back-to-back swaps with market participants outside Italy. But as the relevant documents were not available, the second circumstance could not be taken into account by the court. Nevertheless, the court considered that the international element was sufficient and Article 3(3) of the Rome Convention was not engaged.

Thus, this new decision not only continues the very broad interpretation of the Court of Appeal as to which elements are relevant to the situation, but also lowers the requirements even further. This British approach appears to be unique. By contrast, according to the hitherto prevailing opinion in other Member States, using a foreign model contract form and English as the contract language alone was not sufficient to establish an international element (see, e.g., *Ostendorf* IPRax 2018, p. 630; *Thorn/Thon* in Festschrift Kronke, 2020, p. 569; *von Hein* in Festschrift Hopt, 2020, p. 1405). Relying solely on the Master Agreement in order to affirm an international element seems unconvincing, especially when taking Recital 15 of the Rome I Regulation into account. Recital 15 Rome I states that, even if a choice of law clause is accompanied by a choice of court or tribunal, Article 3(3) of the Rome I Regulation is still engaged. This shows that it is the purpose of this provision to remove the applicability of mandatory law in domestic matters from the party's disposition. The international element must rather be determined according to objective criteria. With this interpretation, Article 3(3) of the Rome I Regulation also loses its *effet utile* to a large extent.

Unfortunately, the Court of Appeal considered its interpretation to be an *acte clair* and therefore refrained from referring the case to the CJEU. Since Brexit became effective, the Rome I Regulation continues to apply in the United Kingdom in an "anglicised" form as part of national law, but the English courts are no longer bound by CJEU rulings. As a result, a divergence between the English and the Continental European assessment of a choice of law in domestic situations is exacerbated.

This also becomes relevant in the context of jurisdiction agreements. In the United Kingdom, these are now governed by the HCCH 2005 Choice of Court Convention which is also not applicable according to article 1(2) if, "*the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*". As there is a great interest in maintaining the attractiveness of London as a the "jurisdiction of choice", it is very likely that the Court of Appeal will also apply the standards that it has developed for Article 3(3) Rome I to the interpretation of the Choice of Court Convention as well.

One can only hope that in order to achieve legal certainty, at least within the European Union, the opportunity for a request for referral to the CJEU will present itself to a Member State court as soon as possible. This would allow the Court of Justice to establish more differentiated standards for determining under which circumstances a relevant foreign connection applies.

Update: Repository HCCH 2019 Judgments Convention

HCCH 2019 Judgments Convention Repository

In preparation of the Conference on the HCCH 2019 Judgments Convention on 9/10 June 2023, taking place on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

Update of 28 September 2022: New entries are printed bold.

Please also check the “official” Bibliography of the HCCH for the instrument.

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III. Recordings of Events Related to the HCCH 2019 Judgments Convention

ASADIP; HCCH	“Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras”, 3 December 2020 (full recording available here and here)
ASIL	“The Promise and Prospects of the 2019 Hague Convention”, 25-26 June 2020 (full recording available here and here)
Department of Justice Hong Kong; HCCH	“Inaugural Global Conference – 2019 HCCH Judgments Convention: Global Enforcement of Civil and Commercial Judgments”, 9 September 2019 (recording available here)
HCCH	“HCCH a|Bridged: Innovation in Transnational Litigation – Edition 2021: Enabling Party Autonomy with the HCCH 2005 Choice of Court Convention”, 1 December 2021 (full recording available here)
HCCH	“22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention”, 2 July 2020 (short documentary video available here)

JPRI; HCCH; UNIDROIT; UNCITRAL	"2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments", 12 November 2020 (recording available here)
UIHJ; HCCH	"3rd training webinar on the Hague Conventions on service of documents (1965) and recognition and enforcement of judgements (2019)", 15/18 March 2021 (full recording available here in French and here in English)
University of Bonn; HCCH	"Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries", 29 October 2020 (full recording available here)
Lex & Forum Journal; Sakkoula Publications SA	« The Hague Conference on Private International Law and the European Union – Latest developments », 3 December 2021 (full recording available here)

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2022: Abstracts

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

(These abstracts can also be found at the IPRax-website under the following

link: https://www.iprax.de/en/contents/)

J. Richter: **Cross-border service of writs of summons according to the revised EU Service Regulation**

The service of judicial documents, particularly the service of writs of summons, is of central importance in civil proceedings. In cross-border proceedings, service of legal documents poses particular problems, which are addressed by the European Regulation on the Service of Documents. The revision of this regulation, which will enter into force on 1 July 2022, provides an opportunity to examine the current and future rules by taking the example of the international service of writs of summons.

G. van Calster: **Lex ecologia. On applicable law for environmental pollution (Article 7 Rome II), a pinnacle of business and human rights as well as climate change litigation.**

The European Union rules on the law that applies to liability for environmental damage, are an outlier in the private international law agenda. EU private international law rules are almost always value neutral. Predictability is the core ambition, not a particular outcome in litigation. The rules on applicable law for environmental damage, contained in the Rome II Regulation on the law that applies to non-contractual obligations, are a clear and considered exception. Courts are struggling with the right approach to the relevant rules. This contribution maps the meaning and nature of those articles, their application in case-law, and their impact among others on business and human rights as well as climate change litigation.

M. Castendiek: **“Contractual” rights of third parties in private international law**

Although contractual rights are usually limited to the parties, almost all jurisdictions in Europe recognize exceptions of this rule. Whereas those “contractual” rights of third parties are strictly limited in common law countries,

German and Austrian Law even extend contractual duties of care on third persons related to the parties. Prior to the Rome Regulations, the conflict-of-law judgments on those "contracts with protective effect in favour of third parties" differed between German and Austrian courts.

The article points out that a consistent jurisdiction on this issue needs a clear distinction between contractual and non-contractual rights even between the parties of the contract. It points out that the Regulation Rome I covers only obligations that would not exist without the contract. Those obligations remain contractual even if they entitle a third party.

"Contractual" duties of care corresponding with negligence in tort, on the other hand, fall within the scope of the Regulation Rome II. For the contracting parties as well as for third parties, the conflict-of-laws in claims following the disregard of such duties is determined by the application of Article 4 Regulation Rome II. The article provides criteria to determine whether the close connection rule in Article 4(3) Regulation Rome II can lead to the application of the law governing the contract.

C. von Bary: **News on Procedural Consumer Protection from Luxemburg: Consumer Status and Change of Domicile**

In two recent decisions, the CJEU continues to refine the contours of procedural consumer protection in cross-border disputes. In the case of a person who spent on average nine hours a day playing – and winning at – online poker, the court clarified that factors like the amount involved, special knowledge or the regularity of the activity do not as such lead to this person not being classified as a consumer. It remains unclear, however, which criteria are relevant to determine whether a contract is concluded for a purpose outside a trade or profession. Further, the CJEU stated that the relevant time to determine the consumer's domicile is when the action is brought before a court. This seems to be true even if the consumer changes domicile to a different member state after the conclusion of the contract and before the action is brought and the seller or supplier has not pursued commercial or professional activities or directed such activities at this member state. This devalues the relevance of this criterion to the detriment of the professional party.

W. Voß: **The Forum Delicti Commissi in Cases of Purely Pecuniary Loss – a Cum-Ex Aftermath**

Localising the place of damage in the context of capital investment cases is a perennial problem both under national and European civil procedural law. With prospectus liability having dominated the case law in the past decades, a new scenario is now increasingly coming into the courts' focus: liability claims resulting from cum-ex-transactions. In its recent decision, the Higher Regional Court of Munich confirms the significance of the place of the claimant's bank account for the localisation of purely financial loss in the context of sec. 32 German Civil Procedure Code but fails to provide any additional, viable reasoning on this notoriously debated issue. The decision does manage, however, to define the notion of principal place of business as delimitation of the scope of application of the Brussels regime convincingly. Incidentally, the text of the judgment also proves an informative lesson for the recently flared-up debate about anonymization of judicial decisions.

L. Hornkohl: **International jurisdiction for permission proceedings under the German Telemedia Act (TMG) in cases of suspected abusive customer complaints on online marketplaces**

In its decision of 11 March 2021, the Cologne Higher Regional Court denied the international jurisdiction of the Cologne courts for permission proceedings under the German Telemedia Act (TMG) in cases of suspected abusive customer complaints in online marketplaces. The Cologne court decision combined several precedents of the German Federal Court and the European Court of Justice. Although the Cologne Higher Regional Court decided that permission proceedings constitute a civil and commercial matter within the meaning of the Brussels I Regulation, international jurisdiction could not be established in Germany. The place of performance according to Art. 7 No. 1 lit. b second indent Brussels Ibis Regulation must, in case of doubt, uniformly be determined at the place of establishment of the online marketplace operator in Luxembourg. Article 7 No. 2 of the Regulation also does not give jurisdiction to German courts. The refusal to provide information per se is not a tort in the sense of Article 7 No. 2.

Furthermore, there is no own or attributable possibly defamatory conduct of the platform operator. Contradictory considerations of the German legislator alone cannot establish jurisdiction in Germany.

A. Spickhoff: Contract and Tort in European Jurisdiction – New Developments

The question of qualification as a matter of contract or/and of tort is among others especially relevant in respect to the jurisdiction at place of performance and of forum delicti. The decision of the court of Justice of the European Union in res Brogsitter has initiated a discussion of its relevance and range to this problem. Recent decisions have clarified some issues. The article tries to show which. The starting point is the fraudulent car purchase.

R.A. Schütze: Security for costs for UK plaintiffs in German civil proceedings after the Brexit?

The judgment of the Oberlandesgericht Frankfurt/Main deals with one of the open procedural questions of the Brexit: the obligation of plaintiffs having permanent residence in the United Kingdom to provide security of costs in German civil proceedings. The Court has rightly decided that from January 1st, 2021 plaintiff cannot rely on sect. 110 par. 1 German Code of Civil Procedure (CCP) anymore as the United Kingdom is no longer member of the EU. If the plaintiff has lodged the complaint before January 1st, 2021, the obligation to provide security of costs arises at that date and security can be claimed by respondent according to sect. 110 CCP. However, the Court has not seen two exceptions from the obligation to provide security for costs according to sect. 110 par. 2 no. 1 and 2 CCP which relieve plaintiff from the obligation to provide security of costs if an international convention so provides (no. 1) or if an international convention grants the recognition and execution of decisions for costs (no. 2). In the instant case the court had to apply art. 9 par. 1 of the European Convention on Establishment of 1955 and the Convention between Germany and the United Kingdom on Recognition and Execution of Foreign Judgments of 1960, both Conventions not having been touched by the Brexit. Facit therefore: claimants having permanent residence in the United Kingdom are not obliged to provide security for costs in

German Civil proceedings.

H. Roth: **Qualification Issues relating to § 167 Civil Procedure Code (Zivilprozessordnung, ZPO)**

§ 167 of the Civil Procedure Code (ZPO) aims to relieve the parties of the risk accruing to them through late official notification of legal action over which they have no control. This norm is part of procedural law. It is valid irrespective of whether a German court applies foreign or German substantive law. The higher regional Court (Oberlandesgericht) of Frankfurt a.M. found differently. It holds that § 167 should only be considered when German substantive law and thus German statute of limitations law is applied.

A. Hemler: **Undisclosed agency and construction contract with foreign building site: Which law is applicable?**

Does the term "contract for the provision of services" in Art 4(1)(b) Rome I Regulation include a building contract with a foreign building site? Or should we apply the exception clause in Art 4(3) Rome I Regulation if the building site is abroad? Which law governs the legal consequences of undisclosed agency, i.e. how should we treat cases where a contracting party acts as an agent for an undisclosed principal? Furthermore, what are the legal grounds in German law for a refund of an advance payment surplus in such a building contract? In the case discussed, the Oberlandesgericht (Higher Regional Court) Köln only addressed the latter question in detail. Unfortunately, the court considered the interesting PIL issues only in disappointing brevity. Therefore, based on a doctrinal examination of the exception clause in Art 4(3) Rome I Regulation, the paper discusses whether the scope of the general conflict of laws rule for contracts for the provision of services should exclude building contracts with a foreign building site by virtue of a teleological limitation. It also sheds light on the dispute around the law governing cases of undisclosed agency. The paper argues that Art 1(2)(g) Rome I Regulation is not applicable in this regard, i.e. the issue is not excluded from the Rome I Regulation's scope. Instead, it is covered by Art 10(1) Rome I Regulation; hence, the law governing the contract remains applicable.

S.L. Gössl: **Uniqueness and subjective components – Some notes on habitual residence in European conflict of laws and procedural law**

The article deals with the case law of the ECJ on the habitual residence of adults, as addressed in a recent decision. The ECJ clarified that there can only ever be one habitual residence. Furthermore, it confirms that each habitual residence has to be determined differently for each legal acts. Finally, in the case of the habitual residence of adults, subjective elements become more paramount than in the case of minors. In autonomous German Private International Law, discrepancies with EU law may arise precisely with regard to the relevance of the subjective and objective elements. German courts should attempt to avoid such a discrepancy.

D. Wiedemann: **Holidays in Europe or relocation to Bordeaux: the habitual residence of a child under the Hague Convention on International Child Abduction**

A man of French nationality and a woman of Chilean nationality got married and had a daughter in Buenos Aires. A few months after the birth of their daughter, the family travelled to Europe, where they first visited relatives and friends and finally stayed with the man's family in Bordeaux. One month and a few days after they arrived in Bordeaux, mother and daughter travelled to Buenos Aires and, despite an agreement between the spouses, never returned to Bordeaux. The father in France asked Argentinean authorities for a return order under the HCA. According to the prevailing view, the HCA only applies, if, before the removal or retention, the child was habitually resident in any contracting state except for the requested state. The court of first instance (Juzgado Civil) assumed a change of the child's habitual residence from Argentina to France, but, considering that the lack of the mother's consent to move to France results in a violation of the Convention on the Elimination of All Forms of Discrimination against Women, it granted an exception under Art. 20 HCA. The higher court (Cámara Nacional de Apelaciones en lo Civil) and the Argentinian Supreme Court (Corte Suprema de Justicia de la Nación) required the manifestation of both parents' intent for a change of the child's habitual residence. The higher court saw a sufficient manifestation of the mother's intent to move to France in the termination of her

employment in Buenos Aires and ordered the return. In contrast, the CSJN refused to give weight to the termination of employment as it happened in connection with the birth of the daughter.

H.J. Snijders: **Enforcement of foreign award (in online arbitration) ex officio refused because of violation of the defendant's right to be heard**

With reference to (inter alia) a judgement of the Amsterdam Court of Appeal, some questions regarding the consideration of requests for recognition and enforcement of foreign arbitral awards in the Netherlands are discussed. Should the State Court ex officio deal with a violation of public order by the arbitral tribunal, in particular the defendant's right to be heard, also in default proceedings like the Amsterdam one? In addition, which public order is relevant in this respect, the international public order or the domestic one? Furthermore, does it matter for the State Court's decision that the arbitral awards dealt with were issued in an online arbitration procedure (regarding a loan in bitcoin)? Which lessons can be derived from the decision of the Amsterdam Court for drafters of Online Arbitration Rules and for arbitral tribunals dealing with online arbitration like the arbitral e-court in the Amsterdam case? The author also points out the relevance of transitional law in the field of arbitration by reference to a recent decision of the Dutch Supreme Court rejecting the view of the Amsterdam Court of Appeal in this matter; transitional law still is dangerous law.

Notifications:

E. Jayme/E. Krist: The War of Aggression on Ukraine: Impact on International Law and Private International Law –Conference, March 31st, 2022 (via Zoom)

C. Budzikiewicz/B. Heiderhoff: „Dialogue International Family Law"- Conference, April 1st-2nd, 2022 in Marburg

Update: Repository HCCH 2019 Judgments Convention

HCCH 2019 Judgments Convention Repository

In preparation of the Conference on the HCCH 2019 Judgments Convention on 9/10 June 2023, taking place on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

Update of 31 August 2022: New entries are printed bold.

Please also check the "official" Bibliography of the HCCH for the instrument.

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III. Recordings of Events Related to the HCCH 2019 Judgments Convention

ASADIP; HCCH	“Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras”, 3 December 2020 (full recording available here and here)
ASIL	“The Promise and Prospects of the 2019 Hague Convention”, 25-26 June 2020 (full recording available here and here)
Department of Justice Hong Kong; HCCH	“Inaugural Global Conference – 2019 HCCH Judgments Convention: Global Enforcement of Civil and Commercial Judgments”, 9 September 2019 (recording available here)
HCCH	“HCCH a|Bridged: Innovation in Transnational Litigation – Edition 2021: Enabling Party Autonomy with the HCCH 2005 Choice of Court Convention”, 1 December 2021 (full recording available here)
HCCH	“22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention”, 2 July 2020 (short documentary video available here)
JPRI; HCCH; UNIDROIT; UNCITRAL	“2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments”, 12 November 2020 (recording available here)

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Report: Summer School on the new Foreign Relations Law, MPIL Heidelberg, June 8-10, 2022

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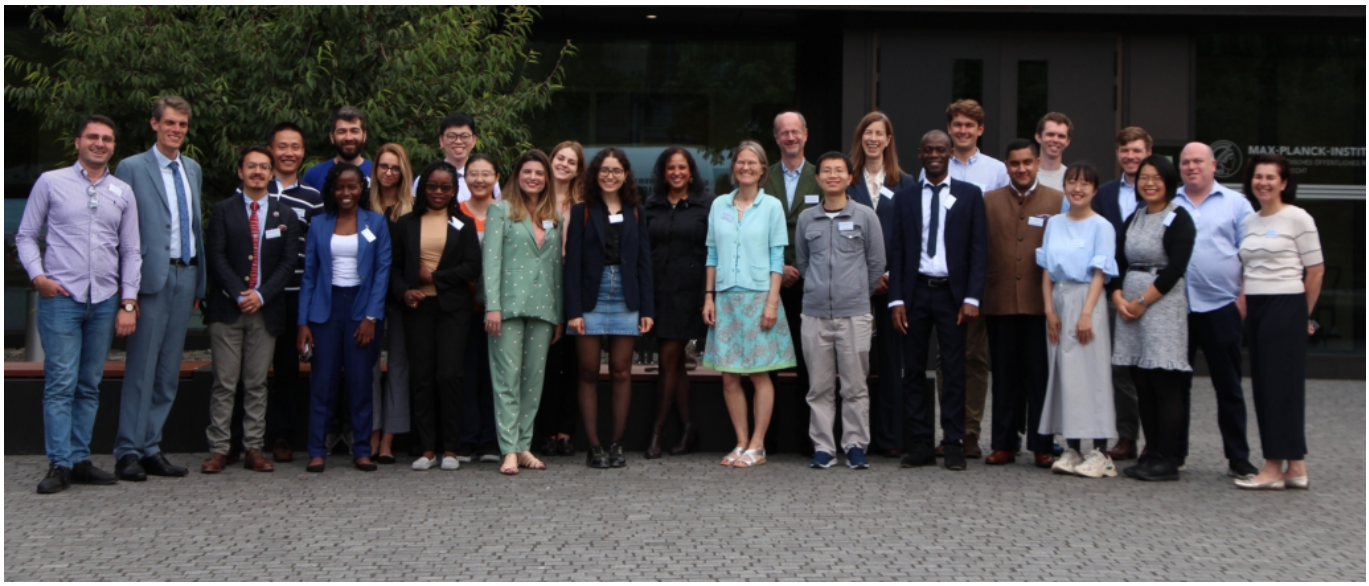
*by Zixuan Yang and Jakob Olbing**



The MPIL in Heidelberg hosted a three-day Summer School titled "Populism and the New Foreign Relations Law: Between Public International Law, 'External Public Law', and Conflict of Laws", led by Anne Peters (MPI Heidelberg**), Karen Knop (University of Toronto and** Max Planck Law Fellow**), and Ralf Michaels (**MPI Hamburg**). The Summer School, which brought together 20 young scholars, was also the first step in a large-scale research project that Karen Knop will lead in the coming years as one of the first Max Planck Law Fellows.**

The aim of the Summer School was to familiarize the participants with foreign relations law, a field which is known in only a few countries, and to examine its relationship to conflict of laws and international law. Led by the three hosts, the participants engaged in lively discussions on the presented topics, thus bringing together their diverse professional and national backgrounds. The results of the Summer School will not be published as such but will instead fuel and direct the joint research project within the Max Planck Law Fellowship Program. Karen Knop is one of the first five Fellows of the Program and is going to collaborate with Anne Peters, director at the MPI Heidelberg and Ralf Michaels, director at the MPI Hamburg on the project for the next few years.

Foreign Relations Law as a law in between

The Summer School began with the observation that few of the many nations represented identified foreign relations law as a distinct area of law. In Germany, one of the few countries having such a field of law, it is known as *Staatsrecht III*. From a comparative law perspective, however, it is difficult to define this new

field of law in a general way. This also generates questions of whether such a field of law is needed at all or which particular issues it should govern, as the possible area of regulation is to a large extent covered by other areas of law, namely international law, conflict of laws, constitutional law, and administrative law as well as by the field of diplomacy. However, there is a variety of situations that cannot be assigned clearly to any of these established areas of law, thus highlighting the question if they should be assembled in a new field. Why, for instance, is the legality of a demonstration in front of an embassy often subjected to different rules and standards than other demonstrations? May South Korean "comfort women" compel the South Korean government to negotiate with Japan for compensation for their suffering during the war? Why is a claim for compensation for a death caused by the exercise of excessive police force dismissed when the fatal shooting occurred across an international border? Do such cases even fall under a court's jurisdiction or is it rather a task of diplomacy to find a solution?

These and many other cases clearly show that there is room for a new field of law which should be explored with closer attention. However, the field's further development should not – as has been the case so far – be left to a few Western countries; rather, the perspectives of other countries should also be included. Precisely this creation of new perspectives was one of the core aims of the Summer School. According to Karen Knop, the still young field of law is in danger of falling victim to populist politics. She understands populism not as an ideology but as a method for the demarcation and devaluation of all things "international" vis-à-vis what is deemed national. This concern was illustrated by the "take back control" slogan of the Brexit campaign, alleging that the EU institutions have little or no democratic legitimacy. The withdrawal from international treaties and organizations is a phenomenon that can, indeed, be observed in many countries. This dynamic should not be encouraged by foreign relations law through its establishment as a substitute for international law.

But are general concerns against international law as undemocratic justified or is the opposite the case? Case studies presented by Anne Peters illustrated how the ratification of international public law treaties – or the withdrawal from such treaties – may or may not be democratically legitimized. Can the executive of a state withdraw from the International Criminal Court without involving the legislative?

Foreign Relation Law as international or domestic law?

On the one hand, one can try to find a solution in public international law, but most treaties or conventions don't entail provisions on withdrawal. Until Brexit, the sentiment rather was that more and more states will join a treaty or convention, not leave. On the other hand, national law could give an answer, when adopting a foreign relations law perspective. Though, in many countries public international law is, in some way or another, incorporated into the national law, legislatives have little opportunities to influence its content, since most treaties are negotiated between the state's representatives. Also, judicial review is very limited concerning public international law. When developing foreign relations law, one could and should address these concerns. As Anne Peters put it: one has to normalize foreign relations law, by subjecting it to judicial review, providing stronger democratic legitimation and figuring out if and when a foreign set of facts should be treated different to a domestic, and when not.

Foreign Relations Law as a voice for unheard actors

It was highlighted throughout the three days that especially in smaller less economically strong countries, the recognition of foreign relations law as an independent field of law next to public international law could be very important. It could provide additional funding to a notoriously underfunded field of law. Normally those countries, mostly members of the global south, have only little chance in being heard, for example when treaties are negotiated. This is even more important as public international law has a long and controversial colonial legacy dating back to the history of imperial politics until the mid-20th century. To move from the colonial global north/south hierarchy and reframe foreign relations law, it is important to reflect whether there is a universal model and criteria for foreign relations law on a global level. In this sense, voices from different sides should all contribute to the formation of this new field of law.

Foreign relations law should also give a voice to actors who have never been heard in international law. Taking a historical and comparative perspective it should be a Post-Colonial foreign relations laws, encouraging non-state participants such as indigenous people to have a say. From a post-colonial perspective, it is also necessary to open up foreign relations to indigenous peoples to facilitate other forms of cross-border disputes and cooperation. Karen Knop raised the example of the Arctic Council, in which both states and indigenous

peoples of the polar region are represented and participate in sustainable development and environmental protection.

Foreign Relations Law and Private International Law

But how to proceed? How can all these voices come together in a new area of law? Ralf Michaels introduced private international law methodology as an example for how to accommodate the different actors. He illustrated the already existing interdependency between foreign relations law and private international law through a series of cases of the U.S. Supreme Court. This interdependency should be further discussed and can offer new perspectives and has a future potential for both sides.

The traditional methodology of private international law is considered to be apolitical and neutral. However, it can also be influenced by diplomatic or policy considerations when certain public elements are involved. In a cross-border shooting case, Hernandez et al. v. MESA, a Mexican national assumed to have illegally crossed the border was shot to death on Mexican soil by a U.S. Border Patrol Agent who stood on U.S. soil. The claim for compensation was dismissed by the U.S. court. The agent's duty to protect the border from illegal crossings was an act of foreign relations and therefore is 'exclusively entrusted to the political branches' and should be immune from judicial inquiry. Based on the separation of power, the court refrained itself from arbitrating on diplomatic matters. Granting such 'private' claims would also have the risk of undermining national security, the court said. There are other tension between national security and private international law. A recent general ban on Sharia and International law in several U.S. States Courts demonstrates populist arguments influence into public policy and against the application or recognition of foreign laws, values and beliefs.

When it comes to the determination of the content of foreign law, 'comity' in foreign relations provide a basis for the forum's treatment of foreign law. In Animal Science Products, the U.S. Supreme Court ruled that respectful considerations should be given to the foreign government's submission on its own law, however, the federal court is not bound to accord conclusive effect to it. Furthermore, comity also plays an important role for the court to determine the territorial reach of domestic law in international cases. The Supreme Court's decision in Empagran concerned an antitrust class-suit alleging the application of the Sherman Act even though the alleged conduct and harm were occurred

significantly on foreign territory. Justice Breyer's statutory interpretation and justification for limiting the scope of U.S. antitrust law in this case was discussed to rethink the nature of the U.S. federal court's long standing *Charming Betsy* principle, also known as the presumption against extraterritoriality.

Foreign Relations Law as a Law of opportunities

It might seem an impossible task to accommodate all these interests and participants into a new foreign relations law and at the same time follow a coherent methodology. But a new field of law gives the opportunity to address issues, which long have been left aside or completely ignored despite the factual relevance and to find creative answers. Indigenous people have been interacting with another across borders since borders where put in place. States where entering into treaties all the time, policemen are shooting everywhere and anyone (in the US) and occasionally across a border and after a war, victims are (sometimes) compensated for their losses by the alien. All the cases have a foreign element, so maybe private international law can provide one solution, as it is his task to provide clear answers to international complex cases, and its methods are designed to accommodate international cases. Its aims of uniformity and certainty of results could also benefit foreign relations law. Another solution could be provided within the framework of global constitutionalism, as Anne Peters suggested. Developing a foreign relations law within the global institutions of public international law, such as the United Nations, by means of diplomacy and treaty making to create a uniform body of law.

After three days filled with sessions, discussions, and lively conversations, the participants departed with the strong sense that the foundation for the further development of foreign relations law had been laid together. As a parting gift, the three hosts wished for a further development of the learned and encouraged the participants to publish the newly made findings. Given the many newly made contacts – woven diligently after the long break due to the Covid-19 pandemic – it is merely a question of time that co-authored publications will appear.

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