Tort Litigation against Transnational Companies in England

This post is an abridged adaptation of my recent article, *Private International Law and Substantive Liability Issues in Tort Litigation against Multinational Companies in the English Courts: Recent UK Supreme Court Decisions and Post-Brexit Implications* in the *Journal of Private International Law*. The article can be accessed at no cost by anyone, anywhere on the journal's website. The wider post-Brexit implications for private international law in England are considered at length in my recent OUP monograph, *Brexit and the Future of Private International Law in English Courts*.

According to a foundational precept of company law, companies have separate legal personality and limited liability. Lord Templeman referred to the principle in *Salomon v Salomon & co Ltd* [1896] UKHL 1, as the 'unyielding rock' on which company law is constructed. (See Lord Templeman, 'Forty Years On' (1990) 11 *Company Lawyer* 10) The distinct legal personality and limited liability of each entity within a corporate group is also recognized. In *Adams v Cape Industries plc* [1990] Ch 433 the court rejected the single economic unit argument made in the *DHN Ltd v Tower Hamlets LBC* [1976] 1 WLR 852 decision, and also the approach that the court will pierce the corporate veil if it is necessary to achieve justice. In taking the same approach as the one taken in *Salomon v Salomon & co Ltd* [1896] UKHL 1, the court powerfully reasserted the application of limited liability and the separate legal entity doctrine in regard to corporate groups, leaving hundreds of current and future victims uncompensated, whilst assisting those who seek to minimize their losses and liabilities through manipulation of the corporate form, particularly in relation to groups of companies. A parent company is normally not liable for the legal infractions and unpaid debts of its subsidiaries. However, the direct imposition of duty of care on parent companies for torts committed by foreign subsidiaries has emerged as an exception to the bedrock company law principles of separate legal personality and limited liability. In *Chandler v Cape plc* [2012] EWCA Civ 525, [69], Arden LJ '……emphatically reject[ed] any suggestion that this court [was] in any way concerned with what is usually referred to as piercing the corporate veil.'

Arguments drawn from private international law's largely untapped global governance function inform the analysis in the article and the methodological pluralism manifested in the jurisdictional and choice of law solutions proposed. It is through the postulation of territoriality as a governing principle that private international law has been complicit in thwarting the ascendance of transnational corporate social responsibility. (See H Muir-Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347, 386) Private international law has kept corporate liability within the limits of local law through *forum non conveniens* and the *lex loci delicti commissi*. It is only recently that a challenge of territoriality has emerged in connection with corporate social responsibility.

Extraterritoriality is employed in this context as a method of framing a private international law problem rather than as an expression of outer limits. Therefore, there is nothing pejorative about regulating companies at the place of their seat, and there is no reason why the state where a corporate group is based should not (and indeed should not be obliged to) sanction that group's international industrial misconduct on the same terms as similar domestic misconduct, in tort claims for harm suffered by third parties or stakeholders. (Muir-Watt (ibid) 386)

The idea of methodological pluralism, driven by the demands of global governance, can result in jurisdictional and choice of law rules that adapt to the needs of disadvantaged litigants from developing countries, and hold multinational companies to account. The tort-based parental duty of care approach has been utilized by English courts for holding a parent company accountable for the actions of its subsidiary. The limited liability and separate legal entity principles, as applied to corporate groups, are circumvented by the imposition of direct tortious liability on the parent company.

The UK Supreme Court's landmark decisions in *Vedanta v Lungowe* [2019] UKSC 20 and *Okpabi v Shell* [2021] UKSC 3 have granted jurisdiction and allowed such claims to proceed on the merits in English courts. The decisions facilitate victims of corporate human rights and environmental abuse by providing clarity on significant issues. Parent companies may assume a duty of care for the actions of their subsidiaries by issuing group-wide policies. Formal control is not necessarily the determining factor for liability, and any entity that is involved with the management of a particular function risks being held responsible for any damage flowing from the performance of that function. When evaluating whether a

claimant can access substantial justice in another forum, English courts may consider the claimants lack of financial and litigation strength. The UK Supreme Court decisions are in alignment with the ethos of the UN Guiding Principles on Business and Human Rights ("Ruggie Principles"), particularly the pillar focusing on greater access by victims to an effective remedy. (The United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011))

Post-Brexit, the broader availability of the doctrine of *forum non conveniens* may help the English courts to ward off jurisdictional challenges against parent companies for damage caused by their subsidiaries at the outset. However, in exceptional cases, the claimant's lack of financial and litigation strength in the natural forum may be considered under the interests of justice limb of *The Spiliada* test, which motivate an English court not to stay proceedings. (*Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460) It has been argued that if the Australian "clearly inappropriate forum" test for *forum non conveniens* is adopted, (*Voth v Manildra Flour Mills Pty Ltd* (1991) 65 A.L.J.R. 83 (HC); *Regie National des Usines Renault SA v Zhang* [2002] HCA 10 (HC)) it is unlikely that a foreign claimant seeking compensation from a parent company in an English court would see the case dismissed on *forum non conveniens* grounds. As a result, it is more likely that a disadvantaged foreign litigant will succeed in overcoming the jurisdictional hurdle when suing the parent company. From a comparative law standpoint, the adoption of the Australian common law variant of *forum non conveniens* will effectively synthesize *The Spiliada's* wide-ranging evaluative enquiry with the certainty and efficiency inherent in the mandatory rules of direct jurisdiction of the Brussels-Lugano regime.

In relation to choice of law for cross-border torts, the UK has wisely decided to adopt the Rome II Regulation as retained EU law. (See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019) Article 4(1) of the Rome II Regulation will continue to lead to the application of the law of the country where the damage occurred. Post-Brexit, it remains to be seen whether the English courts would be more willing to displace the applicable law under Article 4(1) by applying Article 4(3) of Rome II more flexibly. The territorial limitations of the *lex loci damni* might be overcome by applying the principle of closest connection to select a more favorable law. The result-selectivism inherent in the idea of a favorable law is reminiscent of the regulatory approach of governmental interest analysis. (See SC

Symeonides, *Codifying Choice of Law Around the World* (OUP 2014) 287) Article 7 of the Rome II Regulation provides the claimant in an environmental damage claim a choice of applicable law either pursuant to Article 4(1) or the law of the country in which the event giving rise to the damage occurred. Alternatively, any regulatory provisions in English law may be classified as overriding mandatory provisions of the law of the forum under Article 16 of the Rome II Regulation. The Rome II Regulation, under the guise of retained EU law, constitutes a unique category of law that is neither EU law nor English law *per se*. The interpretation of retained EU law will give rise to its own set of challenges. Ultimately, fidelity to EU law will have to be balanced with the ability of UK appellate courts to depart from retained EU law and develop their own jurisprudence.

Any future amendments to EU private international law will not affect the course of international civil litigation before English courts. (Cf A Dickinson, 'Walking Solo – A New Path for the Conflict of Laws in England' Conflictoflaws.net, suggests engagement with the EU's reviews of the Rome I and II Regulations will provide a useful trigger for the UK to re-assess its own choice of law rules with a view to making appropriate changes) However, recent developments in the UK and Europe are a testament to the realization that the avenue for access to justice for aggrieved litigants may lead to parent companies that are now subject to greater accountability and due diligence.

CSDD and PIL: Some Remarks on the Directive Proposal

by Rui Dias

On 23 February 2022, the European Commission published its proposal of a Directive on Corporate Sustainability Due Diligence (CSDD) in respect to human rights and the environment. For those interested, there are many contributions available online, namely in the Oxford Business Law Blog, which dedicates a

whole series to it (here). As to the private international law aspects, apart from earlier contributions on the previous European Parliament resolution of March 2021 (info and other links here), some first thoughts have been shared e.g. by Geert von Calster and Marion Ho-Dac.

Building on that, here are some more brief remarks for further thought:

Article 2 defines the personal scope of application. European companies are covered by Article 2(1), as the ones «formed in accordance with the legislation of a Member-State», whereas those of a «third country» are covered by Article 2(2). While other options could have been taken, this criterium of incorporation is not unknown in the context of the freedom of establishment of companies, as we can see in Article 54 TFEU (basis for EU legal action is here Article 50(1) and (2)(g), along with Article 114 TFEU).

There are general, non PIL-specific inconsistencies in the adopted criteria, in light of the *relative*, not *absolute*thresholds of the Directive, which as currently drafted aims at also covering medium-sized enterprises only if more than half of the turnover is generated in one of the high-impact sectors. As recently pointed out by Hübner/Habrich/Weller, an EU company with e.g. 41M EUR turnover, 21M of which in a high impact sector such as e.g. textiles is covered; whilst a 140M one, having «only» 69M in high-impact sectors, is not covered, even though it is more than three times bigger, including in that specific sector.

Article 2(4) deserves some further attention, by stating:

«As regards the companies referred to in paragraph 1, the Member State competent to regulate matters covered in this Directive shall be the Member State in which the company has its registered office.»

So, the adopted connecting factor as to EU companies is the *registered office*. This is in line with many proposals of choice-of-law uniformization for companies in the EU. But apparently there is no answer to the question of which national law of a Member-State applies to third-country companies covered by Article 2(2): let us not forget that it is a proposed Directive, to be transposed through national laws. And as it stands, the Directive may open room for differing civil liability

national regimes: for example, in an often-criticised option, Recital 58 expressly excludes the burden of proof (as to the company's action) from the material scope of the Directive proposal.

Registered office is of course unfit for third country-incorporated companies, but Articles 16 and 17 make reference to other connecting factors. In particular, Article 17 deals with the public enforcement side of the Directive, mandating the designation of authorities to supervise compliance with the due diligence obligations, and it uses the location of a branch as the primarily relevant connection. It then opens other options also fit as subsidiary connections: «If the company does not have a branch in any Member State, or has branches located in different Member States, the competent supervisory authority shall be the supervisory authority of the Member State *in which the company generated most of its net turnover in the Union*» in the previous year. Proximity is further guaranteed as follows: «Companies referred to in Article 2(2) may, on the basis of a change in circumstances leading to it generating most of its turnover in the Union in a different Member State, make a duly reasoned request to change the supervisory authority that is competent to regulate matters covered in this Directive in respect of that company».

Making a parallel to Article 17 could be a legislative option, so that, in respect to third-country companies, *applicable law* and *powers for public enforcement* would coincide. It could also be extended to *jurisdiction*, if an intention arises to act in that front: currently, the general jurisdiction rule of Brussels Ia (Article 4) is a basis for the amenability to suit of companies *domiciled* (i.e., with statutory seat, central administration, or principal place of business – Article 63) in the EU. In order to sue third country-domiciled companies, national rules on jurisdiction have to be invoked, whereby many Member-States include some form of *forum necessitatis* in their national civil procedure laws (for an overview, see here).The Directive proposal includes no rules on jurisdiction: it follows the option also taken by the EP resolution, unlike suggested in the previous JURI Committee draft report, which had proposed new rules, through amendments to Brusselas Ia, on connected claims (in a new Art. 8, Nr. 5) and on *forum necessitatis* (through a new Art. 26a), along with a new rule on applicable law to be included in Rome II (Art. 6a) – a pathway which had also been recommended by GEDIP in October 2021 (here).

As to the applicable law in general, in the absence of a specific choice-of-law rule, Article 22(5) states:

«Member States shall ensure that the liability provided for in provisions of national law transposing this Article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.»

So, literally, it is «the liability provided for» in national transposing laws, and not the provisions of national law themselves, that are to be «of overriding mandatory application». This may be poor drafting, but there is apparently no material consequence arising out of it.

Also, the final part («in cases where the law applicable to claims to that effect is not the law of a Member State») does not appear to make much sense. It is at best redundant, as Geert van Calster points out, suggesting it to be struck out of the proposal. Instead of that text, it could be useful to add «irrespective of the law otherwise applicable under the relevant choice-of-law rules», miming what Rome I and II Regulations state in Articles 9 and 16.

A further question raised by this drafting option of avoiding intervention in Rome II or other choice-of-law regulations, instead transforming the new law into a big set of *lois de police*, is that it apparently does not leave room for the application of foreign, non-EU law more favourable to the victims. If a more classical conflicts approach would have been followed, for example mirrored in Article 7 of Rome II, the *favor laesi* approach could be extended to the whole scope of application of the Directive, so that the national law of the Member-State where the event giving rise to damage occurred could be invoked under general rules (Article 4(1) of Rome II), but a more favourable *lex locus damni* would still remain accessible. Instead, by labelling national transposing laws as overridingly mandatory, that option seems to disappear, in a way that appears paradoxical vis-à-vis other rules of the Directive proposal that safeguard more favourable, existing solutions, such as in Article 1(2) and Article 22(4). If there is a political option of not allowing the application of third-country, more favourable law, that should probably be made clear.

Call for Papers: German Conference for Young Scholars in Private International Law 2023

The **fourth German Conference for Young Scholars in Private International Law**, held on site at the Sigmund Freud University in Vienna on **23 and 24 February 2023** (we have posted about the event previously here), has issued a call for papers. Proposals are invited for conference presentations (20 min.; to be published) and short presentations (5-10 min.; non-published). Furthermore, the organizers proudly announced that the keynote lecture will be delivered by **Professor Horatia Muir Watt** (Sciences Po).

The organizers describe the purpose of these proposals and the goals of the conference as follows (emphasis added):

"The theme of the conference will be

Deference to the foreign – empty phrase or guiding principle of private international law?

As part of any legal system, rules of private international law are determined by the principles of the respective national jurisdiction, but they also open up the national system to foreign rules. This creates the challenge of reconciling foreign law and foreign values with the national legal system. At the conference, we will seek to explore whether and to what extent deference to the foreign is a pervasive principle in private international law. In doing so, we will look at the methods of private international law as well as interdisciplinary approaches to the justification and implementation of said principle.

The theme invites discussion of **fundamental questions**:

- What is the history of deference to the foreign in private international law?
- Does European Union law lead to a new understanding of the foreign and, in particular, to a stronger delineation from third countries?
- To what extent does mutual trust function as a basis of deference to the foreign in the pro- cess of internationalisation and Europeanisation?
- What is the relationship between deference to the foreign and escape clauses, overriding mandatory provisions, preliminary questions, local data theory *(Datumtheorie)*, renvoi, and public policy clauses?
- What is the role of fundamental and human rights in the context of deference to the foreign?
- Are there tendencies in private international law, specific to or across different areas of law, towards a decline of the principle of deference to the foreign?
- Which levels of acceptance, integration, or assimilation are recognised in private interna- tional law?
- What is the importance of deference to the foreign in the European area of justice?

Contributions can also focus on the **relationship between deference to the foreign and the methods of private international law**:

- What is the role of methods and private international law concepts in implementing the principle of deference to the foreign (e.g. substitution or recognition)?
- Which insights does legal pluralism offer in relation to deference to the foreign?
- What are the insights of interdisciplinary approaches to the justification and methodological implementation of the principle of deference to the foreign?
- Are there parallels between the conflict of laws approach to deference to the foreign and approaches in other sciences or arts?

Various examples can serve as illustrations of whether and how private international law imple- ments the principles of deference to the foreign in specific areas, for instance:

- The influence of EU freedom of movement on the recognition of legal situations or a per- son's status, such as same-sex marriages or parenthood
- The recognition of foreign citizenship of multinationals
- The importance of deference to the foreign in the regulation of international supply chains
- Deference to the foreign in economic law within the EU, g. by means of the European Passport in banking and capital market law

We are looking forward to contributions which take up the theme of deference to the foreign. The examples given above are mere suggestions and should not limit the scope of suitable topics. We welcome contributions from **all areas of private international law** and **international civil procedure** as well as from **international arbitration** and **uniform law**.

Formalities

Speakers are invited to give a **presentation** of approximately 20 minutes (in either German or English). The written contributions will later be published in a **conference volume** with Mohr Siebeck.

The conference programme will also include smaller discussion rounds in which **short presentations** of approximately 5-10 minutes can be given. These contributions will **not be published**. We are also looking forward to abstracts for such short presentations.

The deadline for the submission of proposals is **12 September 2022**. Please send your proposal to *ipr@sfu.ac.at*. The proposal should contain:

- an **anonymised abstract** (not exceeding 800 words) in pdf format, and

- a short **cover letter**, preferably in the e-mail, containing the speaker's name, address, and institutional affiliation, as well as
- the indication whether the abstract proposes a **conference presentation** (20 minutes)

and/or a short presentation in the smaller discussion rounds.

Please do not hesitate to contact us, if you have any further questions (ipr@sfu.ac.at).

We are very much looking forward to your proposals.

Kind regards:
Andreas Engel | Florian Heindler | Katharina Kaesling | Ben Köhler
Martina Melcher | Bettina Rentsch | Susanna Roßbach | Johannes Ungerer

More information is available at https://tinyurl.com/YoungPIL."

Survey on the application of Brussels Ia

Milieu Consulting is conducting a **study on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation)** on behalf of the European Commission (DG JUST).

As part of this study, Milieu developed a technical survey that targets **legal practitioners** (i.e. judges; lawyers; notaries; bailiffs), **academia** (i.e., scholars in private international law and relevant sectors, such as consumer protection or

business and human rights), and **national authorities** (i.e., ministries of justice, ministries in charge with consumer protection, ministries of economy) in EU Member States.

Readers are invited to participate (by 6 June) at https://ec.europa.eu/eusurvey/runner/BrusselsIatechnicalsurvey

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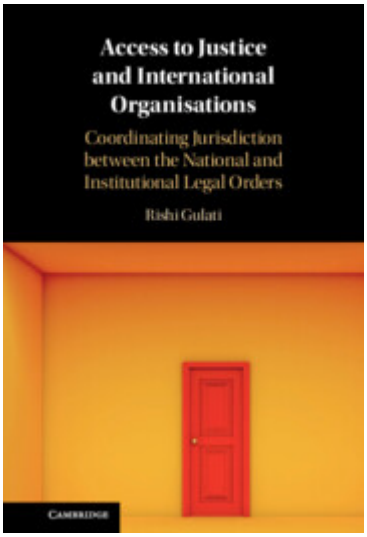
Access to Justice and International Organizations by Rishi Gulati

'Access to Justice and International Organisations: Coordinating Jurisdiction between the National and Institutional Legal Orders' by Rishi Gulati has just been published by Cambridge University Press. The author has kindly provided us with the follow summary:



> *This book addresses some of the most difficult legal challenges that international institutions confront. As is all too evident, we live in a denial of justice age when it comes to the individual pursuit of justice against international organisations (IOs). Victims of institutional conduct are often denied reasonable means of dispute settlement at the international level. Victims are also generally unable to seek justice at the national level due to IO immunities, which aim to secure institutional independence. Access to justice and IO independence are equally important values and satisfactorily realising them both has so far proven elusive. In this book, Rishi Gulati argues that*

private international law techniques can help allocate regulatory authority between the national and institutional orders in a nuanced manner by maintaining IO independence without sacrificing access to justice. As private international law rules can be adjusted nationally without the need for international action, the solution proposed can be readily implemented, thereby resolving a conundrum that public international law has not been able to address for decades.

The book is divided into five chapters. Chapter 1 provides the basis of, and nature of an IO's access to justice obligation. It demonstrates that under international law, IOs must provide 'appropriate' modes of dispute resolution to the victims of institutional conduct. Relying on international human rights law in general, and the right to a fair trial in particular, chapter 2 goes on to specify the criteria for assessing the 'appropriateness' of dispute resolution mechanisms that should be created at IOs. The discussion does not stop here. Chapter 3 goes on to rigorously apply those criteria to assess dispute resolution mechanisms at IOs, where such mechanisms even exist. It is concluded that where such mechanisms exist, they tend to be deficient. This is the case with several international administrative tribunals created to resolve employment disputes. Alarmingly, in many instances, dispute resolution mechanisms are completely absent, meaning that a denial of justice is a foregone conclusion.

It is thus hardly surprising that more and more, national courts are asked by victims to adjudicate claims against IOs. However, adjudication at the national level is complicated due to the existence of an IO's jurisdictional immunities before national courts. Chapter 4 considers the nature of institutional immunities, and shows that the application of IO immunities is a conundrum that is yet to be resolved. This chapter considers the latest jurisprudence on the topic. It provides a succinct analysis of all aspects of the law on IO immunities, showing that the manner in which the law is currently applied results in further denials of justice. It is pointed out that no satisfactory solution has been implemented to realise access to justice for victims and an IO's functional independence simultaneously. Chapter 5 resolves this long-standing international legal challenge. It shows how private international law techniques can be used to realize access to justice in claims against IOs but without compromising on IO independence. This book shows how the various branches of public international law, including international human rights and

international organisations law, do and should interact with private international law with a view to solve a particularly difficult regulatory challenge. The work is not only intended to be academically rigorous, but it seeks to provide real life answers to hard cases.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2022: 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/)

H.-P Mansel/K. Thorn/R. Wagner: **European Conflict of Law 2021: The Challenge of Digital Transformation**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January 2021 until December 2021. It gives information on newly adopted legal instruments and summarizes current projects that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the CJEU as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

H. Wais: **The Applicable Law in Cases of Collective Redress**

Both the European and the German legislator have recently passed legislation aimed at establishing access to collective redress for consumers. As European conflict of law rules do not contain any specific rules on the applicable law in cases of collective redress, the existing rules should be applied in a way that enables consumers to effectively pursue collective actions. To that aim, Art. 4 (3) 1st S. Rome II-Regulation provides for the possibility to rely on the place of the event that has given rise to the damages as a connecting-factor for collective redress cases in which mass damages have occurred in different states. As a consequence of its application, all claims are governed by the same applicable law, thereby fostering the effectiveness of collective redress.

M. Lehmann: **Locating Financial Loss and Collective Actions in Case of Defective Investor Information: The CJEU's Judgment in VEB v BP**

For the first time, the CJEU has ruled in VEB v BP on the court competent for deciding liability suits regarding misinformation on the secondary securities market. The judgment is also of utmost importance for the jurisdiction over collective actions. This contribution analyses the decision, puts it into larger context, and discusses its repercussions for future cases.

M. Pika: **Letters of Comfort and Alternative Obligations under the Brussels I and Rome I Regulations**

In its judgment of 25 November 2020 (7 U 147/19), the Higher Regional Court of Brandenburg ruled on special jurisdiction regarding letters of comfort under Article 7 No. 1 Brussels I Regulation. While the court left the decision between lit. a and lit. b of that Article open, it ruled that either way, the courts at the domicile of the creditor of the letter of comfort (in this case: the subsidiary) have no special jurisdiction. This article supports the court's final conclusion. In addition, it assesses that Article 7 No. 1 lit. b Brussels I Regulation on services may apply to letters of comforts given the CJEU's decision in Kareda (C-249/16).

B. Hess/A.J. Wille: **Russian default interests before the District Court of Frankfort**

In its judgment of February 2021, the Landgericht Frankfurt a.M., applying Russian law, awarded a three-month interest rate of 37% to a defendant domiciled in Germany. When examining public policy, the regional court assumed that there was little domestic connection (Inlandsbezug), as the case was about the repayment of a loan issued in Moscow for an investment in Russia. However, the authors point out that the debtor's registered office in Hesse established a clear domestic connection. In addition, the case law of German courts interpreting public policy under Article 6 EGBGB should not be directly applied to the interpretation of Articles 9 and 21 of the Rome I Regulation.

D. Looschelders: **Implied choice of law under the EU Succession Regulation – not just a transitional problem in connection with joint wills**

The decision of the German Federal Supreme Court focuses on the question, under which conditions an implied choice of law may be assumed within the framework of the EU Succession Regulation (Regulation No 650/2012). In this particular case, an implied choice of German law as the law governing the binding effect of the joint will drawn up by the German testator and her predeceased Austrian husband was affirmed by reference to recital 39(2) of the EU Succession Regulation. Actually, the joint will of the spouses stipulated the binding effect as intended by German law. As the spouses had drawn up their will before the Regulation became applicable, the question of an implied choice of law arose in the context of transition. However, the decision of the German Federal Supreme Court will gain fundamental importance regarding future cases of implied choices of law for all types of dispositions of property upon death, too. Nevertheless, since the solution of the interpretation problem is not clear and unambiguous, a submission to the ECJ would have been necessary.

M. Reimann: **Human Rights Litigation Beyond the Alien Tort Claims Act: The Crucial Role of the Act of State Doctrine**

The Kashef case currently before the federal courts in New York shows that human rights litigation against corporate defendants in the United States is alive and well. Even after the Supreme Court's dismantling of the Alien Tort Claims Act jurisdiction remains possible, though everything depends on the circumstances. And even after the Supreme Court's virtual elimination of federal common law causes of action claims under state or foreign law remain possible, though they may entail complex choice-of-law issues.

Yet, so far, the most momentous decision in this litigation is the Court of Appeals' rejection of the defendants' potentially most powerful argument: the Court denied them shelter under the act of state doctrine. It did so most importantly because the alleged human rights abuses amounted to violations of jus cogens.

Coming from one of the most influential courts in the United States, the Second Circuit's Kashef decision adds significant weight to the jus cogens argument against the act of state doctrine. As long as the Supreme Court remains silent on the issue, Kashef will stand as a prominent reference point for future cases. This is bad news for corporate defendants, good news for plaintiffs, and excellent news for the enforcement of human rights through civil litigation.

J. Samtleben: **Paraguay: Choice of Law in international contracts**

To date, Paraguay is the only country to have implemented into its national law the Hague Principles on Choice of Law in International Commercial Contracts. Law No. 5393 of 2015, which closely follows the Hague model, owes its creation primarily to the fact that the Paraguayan delegate to the Hague was actively involved in drafting the Principles. Unlike the Principles, however, Law No. 5393 also regulates the law governing the contract in the absence of a choice of law, following the 1994 Inter-American Convention on the Law Applicable to International Contracts of Mexico. Contrary to the traditional rejection of party autonomy in Latin America, several Latin American countries have recently permitted choice of law in their international contract law. Paraguay has joined this trend with its new law, but it continues to maintain in procedural law that the jurisdiction of Paraguayan courts cannot be waived by party agreement.

Determining the Appropriate Forum by the Applicable Law by Prof. Richard Garnett (1 April Online)

The Chinese University of Hong Kong' Cross-Border Legal issues Dialogue Seminar Series presents this online seminar by Professor Richard Garnett on 1st April 2022 12.30pm -2pm (Hong Kong time; GMT +8 hours).

The conflict of laws has traditionally drawn a sharp distinction between jurisdiction and applicable law. The conventional approach suggests that a court only reaches the question of the law to be applied to the merits after the tribunal has determined that it has the power to adjudicate the action. Common law systems have however long recognised that a court has a discretion to accept or decline jurisdiction (determine the appropriate forum) and that a relevant factor in this discretion is the applicable law.

The purpose of this presentation is to examine the current status of the applicable law in jurisdiction and forum disputes, noting the trend in countries such as Australia to give the factor substantial weight and significance.

About the speaker:

Richard Garnett is Professor of Private International Law at the University of Melbourne, Australia and a consultant in international disputes at Corrs Chambers Westgarth. Richard regularly advises on cross-border litigation and arbitration matters and has appeared as advocate (barrister) before several tribunals including the High Court of Australia. Richard has written extensively in the fields of conflict of laws, foreign state immunity and international arbitration, with his work cited by leading tribunals around the world, including the International Court of Justice, the European Court of Human Rights, the English Court of Appeal, United States federal district courts, the Singapore Court of

Appeal and Australian, Israeli and New Zealand courts. Richard has also served as expert member of the Australian Government delegation to the Hague Conference on Private International Law, to negotiate the 2005 Hague Convention on Choice of Court Agreements and the 2019 Convention on Recognition and Enforcement of Foreign Judgments.

Please register by 5 pm, 31 March 2022 (Hong Kong time; GMT +8 hours) to attend the seminar.

New York's Appellate Division Holds that Chinese Judgment Should Not Be Denied Enforcement on Systemic Due Process Grounds

Written by William S. Dodge (Professor, University of California, Davis, School of Law)

Should courts in the United States refuse to recognize and enforcement Chinese court judgments on the ground that China does not provide impartial tribunals or procedures compatible with the requirements of due process of law? Last April, a New York trial court said yes in *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*, relying on State Department Country Reports as conclusive evidence that Chinese courts lacked judicial independence and suffered from corruption. As Professor Wenliang Zhang and I pointed out on this blog, the implications of this decision were broad. Under the trial court's reasoning, no Chinese judgment would ever be entitled to recognition in New York or any of the other U.S. states that have adopted Uniform Acts governing

foreign judgments. Moreover, U.S. judgments would become unenforceable in China because China enforces foreign judgments based on reciprocity. But on March 10, just three weeks after oral argument, New York's Appellate Division answered that question no, reversing the trial court's decision.

As background, it is important to note that the recognition and enforcement of foreign country judgments in the United States is generally governed by state law. Twenty-eight states and the District of Columbia have enacted the 2005 Uniform Foreign-Country Money Judgments Recognition Act. In nine additional states, its predecessor, the 1962 Uniform Foreign Money-Judgments Recognition Act, remains in effect. At the time of the trial court's decision, the 1962 Uniform Act governed in New York, but it was superseded by the 2005 Uniform Act on June 11, 2021. Both Uniform Acts provide for the nonrecognition of a foreign judgment if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law."

This systemic lack of due process ground for nonrecognition comes from the U.S. Supreme Court's 1895 decision in *Hilton v. Guyot*, issued at a time when lawyers routinely distinguished between civilized and uncivilized nations. It was incorporated in the 1962 Uniform Act at the height of the Cold War, and included in the 2005 Uniform Act without discussion, apparently to maintain continuity with the 1962 Act. Despite its codification for nearly sixty years, fewer than five cases have refused recognition on this ground. The leading case is *Bridgeway Corp. v. Citibank*, involving a Liberian judgment issued during its civil war, when the judicial system had almost completely broken down.

Shanghai Yongrun involved a business dispute between two Chinese parties, which was submitted to a court in Beijing under a choice-of-forum clause in the parties' agreement. The defendant was represented by counsel, presented its case, and appealed unsuccessfully. Nevertheless, the New York trial court held that the Chinese judgment was not enforceable because China lacks impartial tribunals and procedures compatible with due process. The court relied "conclusively" on China Country Reports prepared by the State Department identifying problems with judicial independence and corruption in China.

In a brief order, the Appellate Division reversed. It concluded that the trial court should not have dismissed the action based on the Country Reports. These

Reports did not constitute "documentary evidence" under New York's Civil Practice Law and Rules. But more fundamentally, reliance on the Country Reports was inappropriate because they "primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters" and "do not utterly refute plaintiff's allegation that the civil law system governing this breach of contract business dispute was fair."

On this, the Appellate Division was clearly correct. The State Department prepares Country Reports to administer provisions of the Foreign Assistance Act denying assistance to countries that consistently engage in gross violations of human rights, not to evaluate judicial systems for other purposes. See 22 U.S.C. §§ 2151n & 2304. The Reports themselves warn that they "they do not state or reach legal conclusions with respect to domestic or international law." Moreover, if these Reports were used to determine the enforceability of foreign judgments, China would not be the only country affected. An amicus brief that I wrote and fourteen other professors of transnational litigation joined noted that State Department Country Reports expressed similar concerns about judicial independence, corruption, or both with respect to 141 other countries, including Argentina, Brazil, Italy, Japan, Mexico, South Korea, and Spain.

The Appellate Division concluded that "[t]he allegations that defendants had an opportunity to be heard, were represented by counsel, and had a right to appeal in the underlying proceeding in the People's Republic of China (PRC) sufficiently pleaded that the basic requisites of due process were met." By focusing on the facts of the specific case, the Appellate Division appears to have taken a case-by-case, rather than a systemic, approach to due process. Such a case-by-case approach is expressly permitted under the 2005 Uniform Act, which adds as a new ground for nonrecognition that "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." Such a case-specific approach avoids the overinclusiveness of denying recognition on systemic grounds when there are no defects in the judgment before the court.

The Appellate Division's decision in *Shanghai Youngrun* continues the growing trend that Professor Zhang and I have noted of U.S. decisions recognizing and enforcing Chinese judgments. Just two months before this decision, in *Yancheng Shanda Yuanfeng Equity Investment Partnership v. Wan*, a U.S. district court in Illinois recognized and enforced a Chinese judgment in another business dispute.

The court expressly rejected the New York trial court's holding in *Shanghai Yongrun*, noting "the multiple federal cases … where American courts enforced Chinese court judgments and/or acknowledged the adequacy of due process in the Chinese judicial system." One hopes that this trend will continue.

Online Conference: Cross Border Portability of Refugees' Personal and Family Status – A Plea for Better Interplay Between Private International Law and Migration Law

You are kindly invited to the online conference on "Cross-border portability of refugees' personal and family status – a plea for better interplay between private international law and migration law" by Prof. Dr. Jinske Verhellen on March 16, 2022, Wednesday between 12.30-13.30 (GMT+3). The conference is organized by Bilkent University as a part of the Talks on Migration Series within the Jean Monnet Module on European and International Migration Law. It will be held via zoom, free of charge. Please contact us (Jmmigration@bilkent.edu.tr) for participation.

Biography:
Jinske Verhellen is a Professor of Private International Law and Head of the Institute for Private International Law at the Faculty of Law and Criminology of Ghent University (Belgium). She is a member of the Ghent University Interfaculty Research Group CESSMIR (Centre for the Social Study of Migration and Refugees) and of the Ghent University Human Rights Research Network. She has

published on various aspects of private international law, international family law, migration law, and nationality law.

Abstract:

The lecture will address several legal problems encountered by refugees with regard to their personal and family status acquired in one country and transferred to another country (such as the absence of documentary evidence, the issue of limping legal relationships). It will focus on the interactions between international refugee law (relating to the rights and obligations of States regarding the protection of refugees) and private international law (dealing with private relationships in a cross-border context). These two sets of rules still operate in very different and even separated universes. The following issues will be covered: specific private international law hurdles that refugees have to take, the concept of personal status (age, parental status, marital status) in international refugee law, and the role of private international law conventions in the international protection of refugees.

Jean Monnet Module Series of

Webinars on Multilevel, Multiparty and Multisector Cross-Border Litigation in Europe March – May 2022, 2nd Edition

From March 15 to May 19, 2022, as part of the three-year European project called Jean Monnet Module on Multilevel, Multiparty and Multisector Cross-Border Litigation in Europe, will take place the 2nd edition of the cycle of online seminars on transnational civil and commercial litigation in Europe. Among the novelties of this edition, the participation of professionals from the European Court of Human Rights, the European Central Bank, the World Intellectual Property Organization and the Sabin Center for Climate Change Law, Columbia Law School, New York. The initiative has received the patronage of the Chamber of International Lawyers, the Italian National Council of Notaries, the European Union of Judicial Officers, the Transnational Dispute Management network and the DEuTraDiS Research Center.

Deadline for registration: March 15, 2022.

Here the registration form and the official flyer.