Choice of Law in the American Courts in 2022: Thirty-Sixth Annual Survey

The 36th Annual Survey of Choice of Law in the American Courts (2022) has been posted to SSRN.

The cases discussed in this year's survey cover such topics as: (1) choice of law, (2) party autonomy, (3) extraterritoriality, (4) international human rights, (5) foreign sovereign immunity, (6) foreign official immunity, (7) adjudicative jurisdiction, and (8) the recognition and enforcement of foreign judgments. Happy reading!

John Coyle (University of North Carolina School of Law)
William Dodge (University of California, Davis School of Law)
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Book: Intolerant Justice: Conflict and Cooperation on Transnational Litigation by Asif Efrat

Summary provided by the author, Asif Efrat

In a globalized world, legal cases that come before domestic courts are often transnational, that is, they involve foreign elements. For example, the case before the court may revolve around events, activities, or situations that occurred in a foreign country, or the case may involve foreign parties or the application of foreign law. Such cases typically present an overlap between the legal authorities of two countries. To handle a transnational case cooperatively, one legal system

must cede its authority over the case, in full or in part, to a foreign legal system. This effectively means that a local citizen would be subjected to the laws or jurisdiction of a foreign legal authority, and that raises a host of questions and concerns: Does the foreign legal system abide by the rule of law? Does it guarantee human rights? Will the foreign court grant our citizen the due process and fair treatment they would have enjoyed at home?

The newly published book *Intolerant Justice: Conflict and Cooperation on Transnational Litigation* (Oxford University Press) argues that the human disposition of *ethnocentrism* – the tendency to divide the world into superior in-groups and inferior out-groups – would often lead policymakers to answer these questions negatively. The ethnocentric, who fears anything foreign, will often view the foreign legal system as falling below the home country's standards and, therefore, as unfair or even dangerous. Understandably, such a view would make cooperation more difficult to establish. It would be harder to relinquish the jurisdiction over legal cases to a foreign system if the latter is seen as unfair; extraditing an alleged offender to stand trial abroad would seem unjust; and the local enforcement of foreign judgements could be perceived as an affront to legal sovereignty that contravenes fundamental norms.

This book examines who expresses such ethnocentric views and how they frame them; and, on the other hand, who seeks to dispel these concerns and establish cooperation between legal systems. In other words, the domestic political debate over transnational litigation stands at the center of this book.

In this debate, the book shows, some domestic actors are particularly likely to oppose cooperation on ethnocentric grounds: the government's political opponents may portray the government's willingness to cooperate as a dangerous surrender to a foreign legal system, which undermines local values and threatens the home country's citizens; NGOs concerned for human rights might fear the human-rights consequences of cooperation with a foreign legal system; and lawyers, steeped in local rules and procedures, may take pride in their legal system and reject foreign rules and procedures as wrong or inferior.

By contrast, actors within the state apparatus typically view cooperation on litigation more favorably. Jurists who belong to the state – such as judges, prosecutors, and the justice-ministry bureaucracy – may support cooperation out of a concern for reciprocity or based on the principled belief that offenders should

not escape responsibility by crossing national borders. The ministry of foreign affairs and the ministry of defense may similarly support cooperation on litigation that could yield diplomatic or security benefits. These proponents of cooperation typically argue that legal differences among countries should be respected or that adequate safeguards can guarantee fair treatment by foreign legal authorities. In some cases, these arguments prevail and cooperation on litigation is established; in other cases, the ethnocentric sentiments end up weakening or scuttling the cooperative efforts.

These political controversies are examined through a set of rich case studies, including the Congressional debate over the criminal prosecution of U.S. troops in NATO countries, the British concerns over extradition to the United States and EU members, the dilemma of extradition to China, the wariness toward U.S. civil judgments in European courts, the U.S.-British divide over libel cases, and the concern about returning abducted children to countries with a questionable human rights record.

Overall, this book offers a useful analytical framework for thinking about the tensions arising from transnational litigation and conflict of laws. This book draws our attention to the political arena, where litigation-related statutes and treaties are crafted, oftentimes against fierce resistance. Yet the insights offered here may also be used for analyzing judicial attitudes and decisions in transnational cases. This book will be of interest to anyone seeking to understand the challenges of establishing cooperation among legal systems.

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.

The "Event Giving Rise to the Damage" under Art. 7 Rome II Regulation in CO2 Reduction Claims – A break through an empty Shell?

Written by Madeleine Petersen Weiner/Marc-Philippe Weller

In this article, we critically assess the question of where to locate the "event

giving rise to the damage" under Art. 7 Rome II in CO_2 reduction claims. This controversial – but often overlooked – question has recently been given new grounds for discussion in the much discussed "*Milieudefensie et al. v. Shell*" case before the Dutch district court in The Hague. In this judgment, the court had to determine the law applicable to an NGO's climate reduction claim against *Royal Dutch Shell*. The court ruled that Dutch law was applicable as the law of the place where the damage occurred under Art. 4 (1) Rome II and the law of the event giving rise to the damage under Art. 7 Rome II as the place where the business decision was made, *i.e.*, at the Dutch headquarters. Since according to the district court both options – the place of the event where the damage occurred and the event giving rise to the damage – pointed to Dutch law, this question was ultimately not decisive.

However, we argue that it is worth taking a closer look at the question of where to locate the event giving rise to the damage for two reasons: First, in doing so, the court has departed from the practice of interpreting the event giving rise to the damage under Art. 7 Rome II in jurisprudence and scholarship to date. Second, we propose another approach that we deem to be more appropriate regarding the general principles of proximity and legal certainty in choice of law.

1. *Shell* – the judgment that set the ball rolling (again)

The Dutch environmental NGO *Milieudefensie* and others, which had standing under Dutch law before national courts for the protection of environmental damage claims, made a claim against the *Shell* group's parent company based in the Netherlands with the aim of obliging *Shell* to reduce its CO_2 emissions. According to the plaintiffs, *Shell's* CO_2 emissions constituted an unlawful act. The Dutch district court agreed with this line of reasoning, assuming tortious responsibility of *Shell* for having breached its duty of care. The court construed the duty of care as an overall assessment of *Shell's*obligations by, among other things, international standards like the UN Guiding Principles of Human Rights Responsibilities of Businesses, the right to respect for the private and family life under Art. 8 ECHR of the residents of the Wadden region, *Shell's* control over the group's CO_2 emissions, and the state's and society's climate responsibility etc. This led the district court to ruling in favor of the plaintiffs and ordering *Shell* to reduce its greenhouse gas emissions by 45% compared to 2019.

In terms of the applicable law, the court ruled that Dutch law was applicable to the claim. The court based its choice of law analysis on Art. 7 Rome II as the relevant provision. Under Art. 7 Rome II, the plaintiff can choose to apply the law of the event giving rise to the damage rather than the law of the place where the damage occurred as per the general rule in Art. 4 (1) Rome II. The court started its analysis by stating that "climate change, whether dangerous or otherwise, due to CO_2 emissions constitutes environmental damage in the sense of Article 7 Rome II", thus accepting without further contemplation the substantive scope of application of Art. 7 Rome II.

The court went on to find that the adoption of the business policy, as asserted by the plaintiffs, was in fact "an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region". The court thereby declined *Shell's* argument that *Milieudefensie's* choice pointed to the law of the place where the actual CO_2 emissions occurred, which would lead to a myriad of legal systems due to the many different locations of emitting plants operated by *Shell*.

2. The enigma that is "the event giving rise to the damage" to date

This line of reasoning marks a shift in the way "the event giving rise to the damage" in the sense of Art. 7 Rome II has been interpreted thus far. To date, there have been four main approaches: A broad approach, a narrower one, one that locates the event giving rise to the damage at the focal point of several places, and one that allows the plaintiff to choose between several laws of events which gave rise to the damage.

(1.) The Dutch district court's location of the event giving rise to the damage fits into the broad approach. Under this broad approach, the place where the business decision is made to adopt a policy can qualify as a relevant event giving rise to the damage. As a result, this place will usually be that of the effective headquarters of the group. On the one hand, this may lead to a high standard of environmental protection as prescribed by recital 25 of the Rome II Regulation, as was the case before the Dutch district court, which applied the general tort clause Art. 6:162 BW. On the other hand, this may go against the practice of identifying a *physical* action which *directly* leads to the damage in question, rather than a purely internal process, such as the adoption of a business policy.

(2.) Pursuant to a narrower approach, the place where the direct cause of the violation of the legal interest was set shall be the event giving rise to the damage. In the case of CO_2 reduction claims, like *Milieudefensie et al. v. Shell*, that place would be located (only) at the location of the emitting plants. This approach – while dogmatically stringent – may make it harder to determine responsibility in climate actions as it cannot necessarily be determined which plant led to the environmental damage, but rather the emission as a whole results in air pollution.

(3.) Therefore, some scholars are in favor of a focal point approach, according to which the event giving rise to the damage would be located at the place which led to the damage in the most predominant way by choosing one focal point out of several events that may have given rise to the damage. This approach is in line with the prevailing opinion regarding jurisdiction in international environmental damage claims under Art. 7 Nr. 2 Brussels I-*bis* Regulation. In practice, however, it may sometimes prove difficult to identify one focal point out of several locations of emitting plants.

(4.) Lastly, one could permit the victim to choose between the laws of several places where the events giving rise to the damage took place. However, if the victim were given the option of choosing a law, for example, of a place that was only loosely connected to the emissions and resulting damages, Art. 7 Rome II may lead to significantly less predictability.

3. Four-step-test: A possible way forward?

Bearing in mind these legal considerations, we propose the following interpretation of the event giving rise to the damage under Art. 7 Rome II:

First, as a starting point, the laws of the emitting plants which *directly* lead to the damage should be considered. However, in order to adequately mirror the legal and the factual situations, the laws of the emitting plants should only be given effect insofar as they are responsible for the total damage.

If there are several emitting plants, some of which are more responsible for greenhouse gas emissions than others, these laws should only be invoked under Art. 7 Rome II for the *portion of their responsibility regarding the entire claim*. This leads to a *mosaic approach* as adopted by the CJEU in terms of jurisdiction for claims of personality rights. This would give an exact picture of contributions

to the environmental damage in question and would be reflected in the applicable law.

Second, in order not to give effect to a myriad of legal systems, this mosaic approach should be slightly moderated in the sense that courts are given the opportunity to make estimations of proportions of liability in order not to impose rigid calculation methods. For example, if a company operates emitting plants all over the world, the court should be able to roughly define the proportions of each plant's contribution, so as to prevent potentially a hundred legal systems from coming into play to account for a percentile of the total emissions.

Third, as a fall-back mechanism, should the court not be able to accurately determine each plant's own percentage of responsibility for the total climate output, the court should identify the central place of action in terms of the company's environmental tort responsibility. This will usually be at the location of the emitting plant which emits the most CO_2 for the longest period of time, and which has the most direct impact on the environmental damage resulting from climate change as proclaimed in the statement of claim.

Fourth, only as a *last resort*, should it not be possible to calculate the contributions to the pollution of each emitting plant, and to identify one central place of action out of several emitting plants, the event giving rise to the damage under Art. 7 Rome II should be located at the place where the *business decisions* are taken.

This proposal is discussed in further detail in the upcoming Volume 24 of the Yearbook of Private International Law.

First strike in a Dutch TikTok class action on privacy violation:

court accepts international jurisdiction

Written by Eduardo Silva de Freitas (Erasmus University Rotterdam) & Xandra Kramer (Erasmus University Rotterdam/Utrecht University), members of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO), www.euciviljustice.eu.

Introduction

On 9 November 2022 the District Court Amsterdam accepted international jurisdiction in an interim judgment in a collective action brought against TikTok (DC Amsterdam, 9 November 2022, ECLI:NL:RBAMS:2022:6488; *in Dutch*). The claim is brought by three Dutch-based representative organisations; the Foundation for Market Information Research (*Stichting Onderzoek Marktinformatie*, SOMI), the Foundation Take Back Your Privacy (TBYP) and the *Stichting Massaschade en Consument* (Foundation on Mass Damage and Consumers). It concerns a collective action brought under the Dutch collective action act (WAMCA) for the infringement of privacy rights of children (all foundations) and adults and children (Foundation on Mass Damage and Consumers). In total, seven TikTok entities are sued, located in Ireland, the United Kingdom, California, Singapore, the Cayman Islands and China. The claims are for the court to order that an effective system is implemented for age registration, parental permission and control, and measures to ensure that commercial communication can be identified and that TikTok complies with the Code of Conduct of the Dutch Media Act and the GDPR.

After an overview of the application of the WAMCA, which has been introduced in a different context on this blog earlier, we will discuss how the Court assessed the question of international jurisdiction.

The class action under the Dutch WAMCA

Following case law of the Dutch Supreme Court in the 1980s concerning legal standing of representative organisations, the possibility to start a collective action was laid down in Article 3:305a of the Dutch Civil Code (DCC) in 1994. However, this was limited to declaratory and injunctive relief. Redress for compensation in

mass damage cases was only introduced in 2005 with the enactment of the Collective Settlement of Mass Claims Act (*Wet collectieve afwikkeling massaschade*, WCAM). This collective settlement scheme enables parties to jointly request the Amsterdam Court of Appeal to declare a settlement agreement binding on an opt-out basis. The legislative gap remained as a collective action for compensation was not possible and such mass settlement agreement relies on the willingness of an allegedly liable party to settle.

This gap was closed when in 2019, after a lengthy legislative process, the Act on Redress of Mass Damages in a Collective Action (*Wet afwikkeling massaschade in collectieve actie*, WAMCA) was adopted. The WAMCA entered into force on 1 January 2020 and applies to mass events that occurred on or after 15 November 2016. The WAMCA expanded the collective action contained in Article 3:305a DCC to include actions for compensation of damage (Tillema, 2022; Tzankova and Kramer, 2021). While the WAMCA Act generally operates on an opt-out basis for beneficiaries represented by the representative organisation(s), there are exemptions, including for parties domiciled or habitually resident outside the Netherlands. In addition, the standing and admissibility requirements are relatively strict, and also include a scope rule requiring a close connection to the Netherlands. Collective actions are registered in a central register (the WAMCA register) and from the time of registration a three-months period starts to run (to be extended to maximum six months), enabling other claim organisations to bring a claim, as only one representative action can be brought for the same event(s). If no settlement is reached, an exclusive representative will be appointed by the court. Since its applicability as of 1 January 2020, 61 collective actions have been registered out of which 8 cases have been concluded to date; only a very few cases have been successful so far. These collective actions involve different cases, including consumer cases, privacy violations, environmental and human rights cases, intellectual property rights, and cases against the government. Over one-third of the cases are cross-border cases and thus raise questions of international jurisdiction and the applicable law.

As mentioned above, in the TikTok case eventually three Dutch representative foundations initiated a collective action against, in total, seven TikTok entities, including parent company Bytedance Ltd. (in the first action, the claim is only brought against the Irish entity; in the other two actions, respectively, six and seven entities are defendants). These are TikTok Technology Limited (Ireland),

TikTok Information Technology Limited (UK), TikTok Inc. (California), TikTok PTE Limited (Singapore), Bytedance Ltd. (Cayman Islands), Beijng Bytedance Technology Co. Ltd. (China) and TikTok Ltd. (also Cayman Islands). The claim is, in essence, that these entities are responsible for the violation of fundamental rights of children and adults. The way in which the personal data of TikTok users is processed and shared with third parties violates the GDPR as well as the Dutch Telecommunications Act and Media Act. It is also claimed that TikTok's terms and conditions violate the Unfair Contract Terms Directive (UCTD – 93/13/EEC) and the relevant provisions of the Dutch Civil Code.

International jurisdiction of the Amsterdam District Court

The first stage of the proceedings, leading up to this interim judgment, deals with the international jurisdiction of the District Court of Amsterdam, as the TikTok entities challenge its international jurisdiction. TikTok requested the Court to refer preliminary questions to the CJEU but the Court refused this request, stating that the questions on (a) how the GDPR and Brussels I-bis Regulation regimes interact and (b) the applicability of Article 79(2) GDPR were deemed resolved.

Relevant jurisdiction rules

Considering the domicile of the defendant(s) and the alleged violation of the GDPR, both EU and Dutch domestic jurisdiction rules come into the picture. TikTok alleges that the Dutch courts do not have jurisdiction over this case under Article 79(2) GDPR. Moreover, TikTok alleges that, since Article 79(2) GDPR is a *lex specialis* in relation to the Brussels I-bis Regulation, the latter cannot be applied to override the jurisdictional rules set out in the GDPR. The three representative organisations argue that the Dutch courts have jurisdiction under both EU private international law rules and the Dutch Code of Civil Procedure (DCCP). Before delving into how the District Court of Amsterdam construed the interaction between the legislations concerned, we will describe the applicable rules on international jurisdiction for privacy violations. The alleged violations occurred, or the claims relate to violations occurring, after 25 May 2018, that is, after the entry into force of the GDPR. TikTok Ireland is a data controller subject to the GDPR. Under Article 79(2) GDPR the "data subjects" (those whose rights are protected by the GDPR) shall bring an action for the violation of their rights in either the courts of the Member State in which the data controller or processor is

established or of the Member State in which the data subject has its habitual residence. Furthermore, Article 80(1) GDPR provides for the possibility of data subjects to mandate a representative body which has been properly constituted under the law of that Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms to file actions on their behalf under Article 79 GDPR.

The case also deals with non-GDPR-related claims, which triggers the application of the Brussels I-bis Regulation, at least as far as the entities domiciled in the EU are concerned. Article 7(1)(a) Brussels I-bis states that, for contractual matters, jurisdiction is vested in the Member State in which the contract is to be performed. More importantly for this case, with regards to torts, Article 7(2) provides jurisdiction for the courts of the place where the harmful event occurred or may occur. Finally, in relation to the TikTok entities that are not domiciled in the EU, the international jurisdiction rules of the Dutch Code of Civil Procedure (Articles 1-14 DCCP) apply. This is the case regarding both GDPR and non-GDPR-related claims. These Dutch rules are largely based on those of the Brussels I-bis Regulation and also include a rule on multiple defendants in Article 7 DCCP.

The claims against TikTok Ireland

The Amsterdam District Court starts its reasoning by addressing whether it has jurisdiction over TikTok Technology Limited, domiciled in Ireland, the entity that is sued by all three representative organisations. The Court states that Article 80(1) GDPR does not distinguish between substantive and procedural rights in granting the possibility for data subjects to mandate a representative body to file actions on their behalf under Article 79 GDPR. Therefore, actions brought under Article 80(1) GDPR can rely on the jurisdictional rule set out in Article 79(2) GDPR which allows for the bringing of actions before the courts of the Member State in which the data subject has its habitual residence. The Court further reasons that the word 'choice' enshrined in Recital 145 GDPR, when mentioning actions for redress, allows for the interpretation that it is up to the data subject to decide where she prefers to file her claim. In the case at hand, since the data subjects concerned reside in the Netherlands, they can mandate a representative body to file claims before the Dutch courts.

As to the non-GDPR-related claims and GDPR violations that also qualify as tortious conduct, the District Court considered first whether the case concerned

contractual matters, to decide whether Article 7(1) or Article 7(2) Brussels I-bis Regulation applies. For this purpose, the District Court relied on the rule established by the CJEU in *Wikingerhof* v. *Booking.com* (Case C-59/19, ECLI:EU:C:2020:95), according to which a claim comes under Article 7(2) when contractual terms as such and their interpretation are not at stake, but rather the application of legal rules triggered by the commercial practices concerned – or, in other words, contractual "interpretation being necessary, at most, in order to establish that those practices actually occur". Given that, in this case, the question is whether TikTok's terms and conditions are abusive under both the UCTD and the DCC, the claim was deemed to fall under Article 7(2) Brussels I-bis Regulation.

Next, the District Court assesses whether the criteria for establishing jurisdiction under Article 7(2) are met. For this purpose it refers to the CJEU ruling in *eDate Advertising and Others* (Case C-509/09, ECLI:EU:C:2011:685). In this case the CJEU ruled that, when it comes to "publication of information on the internet" that triggers an "adverse effect on personality rights", the habitual residence of the victim being his centre of interests can be regarded as the place in which the damage occurred. The District Court rightfully ruled that since the rights of TikTok users that have their habitual residence in the Netherlands had been violated through online means, the Netherlands can be regarded as the place in which the damage occurred.

The Court confronts TikTok's argument that, since Article 79(2) GDPR is a *lex specialis* in relation to the Brussels I-bis Regulation, the latter cannot be applied to override the jurisdictional rules set out in the GDPR. As per the Court, the rules on conflict of jurisdiction established by the Brussels I-bis Regulation are general in nature and, as such, cannot be derogated from other than by explicit rules. Hence, the Court interprets Recital 147 GDPR – which states that the application of the Brussels I-bis Regulation should be without prejudice to the application of the GDPR – as being unable to strip away the applicability of the Brussels I-bis Regulation. In the Court's understanding, Recital 147 GDPR points to the complementarity of the GDPR in relation to the Brussels I-bis Regulation, and both regimes coexist without hierarchy. Therefore, according to the Court, the GDPR is not a *lex specialis* in relation to the Brussels I-bis Regulation. Furthermore, the Court notes that, under Article 67 Brussels I-bis Regulation, its regime is without prejudice to specific jurisdictional rules contained in EU

legislation on specific matters. While the relationship between the jurisdiction rules of the GDPR and the Brussels I-bis Regulation is not wholly undisputed, in the present case the provisions do not contradict each other, while at the same time in this case also non-GDPR issues are at stake.

The claims against non-EU based TikTok entities

Having established international jurisdiction in the case against TikTok Ireland, the Amsterdam District Court rules on its international jurisdiction in relation to the other TikTok entities sued by two of the foundations. As no EU rules or international convention applies, the Dutch jurisdiction rules laid down in Articles 1-14 DCCP apply. Article 7(1) DCCP contains a rule for multiple defendants and connected claims similar to that in Article 8(1) Brussels I-bis. The Court considers that both legal and factual aspects are closely intertwined in this case. The claims concern several different services, not only the processing of data, and all defendants are involved in the provision of these services. The claims are therefore so closely connected that it is expedient that they are dealt with in the same proceedings.

Outlook

TikTok attempted to appeal this interim judgment on international jurisdiction. Under Article 337(2) DCCP, it is at the court's discretion to grant leave to appeal interim decisions when the appeal is not filed against the final judgment at the same time. In this case, the Court did not find sufficient reasons to allow for such appeal. The case will now proceed on other preliminary matters, including the admissibility of the claim under the WAMCA, and (if admissible) the appointment of the exclusive representative. For this purpose, at the end of its judgment the Court orders parties to provide security as to the financing of the case, which requires submitting to the Court a finance agreement with the third-party financer. After that, assuming that no settlement will be reached, the case will proceed on the merits. It may well be that either of the parties will appeal the final judgment, and that on that occasion TikTok will raise the jurisdictional question again.

To be continued.

Serving Defendants in Ukrainian Territory Occupied by Russia

Jeanne Huang

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Both Russia and Ukraine are member states of the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention (HSC)). After Russia occupied the Autonomous Republic of Crimea and its capital city, Sevastopol, and exercised control over certain areas of Ukraine (the "Occupied Areas"), Ukraine filed a declaration ("Ukraine's Declaration on Crimea") under the HSC. It states that, as a result of Russia's occupation, implementing the HSC in the Occupied Areas is limited, that the procedure for service and relevant communication is determined by the Central Authority of Ukraine, and that documents or requests issued by the Russian and related illegal Authorities in the Occupied Areas are null and void and have no legal effect.

In 2016, Russia declared ("Russia's Declaration on Crimea") that Ukraine's Declaration on Crimea is based on "a bad faith and incorrect presentation and interpretation of facts and law" under the HSC and other Hague Conventions. Thus far, Estonia, Finland, Germany, Latvia, Lithuania, and Poland have each made declarations supporting Ukraine's and announcing that they will not engage in any direct interaction with the Authorities in the Occupied Areas and will not accept any documents or requests emanating from or through such Authorities. The conflicting Declaration made by Ukraine and Russia, respectively, brings challenges for serving a defendant residing in the Occupied Areas—the scope of which has expanded during the recent military conflict—in civil and commercial cases when the defendant neither appoints an agent in the forum nor waives service. On one hand, neither Ukraine nor Russia permit service by postal channels (mail) under HSC Article 10(a). On the other, service via the Ukrainian Central Authority in the Occupied Areas is unguaranteed as indicated in Ukraine's

Declaration on Crimea; however, Ukraine and its supporting states do not recognize service conducted by the Russian Central Authority. A practical question for litigators is how to conduct service of process in the Occupied Areas?

This post suggests that the legal effects of service conducted by the Russian Central Authority under the HSC on a defendant in the Occupied Areas should be recognized for two reasons. Firstly, the Ukraine and its supporting states' declarations under the HSC are interpretative declarations rather than reservations (the same is true of the Russian declaration). Secondly, the Namibia Exception can provide certainty and predictability for litigators in international civil and commercial cases and should be applied to service conducted by the Russian Central Authority in the Occupied Areas.

Legal Dilemmas for the HSC

The competing declarations on Crimea do not identify the HSC provision pursuant to which they are made, nor do they specify the provisions whose legal effect they purport to modify. Arguably, no provision of HSC provides a legal basis for either declaration on Crimea.

1. Provisions for the Designation and Function of a Central Authority

Ukraine's Declaration on Crimea provides that documents or requests made by Russia or a related authority in the Occupied Areas are void. HSC Articles 2–17 do not provide a basis for the declaration, because the purported invalidity of service conducted by the Russian Central Authority does not directly relate to the designation or function of the Ukrainian Central Authority. It is also likely beyond the scope of HSC Article 18, which allows each contracting state to designate other Authorities and determine their competence. A counterargument may be that Russia's invasion violated Ukraine's sovereignty, so Ukraine can invoke Article 18 and claim that Russia and relevant local authorities are illegal and that the documents or requests issued by them are void. Ukraine's territorial sovereignty over the Occupied Areas is, however, an incidental question to the validity of the documents or requests issued by Russia and the relevant local authorities. Importantly, the HSC does not contain a compromissory clause. This distinguishes it from treaties such as the United Nations Convention on the Law of the Sea under which, in some circumstances, tribunals can determine incidental questions "when those issues must be determined in order for the . . . tribunal to be able to rule on the relevant claims."

For the same reasons, Russia's Declaration on Crimea lacks a clear basis in HSC Articles 2-18.

2. Provision for Dependent Territories

Article 29 allows a state to extend the application of the HSC to territories "for the international relations of which [the declaring state] is responsible." The meaning of this language is not clear. Article 56(1) of the European Convention on Human Rights (ECHR) includes a similar phase. Article 56(1) is the so-called "colonial clause," which prevents the automatic application of the ECHR to non-metropolitan territories and empowers a metropolitan state to declare its application. In 1961, the European Commission extended Article 56(1) to "dependent territories irrespective of domestic legal status." The concept of dependent territories under the ECHR has been defined by almost exclusive deference to a member state's unilateral Article 56(1) declaration. In Quark Fishing Ltd. v. United Kingdom, for example, Protocol No. 1 was held inapplicable to a fishing vessel under a Falklands flag because the UK declaration only extended the ECHR, not Protocol No. 1, to islands that belonged to Falkland Islands (Islas Malvinas) Dependencies.

However, the ECHR's deferential approach should not apply to HSC Article 29. Argentina is not a member state of the ECHR and the court in Quark Fishing relied on the fact that there was no dispute that the islands were a "territory" within the meaning Article 56(1). As an HSC member state, however, Argentina declared its opposition to the UK's extension of the HSC to the Falkland Islands, relying on a UN resolution noting a dispute between the two states about sovereignty over the islands. Due to the unclear relationship between Article 29 and international law on the occupation or succession of territories, Article 29 may not serve as a legal basis for the Declarations on Crimea.

Legal Effect of the Declarations

The Vienna Convention on the Law of Treaties (VCLT) and the Guide to Practice on Reservations to Treaties adopted by the International Law Commission divide declarations formulated by a state under a treaty into reservations and interpretative declarations. A reservation is intended to exclude or modify the legal effect of certain provisions of a treaty, while an interpretative declaration is purported to specify or clarify their meaning or scope. Putting aside whether they are affirmatively authorized by the HSC, the Declarations on Crimea should be

presumptively permissible. This is because reservations are generally permissible unless an exception under the VCLT is triggered, so interpretative declarations should also be presumptively permissible.

The Declarations on Crimea are best understood as interpretative declarations for the following reasons.

First, the question of territorial application is not part of the functioning ratione materiae of the HSC. The subject matter of the Convention is service. HSC Article 29 allows member states to determine the territorial application of the Convention, suggesting that the Convention does not require its application to be extended to the entire territory of a member state.

Second, a declaration purporting to exclude or extend the application of a treaty as a whole to all or part of its territories without modifying its legal effect is not a reservation. The contents of the respective Declaration on Crimea made by Russia and Ukraine show that both countries seek to clarify the application of the HSC as a whole to the Occupied Areas.

Third, none of the declarants explicitly indicates that the Declaration on Crimea is a condition for them to ratify or continue as a member of the HSC. Consequently, they are not conditional interpretative declarations that should be treated as reservations.

Finally, a reservation would modify the legal effect of the HSC, applying between the reserving state and another state if the latter has not objected within twelve months after it was notified, which is not the case here. It is impossible for other state to tacitly accept the conflicting declarations.

Therefore, because the Declaration on Crimea made by Ukraine, its supporting states, and Russia, respectively, are interpretative declarations rather than reservations, they do not exclude or modify the legal effect of the HSC. Neither do they alter the treaty relations between the declarants and the majority of HSC member states that have not expressed a view on these Declarations.

The Namibia Exception

The VCLT does not provide a timeline for a state to accept another state's interpretative declaration. However, private parties in international litigation require certainty about service of process in Ukraine under the HSC. The courts

of HSC member states should not recognize only the Ukrainian Central Authority for service in Occupied Areas just because their governments are politically aligned with Ukraine. Instead, for the reasons set out below, the Namibia Exception protecting the rights and interests of people in a territory controlled by non-recognized government should be extended to service conducted by the Russian Central Authority and local authorities in the Occupied Areas under the HSC.

The "Namibia Exception" comes from the Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution case. That decision provides that the non-recognition of a state's administration of a territory due to its violation of international law should not result in depriving the people of that territory of any advantages derived from international cooperation. The courts of HSC member states should recognize not only the Ukrainian Central Authority for service in the Occupied Areas, but also service conducted by the Russian Central Authority and local authorities in the Occupied Areas under the HSC.

First, service under the HSC concerns private rights. Service of process aims to ensure that a defendant is duly informed of a foreign litigation against it. When the defendant resides in the Occupied Areas, service conducted by the Russian Central Authority under the HSC should belong to the realm of the de facto government. Recognizing the conduct of de facto government does not necessarily lead to de jure recognition (e.g., Luther v. Sagor [1921] 3 KB 532 (Can.)).

Second, service through the Russian Central Authority is the only realistic way to serve a defendant in the Occupied Areas who has no agents in a foreign forum, given that Ukraine made a reservation on service by postal channels under HSC Article 10. Ukraine might be advised to withdraw this reservation during war time.

Third, non-recognition of service conducted by the Russian Central Authority in the Occupied Areas would lead to unjust consequences for Ukrainian people in the Occupied Areas who have to comply with the Russian legal order.

A concern is that applying the Namibia Exception to service of process conducted by the Russian Central Authority may harm Ukrainians in the Occupied Area

when they are likely not in a position to defend themselves in a court in the United States, China or other foreign countries. The concern is not a good reason to reject the Namibia Exception because it can be addressed by the foreign courts using legal aids, remote hearing, forum non convenience, temporary stay, or other case management methods.

Recommendations for HSC Member States

The HSC Special Commission is a group of experts designated by member states to discuss issues with the practical operation of the Convention. It has issued recommendations for HSC member states regarding the meaning of "civil or commercial matters", service by electronic means, and other matters. It should publish a recommendation to assist member states in adopting a consistent response to the conflicting Declarations on Crimea.

The legal nature of Ukraine's and Russia's Declarations on Crimea are different. Ukraine's Declaration on Crimea is an amplifying interpretative declaration, which intends to address new events not covered by a treaty. Russia's invasion created such an event: the Ukrainian Central Authority can no longer effectuate service in the Occupied Areas. In contrast, Russia's Declaration on Crimea is an interpretation contra legem. This is because Russia's occupation of Ukraine violated international law on the prohibition of the unlawful use of force, which is contrary to the principle of good faith. Although states are free to decide whether to acknowledge Russia's interpretation contra legem, the International Court of Justice has rendered a decision condemning Russia's invasion of Ukraine. Although it does not bind all states, it shows that the international community considers the invasion as a violation of international law. The Special Commission should take this opportunity to assist member states in adopting consistent approaches to apply the HSC to serve defendants in Ukrainian territory occupied by Russia.

See Full text here

GEDIP's Reccommendation on the Proposal for a Directive on Corporate Sustainability Due Diligence

Written by Hans van Loon, former Secretary General of the HCCH and Honorary Professor of the University of Edinburgh Law School

As reported in this blog before (see CSDD and PIL: Some Remarks on the Directive Proposal), the European Commission on 23 February 2022 adopted a proposal for a Directive on corporate sustainability due diligence.

Earlier, at its annual meeting in 2021, the European Group for Private International Law (GEDIP) had adopted a Recommendation to the EU Commission concerning the PIL aspects of corporate due diligence and corporate accountability, and this blog reported on this Recommendation too, see GEDIP Recommendation to the European Commission on the private international law aspects of the future EU instrument on corporate due diligence and accountability.

While some of the recommendations proposed by GEDIP last year are reflected in the Draft Directive, the Draft fails to follow up on several crucial recommendations concerning judicial jurisdiction and applicable law. This will detract from its effectiveness.

In particular:

- The Proposal, while extending to third country companies lacks a provision on judicial jurisdiction in respect of such companies;
- The Proposal, while extending a company's liability to the activities of its subsidiaries and to value chain co-operations carried out by entities "with which the company has a well-established business relationship", lacks a provision dealing with the limitation of the provision on co-defendants in the Brussels I bis Regulation (Article 8(1)) to those domiciled in the EU;
- The Proposal lacks a provision allowing a victim of a violation of human

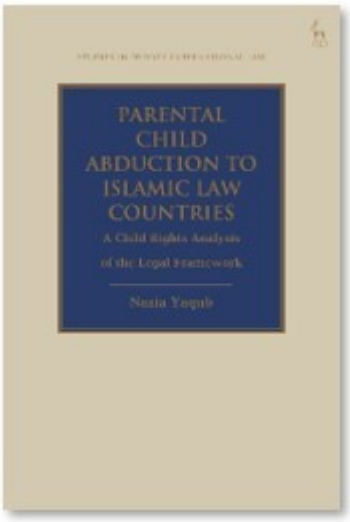
rights to also invoke, similar to a victim of environmental damage under Article 7 of Regulation 864/2007 (Rome II), the law of the country in which the event giving rise to the damage occurred, and does not prevent companies from invoking a less strict rule of safety or conduct within the meaning of Article 17 of Rome II;

- The provision of the Proposal on the mandatory nature of the provisions of national law transposing the Directive (Article 22 (5)) is insufficient because (i) the words "in cases where the law applicable to actions for damages to this effect is not that of a Member State" are redundant and (ii) allthese provisions of national law transposing the Directive should apply irrespective of the law applicable to companies, contractual obligations or non-contractual obligations.

GEDIP therefore, on the occasion of its meeting in Oslo, 9-11 September 2022 adopted a Recommendation concerning the Proposal for a directive of 23 February 2022 on Corporate Sustainability Due Diligence, following up on its Recommendation to the Commission of 8 October 2021. The text of the Recommendation can be found here.

[This post is cross-posted at the EAPIL blog]

Parental Child Abduction to Islamic Countries by Nazia Yaqub



This book by *Nazia Yaqub* is an addition to the Hart series, in which several books on international child abduction have been published. The author investigates Islamic law, discussing where relevant the history and the different schools, and the specific legal rules of the selected States that have not acceded to the Hague Child Abduction Convention (1980), as well as Morocco, which has acceded. She also examines whether the ratification of the Hague Child Abduction Convention by more States with Islamic legal systems would offer an improvement to the protection of children's rights. The author analyses the child's right to have their best interests taken as a primary consideration, the child's right to be given the opportunity to be heard, and the child's right to non-discrimination. The analysis places not only Islamic law under scrutiny but also the Hague Convention.

Besides using policy documents and international literature, she has also interviewed persons who were involved in child abductions.

The difficult discussion about the best interests of the child, including the issues that arise in this regard under the Hague Child Abduction Convention and the law in the Islamic States is presented in a nuanced way, keeping to the central theme of children's rights. The detailed and rigorous analysis explores Islamic law, utilises case studies garnered from the empirical research and the Hague Convention. The book also sets out various models of child participation and shows how this right is only partially respected in Islamic law States and by the Hague Convention. It is argued that a child-centred approach requires separate representation for children.

The book also discusses non-discrimination, considering not only children's rights but also other human rights instruments, especially concerning the rights of

women (and girls). The author does not only consider discrimination to which children are subjected but also discrimination of mothers that directly influence children. This leads to an interesting and important analysis regarding the cultural nature of children's rights and the reality of the relation nature of children's rights with their mother/primary carer. Considerable thought is given to the ground for refusal in Article 20 of the Hague Child Abduction Convention. What also emerges through the analysis is the changing gendered dimension of parental abductions and the problematic issue of abduction by primary carers.

Nazia Yaqub *is a lecturer in law at Leeds Beckett University, UK.*

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The Greek Supreme Court on the date of service of documents abroad: The end of a contemporary Greek tragedy

The Greek Supreme Court of Cassation (Areios Pagos) rendered a very important decision at the end of June, which is giving the final blow to a period of procedural insanity. A provision in force since the 1st of January 2016 is forcing claimants to serve the document instituting proceedings abroad within 60 days following filing. Failure to abide by the rule results to the deletion of the claim as non-existent. As a consequence, the claimant is obliged to file a new claim, most

probably being confronted with the same problem.

[Supreme Court of Cassation (Areios Pagos) nr. 1182/2022, available **here.**

Facts and judgment in first instance

The dispute concerns two actions filed on 31.01.2017 and 31.03.2017 against defendants living in Monaco and Cyprus respectively. The claimant served copies of the action by using the main channels provided for by the 1965 Hague Service Convention (for Monaco; entry into force: 1-XI-2007) and the Service of Process Regulation nr. 1393/2007. Service to the defendant in Monaco was effected on 08.05.2017, whereas service to the defendant in Cyprus on 19.06.2017. Both actions were dismissed as non-existent (a verbatim translation would be: non-filed) due to the belated service to the countries of destination [Thessaloniki Court of 1st Instance 2013/2019, unreported]. The claimant filed a second (final) appeal, challenging the judgment's findings.

The overall picture before the decision of the Supreme Court

So far, the vast majority of Greek courts was following the rule in exactly the same fashion as the first instance court. Article 215 Para 2 of the Greek Code of Civil Procedure reads as follows: *… the claim is served to the defendant within a term of 30 days after filing; if the defendant resides abroad or is of unknown residence, the claim is served within 60 days after filing*. The rule applies exclusively to ordinary proceedings, i.e., mostly civil and commercial matters, with the exception of some pertinent disputes, which are regulated under a special Book of the Code of Civil Procedure [Book 4, Articles 591-465: Special Proceedings]

A countless number of motions were dismissed as a result of this rule since 2016. Courts were refusing claims even when the defendants were appearing before the court, submitting pleadings and raising their defense. Only claims addressed to defendants living in countries which are neither EU member states nor Hague Convention signatories, are 'saved'. Article 134, in connection with Article 136 Greek of Code of Civil Procedure has established half a century ago the notorious

system of fictitious service, akin to the French system of remis au parquet (Article 683 Code de Procédure Civile). This system still applies for countries such as the United Arab Emirates or Madagascar, however not for Cyprus or Monaco, due to the prevalence of the EU Regulation and the Hague Convention, anchored in the Constitution (Article 28). Hence, the non- production of a service certificate is no obstacle for the former, whereas any service certificate dated after the 60 days term is not considered good service for the latter, leading to the dismissal of the claim.

The decision of the Supreme Court

Against this background, the Supreme Court was called to address the matter for the first time after nearly six years since the introduction of the new provision.

The Supreme Court began with an extensive analysis of the law in force (Article 134 Code of Civil Procedure; EU Service Regulation; Hague Service Convention, and Article 215 Para 2 Code of Civil Procedure). It then pointed out the repercussions of the latter rule in the system of cross-border service, and interpreted the provision in a fashion persistently suggested by legal scholarship: The 60 days term should be related with the notification of the claim to the Transmitting Authority, i.e., the competent Prosecutor's office pursuant to Article 134 Code of Civil Procedure and the declarations of the Hellenic Republic in regards to the EU Service Regulation and the Hague Service Convention.

The date of actual service should be disconnected from the system initiated by Article 215 Para 2 Code of Civil Procedure. The Supreme Court provided an abundance of arguments towards this direction, which may be summarized as follows: Violation of Article 9 Para 2 Service Regulation 1393/2007 (meanwhile Article 13 Para 2 Service Regulation 2020/1784); contradiction with the spirit of Article 15 of the Hague Service Convention, despite the lack of a provision similar to the one featured in the EU Regulation; violation of the right to judicial protection of the claimant, enshrined in the Greek Constitution under Article 20; violation of Article 6 (1) of the European Convention of Human Rights, because it burdens the claimant with the completion of a task which goes beyond her/his sphere of influence.

For all reasons above, the Supreme Court overturned the findings of the

Thessaloniki 1st Instance court, and considered that service to the defendants in Monaco and Cyprus was good and in line with the pertinent provisions aforementioned.

The takeaways and the return to normality

The judgment of the Supreme Court has been expected with much anticipation. It comes to the rescue of the claimants, who were unjustly burdened with an obligation which was and still is not under their controlling powers. The judgment returns us back to the days before the infamous provision of Article 215 Para 2, where the domestic procedural system was impeccably finetuned with the EU Regulation and the Hague Service Convention.

Second Issue of Journal of Private International Law for 2022

The second issue of *Journal of Private International Law* for 2022 was released today. It features the following interesting articles:

T Kruger *et. al.,* Current-day international child abduction: does Brussels IIb live up to the challenges?

Regulation 2019/1111 tries to tackle the new challenges arising from societal changes and legal developments in international child abduction. The result is a sophisticated set of rules centred on the child and aimed at enhancing their protection. The Regulation provides for the hearing of the child and for speedy and efficient proceedings. In it the EU acknowledges its role in the protection of human and children's rights and sets goals towards de-escalating family conflicts. The new EU child abduction regime is at the same time more flexible than its predecessor allowing consideration of the circumstances characterising each single case in the different stages of the child abduction procedure

O Vanin, Assisted suicide from the standpoint of EU private international law

The article discusses the conflict-of-laws issues raised by such compensatory claims as may be brought against health professionals and medical facilities involved in end-of-life procedures. The issues are addressed from the standpoint of EU private international law. The paper highlights the lack of international legal instruments on assisted-suicide procedures. It is argued that the European Convention on Human Rights requires that States provide a clear legal framework concerning those procedures. The author contends that the said obligation has an impact on the interpretation of the relevant conflict-of-laws provisions of the EU.

S Avraham-Giller, The court's discretionary power to enforce valid jurisdiction clauses: time for a change?

The paper challenges the well-rooted principle in the Anglo-American legal tradition that courts have discretion whether they should enforce a valid jurisdiction clause. The paper highlights the ambiguity and uncertainty that accompany this discretionary power, which raises a serious analytical problem. The paper then analyses two factors that shaped this discretionary power – jurisdictional theories and the general principle of party autonomy in contracts. Based on the analysis, the paper argues that the time has come to end the courts' discretionary power with respect to the limited context of the enforcement of valid jurisdiction clauses. The proposal relies on a number of foundations: contractual considerations that relate to autonomy and efficiency; jurisdictional and procedural considerations, including the consent of a party to the jurisdiction of the court by general appearance; the increasing power of parties to re-order procedure; the more appropriate expression of the forum's public interests and institutional considerations through overriding mandatory provisions; and finally the legal position regarding arbitration agreements and the willingness of a common law legal system such as the United Kingdom to accede to the Hague Convention on Choice of Court Agreements.

TT Nguyen, Transnational corporations and environmental pollution in Vietnam – realising the potential of private international law in environmental protection

Many transnational corporations have been operating in Vietnam, contributing to economic and social development in this country. However, these actors have caused a number of high-profile environmental incidents in Vietnam through the activities of their local subsidiaries, injuring the local community and destroying the natural ecosystem. This paper discloses the causes of corporate environmental irresponsibility in Vietnam. Additionally, this paper argues that Vietnam's private international law fails to combat pollution in this country. To promote environmental sustainability, Vietnam should improve ex-ante regulations to prevent and tackle ecological degradation effectively. Additionally, this paper suggests that Vietnam should remedy its national private international law rules to facilitate transnational liability litigation as an ex-post measure to address the harmful conducts against the natural ecosystem of international business.

D Levina, Jurisdiction at the place of performance of a contract revisited: a case for the theory of characteristic performance in EU civil procedure

The article revisits jurisdiction in the courts for the place of performance of a contract under Article 7(1) of the Brussels Ia Regulation. It proposes a new framework for understanding jurisdiction in contractual matters by offering a comparative and historical analysis of both the place of performance as a ground for jurisdiction and its conceptual counterpart, the place of performance as a connecting factor in conflict of laws. The analysis reveals that jurisdiction in the courts for the place of performance is largely a repetition of the same problematic patterns previously associated with the place of performance as a connecting factor. The article asserts that the persisting problems with Article 7(1) of the Brussels Ia Regulation are due to the inadequacy of the place of performance as a ground for jurisdiction and advocates for the transition to the theory of characteristic performance in EU civil procedure.

T Bachmeier and M Freytag, Discretional elements in the Brussels Ia Regulation
Following continental European traditions, the Brussels Ia Regulation forms a rigid regime of mandatory heads of jurisdiction, generally not providing jurisdictional discretion. Nonetheless, to some limited extent, the Brussels regime includes discretional elements, in particular when it comes to lis pendens (see Articles 30, 33 and 34 of Brussels Ia). Reconsidering the strong scepticism towards forum non conveniens stipulated by the CJEU in its Owusu case, the

fundamental question arises whether a substantial form of discretion concerning jurisdictional competence might be (in)compatible with the core principles of the Brussels regime.

P Mostowik and E Figura-Góralczyk, *Ordre public* and non-enforcement of judgments in intra-EU civil matters: remarks on some recent Polish-German cases
The article discusses the enforcement of foreign judgments within the European Union and the public policy (ordre public) exception. It is mainly focused on some recent judgments of Polish and German courts. On 22nd December 2016 and 23rd of March 2021 rulings in cases of infringement of personality rights were issued by the Court of Appeal in Cracow (ordering an apology and correction). The enforcement of the former ruling was dismissed by the German Supreme Court (Bundesgerichtshof, BGH) (IX ZB 10/18) on 19th July 2018. The non-enforcement was justified by invoking German ordre public and "freedom of opinion" as a constitutional right stipulated in Article 5 of the German Constitution (Grundgesetz). A reference to the CJEU ruling of 17 June 2021 is also presented.

After presenting the issue of ordre public in the context of enforcement of foreign judgments within the EU, the authors evaluate as questionable the argumentation of the BGH in its 2018 judgment. The Polish ruling ordering the defendant to correct and apologise for the false statement was included by the BGH in the category of "opinion" (Meinung) protected by the German Constitution. Enforcement of the judgment of the Polish court in Germany was held to be contrary to this German constitutional right and the enforceability of the Polish judgment was denied as being manifestly contrary to German public policy.

The authors support the functioning of the ordre public clause in intra-EU relations. It is justified inter alia by the large differences in EU legal systems and future possible changes. However, the common standards of the ECHR should be particularly taken into consideration when applying the public policy clause, because they co-shape the EU legal systems.