3rd IBA Litigation Committee Conference on Private International Law

On 24 and 25 October, the 3rd IBA Litigation Committee Conference on Private International Law will take place in Palazzo Turati, Milan, Italy. It will deal with Brexit, International Commercial Courts and Sanctions. More information are available on the IBA conference website.

The programme reads as follows:

Welcome remarks

- Angelo Anglani *NCTM, Rome; Co-Chair, IBA Litigation Committee*
- Vinicio Nardo *Chairman, Consiglio dell'Ordine degli Avvocati di Milano, Milan*

Keynote address
International dispute resolution in turbulent times – is there a role for private international law?

Professor Fausto Pocar *Università degli Studi di Milano, Milan*

Session One

Brexit – the impact on jurisdiction and private international law

With just one week until the deadline, we will check the status of the most controversial event in the history of the European Union. The session will focus on the impact of Brexit on jurisdiction and private international law and look at the possible effects on solutions and perspectives in international commercial disputes.

Session Chair
Carlo Portatadino *Weigmann, Milan; Secretary, IBA Litigation Committee*

Speakers

- Professor Stefania Bariatti *Università degli Studi di Milano, Milan*
- Alexander Layton QC *Twenty Essex, London*

Session Two

The mushrooming of International Commercial Courts throughout Europe – reasons and perspectives

In 2016, on the occasion of the 2nd IBA Litigation Committee Conference on Private International Law, we explored the new phenomenon of the International Commercial Courts and discussed whether the 2005 Hague Convention on Choice of Court Agreements could enhance their role in international commercial dispute resolution. Since that time, and also in light of Brexit we have been assessing the mushrooming of International Commercial Courts throughout Europe. This session will examine the experiences of several jurisdictions and focus on the future perspective on the phenomenon in Europe.

Session Chair
Jacques Bouyssou *Alerion, Paris; Treasurer, IBA Litigation Committee*

Speakers

- Martin Bernet *Bernet Arbitration / Dispute Management, Zurich*
- Hakim Boularbah *Loyens & Loeff, Brussels*
- Jean Messinesi *Honorary President, Tribunal de Commerce de Paris, Paris*
- Duco Oranje *President, NCC Court of Appeal, Amsterdam*
- Professor Giesela Rühl *Friedrich-Schiller-Universität Jena, Jena*
- Mathias Wittinghofer *Herbert Smith Freehills, Frankfurt*

Session Three

Sanctions – politics, procedures and private international law

This session will consider the increasing impact of sanctions on politics and economics. The panellists will present the workings of the European and US sanctions systems and illustrate the resulting consequences on international trade and cross-border disputes. The session will also focus on how clients approach and deal with the matter.

Session Chair

Christopher Tahbaz *Debevoise & Plimpton, New York*

Speakers

- Shannon Lazzarini *Group Deputy General Counsel & Head of Group Litigation, Unicredit, Milan*
- Richard Newcomb *DLA Piper, Washington DC*
- Michael O'Kane *Peters & Peters, London*
- Marco Piredda *Senior Vice-President, International Affairs, ENI, Rome*
- Professor Hans van Houtte *KU Leuven, Leuven, Belgium*

Closing remarks

Tom Price *Gowling WLG, Birmingham; Co-Chair, IBA Litigation Committee*

Max Planck Institute Luxembourg: Upcoming Conference on International Commercial Courts and the Coordination of Cross-Border Proceedings

The progressive global establishment of international commercial courts has marked a defining moment in the growth of the legal services sector in international commercial dispute resolution. By offering litigants the option of having their disputes adjudicated by experienced and specialized judges, often

from both civil law and common law traditions, these courts have resulted in the jurisdictions that embraced them become a choice destination for foreign trade and investment dispute resolution. In this regard, see in particular this publication by Prof. Dr. Marta Requejo Isidro.

Contextualizing the establishment of international commercial courts – duly taking into account, in this framework, the role of Luxemburg as a dispute resolution hub – and investigating the impact of current national and global events on international commercial litigation, with a particular focus on the consequences potentially arising from Brexit, the Max Planck Institute Luxembourg for Procedural Law will host, on 14 October 2019, a conference on *The New Litigation Landscape: International Commercial Courts and the Coordination of Cross-Border Proceedings*.

The Conference will focus, in particular, on the following four major topics:

- The establishment of commercial courts around the globe specializing in cross-border disputes of high value;
- The new framework of global traditional cooperation established by the Hague Conference on Private International Law;
- The impact of Brexit on commercial cross-border litigation in Europe;
- The role of Luxembourg in the new litigation landscape.

More information on this event is available here.

Arbitration and Protest in Hong Kong

Authors: Jie (Jeanne) Huang and Winston Ma

Following the promulgation of the judicial interpretation by the Supreme People's Court ("SPC") on 26 September 2019, *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by*

the Courts of the Mainland and of the Hong Kong Special Administrative Region ("Arrangement") signed by Mainland China and Hong Kong on 2 April 2019 came into effect in Mainland China from 1 October 2019. This Arrangement provides mutual recognition and enforcement of interim measures between Hong Kong and Mainland China. It has generated broad coverage.[1] This post tries to add to the discussion by providing the first case decided under the Arrangement on 8 October 2019, and more broadly, the reflections on the continuing protests in Hong Kong and arbitration under "One Country, Two Systems'.

1. **Mutual recognition and enforcement of interim measures between Hong Kong and Mainland China**

Hong Kong *Arbitration Ordinance* has long been allowing parties to arbitral proceedings in any place to apply to the courts of Hong Kong for interim measures. Interim measures include injunction and other measures for the purpose of maintaining or restoring the status quo pending determination of the dispute; taking action that would prevent, or refraining from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings; preserving assets; or preserving evidence that may be relevant and material to the resolution of the dispute. However, in contrast to the liberal Hong Kong counterpart, people's courts in Mainland China are conservative. Chinese law limits interim measures to property preservation, evidence preservation and conduct preservation. More important, Mainland courts generally only enforce interim measures in support of arbitration administered by domestic or foreign-related arbitration institutions of the People's Republic of China (PRC). This is because Article 272 of *Chinese Civil Procedure Law* provides that where a party applies for a preservation measure, the foreign-related arbitral institution of PRC shall submit the party's application to the intermediate people's court at the place of domicile of the respondent or at the place where the respondent's property is located. Article 28 of Chinese Arbitration Law states that if one of the parties applies for property preservation, the arbitration commission shall submit to a people's court the application of the party in accordance with the relevant provisions of the *Civil Procedure Law*. Article 10 of *Chinese Arbitration Law* restricts arbitration institutions to those registered with the judicial administrative department of the relevant province, autonomous region or municipalities directly under the Central Government.[2]

There are few exceptions to the Mainland conservative approach. First, since

2017, *ad hoc* arbitration has been permitted in China's pilot free trade zones.[3] Therefore, Mainland courts are likely to issue interim measures in support of such *ad hoc* arbitration. Second, a party to a maritime arbitration seated outside of Mainland China can apply for property preservation to the Chinese maritime court of the place where the property is located.[4] However, the property to be preserved was limited to vessels, cargos carried by a vessel, and fuel and supplies of a vessel.[5]

The third exception is created by the recent Arrangement. Arbitral proceedings commenced both before and after 1 October 2019 are potentially caught by the Arrangement, under which property, evidence and conduct preservation orders could be granted by the courts in Mainland China to assist the Hong Kong arbitration.

The scope of the Arrangement confines to arbitral proceedings seated in Hong Kong and administered by institutions or permanent offices meeting the criteria under Article 2 of the Arrangement. Six qualified institutions have been listed on 26 September 2019, being Hong Kong International Arbitration Centre ("HKIAC"), ICC Hong Kong, CIETAC Hong Kong, Hong Kong Maritime Arbitration Group, eBRAM International Online Dispute Resolution Centre and South China International Arbitration Centre (Hong Kong). Future applications will also be considered and the list may be subject to alteration.

Articles 3-5 of the Arrangement set out the procedural requirements for applying to the courts in Mainland China for interim measures. Since time is of essence, application can be made by a party to the arbitration directly to the relevant Mainland Chinese court before an arbitration is accepted by an arbitration institution.[6] If the arbitration has been accepted, the application should be submitted by the arbitration institution or representative office.[7]

Article 8 of the Arrangement further reflects the importance of timeliness by demanding the requested court to make a decision after examining the application "expeditiously". Nevertheless, the Arrangement is silent on the specific time limit applicable to the court's examination process. Pursuant to Article 93 of the *Chinese Civil Procedure Law*, the court is to make an order within 48 hours after receiving an application for property preservation prior to the commencement of arbitration; Furthermore, Article 4 of the *Provisions of the SPC on Several Issues concerning the Handling of Property Preservation Cases by*

the People's Courts demands the court to make an order within 5 days after the security is provided, and within 48 hours in cases of emergency.

The first case decided under the Arrangement demonstrates how "expeditiously" a people's court can make a decision. In the morning of 8 October 2019, the Shanghai Maritime Court received a property preservation application submitted by HKIAC. In this case, the arbitration applicant is a maritime company located in Hong Kong and the respondent is a company in Shanghai. They concluded a voyage charter party which stated that the applicant should provide a vessel to transport coal owned by the respondent from Indonesia to Shanghai. However, the respondent rescinded the charter party and the applicant claimed damages. Based on the charter party, they started an *ad hoc* arbitration and ultimately settled the case. According to the settlement agreement, the respondent should pay the applicant USD 180,000. However, the respondent did not make the payment as promised. Consequently, the respondent brought an arbitration at the HKIAC according to the arbitration clause in the settlement agreement. Invoking the Arrangement, through the HKIAC, the applicant applied to the Shanghai Maritime People's Court to seize and freeze the respondent's bank account and other assets. The Shanghai Court formed a collegial bench and issued the property preservation measure on the same date according to the Arrangement and *Chinese Civil Procedure Law*.

2. **Protests in Hong Kong**

As the first and so far the only jurisdiction with the special Arrangement through which parties to arbitration can directly apply to Mainland Chinese courts for interim measures, Hong Kong has been conferred an irreplaceable advantage while jockeying to be the most preferred arbitration seat for cases related to Chinese parties. Arbitration that is *ad hoc* or seated outside Hong Kong cannot enjoy the benefits of the Arrangement. Parties to an arbitration seated in Hong Kong are encouraged to select one of the listed institutions to take advantage of the Arrangement. Meanwhile, the Arrangement also attracts prominent international arbitration institutions to establish permanent offices in Hong Kong.

One may argue that the Arrangement is the necessary consequence of the "One

Country, Two Systems" principle and the increasingly close judicial assistance between Mainland China and Hong Kong. Especially in the context of China's national strategy to develop the Greater Bay Area, the notion of "one country, two systems, three jurisdictions" makes Hong Kong the only common-law jurisdiction to deal with China-related disputes.[8]

However, to what extent may the recent protests negatively impact on the arbitration industry in Hong Kong? Notably, London and Paris have also experienced legal uncertainly (Brexit in the UK) and protests (Yellow vests movement in France) in recent years. Nevertheless, the Hong Kong situation is more severe than its western counterparts in two aspects. First, currently, the protestors have impacted on the traffic inside Hong Kong. Last month, they even blocked the Hong Kong airport. It is not surprising that parties may want to move the hearings outside of Hong Kong just for the convenience of traffic, if the arbitration is still seated in Hong Kong. Second, the continuation of protests and the uncertainty of the Chinese government's counter-measures may threaten parties' confidence in choosing Hong Kong as the seat for arbitration. The Arrangement brings an irreplaceable advantage to Hong Kong to arbitrate cases related with Chinese parties. However, this significance should not be over-assessed. This is because by choosing a broad discovery and evidence rule, parties and tribunals have various means to deal with the situation where a party wants to hide a key evidence. Arbitration awards can be recognized and enforced in all jurisdictions ratified the New York Convention. Therefore, the value of the Arrangement is mainly for cases where the losing party only has assets in Mainland China for enforcement.

The flourish of arbitration in Hong Kong is closely related to Mainland China. However, Hong Kong, if losing its social stability due to the protests, will lose its arbitration business gradually. In the Chinese Records of the Grand Historian (Shiji by Han dynasty official Sima Qian), there is a famous idiom called "cheng ye xiao he bai ye xiao he".[9] It means the key to one's success is also one's undoing. It is the hope that Mainland China and Hong Kong can find a solution quickly so that the arbitration industry in Hong Kong can continue to be prosperous. This is more important than the implementation of the Arrangement.

Authors:

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Winston Ma is an LLB student at University of Sydney Law School, Australia

[1] E.g. http://arbitrationblog.kluwerarbitration.com/2019/07/24/arrangement-concerning-mutual-assistance-in-court-ordered-interim-measures-interpretations-from-a-mainland-china-perspective-part-i/?_ga=2.249539525.310814453.1570572449-887368654.1570572449.

[2] There are different opinions regarding whether Article 10 and 28 of Chinese Arbitration Law restrict the interim measures to arbitration administered by Chinese arbitration institutions. See the judgment of [2016] E 72 Cai Bao No. 427 issued by Wuhan Maritime Court. In this case, the Ocean Eleven Shipping Corporation initiated an arbitration in HKIAC against Lao Kai Yuan Mining Sole Co., Ltd. The applicant was a company in South Korea and the respondent a Chinese company. The parties had disputes over a voyage charter party. In order to ensure the enforcement of the coming award in Mainland China, the applicant applied to Wuhan Maritime Court to freeze USD 300,000 in the respondent's bank account or seizure, impound or freeze other equivalent assets. The People's Insurance Company provided equivalent insurance for the applicant's property preservation application. Wuhan Maritime Court permitted the property preservation application according to Article 28 of Chinese Arbitration Law and Article 103 of the Civil Procedure Law. However, this case is inconsistent with majority cases where Chinese courts rejected to issue interim measures for arbitration administered by ad hoc or arbitration institutions registered outside of Mainland China.

[3] SPC Opinions on Providing Judicial Safeguard for the Building of Pilot Free Trade Zones, Fa Fa [2016] No. 34, http://www.court.gov.cn/fabu-xiangqing-34502.html.

[4] Art. 21(2) of the Interpretation of the SPC on the Application of the Special Maritime Procedure Law of the PRC, Fa Shi [2003] No. 3.

[5] Ibid., art. 18.

[6] Art. 3 of the Arrangement.

[7] Ibid., art. 2.

[8] China has made the economic integration between the Grater Bay Area a national strategy. The Grater Bay Area includes Hong Kong, Macao and Guangdong Province https://www.bayarea.gov.hk/sc/outline/plan.html.

[9] https://en.wiktionary.org/wiki/%E6%88%90%E4%B9%9F%E8%90%A7%E4%BD%95%EF%BC%8C%E8%B4%A5%E4%B9%9F%E8%90%A7%E4%BD%95.

Cross-border enforcement of claims in the EU – don’t forget to register for the IC²BE final conference 21 and 22 November in Antwerp

As my fellow editor Thalia Kruger has already signaled earlier, the **final conference** for the EU-funded IC^{2}BE project on the cross-border enforcement of claims in the EU will take place in Antwerp (Belgium) on 21 and 22 November 2019. The conference will try to assess how the European framework of cross-border enforcement can be made more coherent and effective. In particular, the conference will discuss the application of the Regulations on the **European Enforcement Order**, the **European Payment Order**, the **European Small Claims Procedure** and the **Account Preservation Order** in various Member States as well as by the Court of Justice of the EU. This event brings together high-level practitioners from the European Commission, the CJEU as well as from

Member State courts and authorities with distinguished scholars from across the EU.

The **case law database** of the IC^{2}BE project is available here.

The current **programme** looks as follows:

Day 1, 21 November 2019

- 12.30-13.45 Registration and light lunch
- 13.45 Welcome (Johan Meeusen, University of Antwerp)

Section 1: Survey and Evaluation (Chair Stefania Bariatti, University of Milan)

- 14.00-14.30 IC2BE: Research Methodology, Key Findings and Best Practices (Jan von Hein, University of Freiburg)
- 14.30-15.00 CJEU case law on Cross-Border Enforcement (Veerle Van Den Eeckhout, Max Planck Institute Luxembourg)
- 15.00-15.30 Discussion
- 15.30-16.00 Coffee Break
- 16.00-17.30 Country reports Belgium (Fieke van Overbeeke, University of Antwerp), The Netherlands (Alina Ontanu, Erasmus University Rotterdam), Poland (Agnieszka Guzewicz and Agnieszka Lewestam-Rodziewicz, University of Wroc?aw), Spain (Samia Benaissa Pedriza, University of Complutense, Madrid)
- 17.30-18.00 Discussion

Day 2, 22 November 2019

Section 1 (continued) (Chair Agnieszka Frackowiak-Adamska, University of Wroc?aw)

- 9.00-10.00 Country Reports Germany (Tilman Imm, University of Freiburg), France and Luxembourg (Carlos Santaló Goris, Max Planck Institute Luxembourg), Italy (Valeria Giugliano, University of Milan)
- 10.00-10.15 Discussion
- 10.15-10.45 Coffee Break

Section 2: Perspectives (Chair Francesca Villata, University of Milan)

- 10.45-11.15 Towards a more coherent EU framework for cross-border enforcement (Burkhard Hess, Max Planck Institute, Luxembourg)
- 11.15-11.35 Making cross-border enforcement more effective for creditors (Gilles Cuniberti, University of Luxembourg)
- 11.35-11.55 Ensuring an adequate protection of debtors, in particular consumers, in cross-border enforcement (Fernando Gascón Inchausti, Complutense University, Madrid)
- 11.55-12.15 Third-state relations and cross-border enforcement after "Brexit" (Paul Beaumont, University of Stirling)
- 12.15-12-30 Comment by CJEU judge Camelia Toader
- 12.30-13.00 Discussion
- 13.00-14.00 Lunch
- 14.00-14.20 Technological progress and alternatives to the cross-border enforcement of small claims (Giesela Rühl, Friedrich-Schiller University Jena)
- 14.20-14.40 Improving access to information about cross-border enforcement (Xandra Kramer, Erasmus University Rotterdam)
- 14.40-15.00 Discussion

Section 3: Stakeholders' views (Chair Carmen Otero, Complutense University, Madrid)

- 15.00-16.00 Stakeholder panel discussion
    - Ilse Couwenberg of the Belgian Court of Cassation,
    - Dr. Bartosz Sujecki, lawyer, Utrecht
    - Dr. Katarzyna Guzenda, German-Polish Center for Consumer Information, Brandenburg (Germany)
    - Patrick Gielen, huissier (Belgium)
- 16.00-16.15 Break

Section 4: Policy (Chair Marta Requejo, CJEU, Référendaire Cabinet de l'Avocat Général M. Campos Sánchez-Bordona)

- 30-17.30 Policy makers
    - Dr. Andreas Stein, European Commission, DG Justice, Head of Unit
    - Paulien van der Grinten, Ministry of Justice of The Netherlands
    - European Parliament, Legal Affairs Committee (tbc)

- 17.30-18.00 Discussion and closing remarks (Chair Thalia Kruger, University of Antwerp)

See here for further details on registration, which is free (only the dinner is to be paid by attendees). Antwerp is close to Brussels and Amsterdam and can easily be reached by train from either of those cities.

National seminars will also take place in the participating countries. See here for the dates.

Rivista di diritto internazionale privato e processuale (RDIPP) No 2/2019: Abstracts

The second issue of 2019 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released and it features:

Adrian Briggs, Professor at Oxford University**, Brexit and Private International Law: An English Perspective** (in English)

The effect of Brexit on private international law in England will depend on the precise terms on which the separation is made. However, if no comprehensive withdrawal agreement is concluded and adopted, the result will be that private international law in the United Kingdom will revert to its original common law structure. This will make the law and practice of dispute resolution more effective in some respects, and more problematic in others. While it is regrettable that so much time and labour has to be spent on planning for a future which the politicians are incapable of defining, it does allow the distinctions between common law legal thinking, and European legal principles, in the field of private international law to be compared and understood more clearly than they have been for many years.

Burkhard Hess, Director of the Max Planck Institute Luxembourg for Procedural

Law, **Protecting Privacy by Cross-Border Injunction** (in English)

Injunctive relief is of paramount importance in the protection of privacy, especially in the context of the Internet. In the cross-border setting, injunctions entail specific problems: on the one hand, jurisdiction may lie with many courts – often worldwide due to the ubiquity of the Internet. On the other hand, injunctions operate with an extraterritorial effect, ordering or prohibiting conduct outside of the State where the court issuing the order is located. Cross-border injunctive relief does not only raise issues of jurisdiction and territorial scope: in fact, additional problems relate to its enforcement. Furthermore, the need may arise to adapt the injunction to an equivalent measure in the State of enforcement. This paper addresses the problems of cross-border injunctive relief from the perspectives of jurisdiction and territorial scope, as well as of recognition and enforcement. While actions for damages and for injunctive relief are regulated in similar ways, the Author of this paper demonstrates that the specific circumstances and necessities that characterize injunctive relief warrant additional and specific solutions.

Chiara E. Tuo, Associate Professor at the University of Genoa, **The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks** (in English)

This article aims at addressing some questions regarding the impact of Brexit on recognition and enforcement of judgments in civil and commercial matters with a view to investigating the rules applicable, first, in the case that Brexit occurs without any withdrawal agreement (“hard Brexit”) and, second, regardless of whether such an agreement will be actually entered into, in the context of a future and renewed judicial cooperation relationship between the EU and UK. To this end and in relation to the first part of the analysis, the relevant passages of both the EU Commission’s guidelines and UK statutory instruments dealing with the issue of recognition and enforcement of judgments are taken into exam and compared the ones with the others in order to assess the different extent to which they provide for the continuous post-Brexit application of the existing EU instruments. On the other hand, and in relation to the second part of the article, the options currently available for a future EU-UK cooperation are considered with the purpose of shedding some light on their respective main advantages and disadvantages.

In addition to the foregoing, the following comments are featured:

Cinzia Peraro, Post-Doctoral Fellow at the University of Verona, **L'istituto della *kafala* quale presupposto per il ricongiungimento familiar con il cittadino europeo: la sentenza della Corte di giustizia nel caso *S.M. c. Entry Clearance Officer*** (*Kafala* as a Prerequisite for Family Reunification with a European Citizen: The Judgment of the Court of Justice in *S.M. v. Entry Clearance Officer*; in Italian)

The family reunification of a European citizen and a foreign minor entrusted to him by kafala has been addressed by a recent judgment of the Grand Chamber of the Court of Justice on the notion of direct descendant pursuant to Directive 2004/38 concerning the free movement of Union citizens and their family members. The Italian judges have also dealt with the issue of the recognition of this institute, widespread in most Islamic countries, in a variety of situations, where the best interests of the child and the European courts' decisions have been considered. Domestic jurisprudence appears to be in line with the interpretation given by the judges of Luxembourg, which nevertheless leaves the question of the unequal treatment between Italian citizens and third country nationals unresolved.

Mariangela La Manna, Post-Doctoral Fellow at the Universit*à* Cattolica del Sacro Cuore, **The ECHR Grand Chamber's Judgment in the *Naït-Liman* Case: An Unnecessary Clarification of the Reach of *Forum Necessitatis* Juridsdiction?** (in English)

The Grand Chamber judgment in the *Naït-Liman v. Switzerland* case is certainly a much anticipated one. Its outcome had, however, long been foreshadowed by commentators and practitioners alike. The decision confirmed the 2016 Chamber's judgment by holding that the Swiss Federal Tribunal's decline of jurisdiction in a civil case involving reparation for torture committed outside the territory of Switzerland by foreign authorities against a foreign national did not amount to a violation of Article 6(1) ECHR. However, the Court's reasoning in the case under review is susceptible of being criticized in more than one respect. The compatibility of the conduct of the Swiss judiciary with Article 6(1) ECHR is dubious to say the least, even more so since the Federal Tribunal's restrictive interpretation of the requirements for the application of forum necessitatis jurisdiction, and especially of the "sufficient connection" requirement, managed

to produce a fully-fledged denial of justice. Should such a trend gain consistency, the effectiveness of the right of access to a court may be put at risk.

Establishing Foreign Law: In the Search for Appropriate Cooperation Instruments – International Symposium, 28th November 2019, Cour de cassation, Paris

Many thanks to Gustavo Cerqueira for this post:

The Société de législation comparée and the International Commission on Civil Status organize in partnership with the universities of Strasbourg and Reims an international symposium dedicated to the establishment of the content of foreign law and the need to consider appropriate instruments for cooperation.
The importance of the subject is major. On the one hand, the place nowadays given to foreign law in the settlement of disputes is growing. On the other hand, the intensified role of the various legal professions in the application of foreign law is indisputable. While judges and civil registrars were more traditionally exposed to such an office, nowadays it is notaries and lawyers in their dual role of advising and drafting documents who are called upon to take into account or implement foreign law.
In this context, while European Union law is often at the root of the involvement of these various actors in the application of foreign law, another, more recent phenomenon further increases the occurrences of how the law is handled: the extensive jurisdictional competition between European States as a result of

Brexit. Indeed, Paris, Amsterdam, Brussels and other capitals establish courts and chambers specializing in international litigation and the application of foreign law.

The stakes are high. The search for appropriate cooperation instruments for a good knowledge of foreign law is necessary in the face of rapidly evolving national laws and case law. These changes, which are specific to each system, therefore reinforce the need for access to reliable foreign law content in order to guarantee legal certainty for litigants, as well as to avoid the civil liability of legal service providers and even fraud in the manipulation of foreign solutions.

The research envisaged takes place in an environment in which there are formal and informal cooperation mechanisms whose effectiveness is only partial in view of the complexity of the phenomena that covers the application of foreign law. Indeed, they were designed to deal with a foreign law that is supposed to be stable and not plural in its sources. These mechanisms, which are not very visible, are also unknown by the practitioners themselves. The current discussions at European (EU) and international level (Hague Conference) attest to the urgent need to consider responses in this area through one or more relevant and effective instruments.

This is the purpose of the symposium. After having established a large inventory, it will be necessary to discuss solutions adapted to the different requirements revealed by both the type of situation to be dealt with and the type of professional involved.

The symposium will be held on 28 November 2019 at the French Court of Cassation (Chambre Criminelle, 5, Quai de l'Horloge, 75001 – Paris).

Registration: emmanuelle.bouvier@legiscompare.com

Conference Directors:

Dr. Gustavo Cerqueira, Agrégé des Facultés de droit, University of Reims (France)

Dr. Nicolas Nord, Deputy Secretary General of the ICCS, Senior Lecturer at the University of Strasbourg (France)

Second Issue of 2019's Revue Critique de Droit International Privé

The last issue of the *Revue Critique de Droit International Privé* will shortly be released. This is a special edition composed of four articles on Brexit. It also contains several case notes, inter alia, a commentary by Horatia Muir Watt on *Vedanta v Lungowe*, major decision on the parent company's duty of care and private international law, rendered by the Supreme Court of the United Kingdom on 10 April 2019 (see also here).

The first article is authored by Paul James Cardwell ("Naviguer en eaux inconnues. Les défis rencontrés par la recherche juridique au Royaume-Uni à l'heure du Brexit"). The abstract reads as follows: *"The consequences of the United Kingdom's decision to leave the European Union (Brexit) remain uncertain still. For legal scholars, Brexit has posed a series of complex legal questions, some of which have not been considered for over 40 years, if at all. This article aims to consider some of the main questions that have arisen during the Brexit process, and some of the potential responses. The article also evaluates the challenges that Brexit represents for researchers and teachers in the various sub-disciplines within legal scholarship, including the fast-paced, ever changing legal landscape. Although only a small number of the questions and challenges can be considered here, it goes without say that Brexit will undoubtedly have significant consequences for the UK, the EU and its Member States as well as for the systems of global governance, in which private international lawyers are inherently linked".*

The second article ("Le Brexit et les conventions de La Haye") is written by Hans van Loon. The abstract reads as follows: *"There are two possible scenarios at present for the immediate future of private international law in the relationship between the United Kingdom and the European Union of Twenty-seven in the event of Brexit. Under the first, the "Withdrawal Agreement" approved by the European Council on 25th November 2018 enters into force; under the second (the "no-deal" scenario) the status quo will end abruptly on 31st October 2019. Both of these hypotheses have important and complex implications. Under the*

Withdrawal agreement, a transition period is organised and when this period ends, specific transitory provisions take over. In such a regime, the law issuing from the conventions has a significant role to play. But in the event of a no-deal Brexit, all the treaties establishing, and concluded by, the European Union, and, as a result, European Union secondary law, including the regulations on private international law cease immediately to apply to the United Kingdom. The Hague conventions, including the new convention of 2 July 2019 on the recognition and enforcement of foreign judgments in civil or commercial matters will fill this gap to a large extent. However, the consequences may nevertheless be brutal for citizens, and in order to mitigate these, the transitory provisions of the Withdrawal agreement should be applied here by analogy".

The third article, written by Uglješa Grušic ("L'effet du Brexit sur le droit international privé du travail"), describes the likely effect of the withdrawal of the United Kingdom from the European Union on the private international law of employment. *"More specifically, it deals with the likely effect of Brexit on employment law, the law of international jurisdiction in employment matters and the law on choice of law for employment matters in the United Kingdom and the European Union, with particular emphasis on private international law in England".*

The fourth article is authored by Louise Merrett ("La reconnaissance et l'exécution en Angleterre des jugements venant des États de l'Union européenne, post-Brexit"). It describes the likely effect of the withdrawal of the United Kingdom from the European Union on the recognition and enforcement of judgments from EU Members States: *"If the UK leaves the European Union without any new agreement in place allowing for mutual recognition and enforcement, the recognition and enforcement of judgments from EU Members States will prima facie only be possible under the existing common law rules. This article will describe the common law rules and draw attention to the key differences between them and the rules which currently apply to the enforcement of judgments under the Brussels I Regulation recast".*

A full table of contents is available here.

61st Seminar of Comparative and European Law of Urbino (Italy)

The 61th edition of the *Séminaire de Droit Comparé et Européen /Seminar of Comparative and European Law of* Urbino (Italy) will be held next summer, from 19 to 31 August.

The Urbino *Seminar* has been taking place uninterruptedly since 1959. The underlying idea is to contribute to the development of knowledge of Comparative, International (both public and private) and European law, benefiting of the relaxing time of the year and of the serenity of the environment of Urbino. The Seminar promotes multilingual competencies: presentations are in French, English or Italian, often followed by summarized translations in the other two languages.

This year's seminar's main topics are legislative cycle, international tax and bank law, new technologies, Brexit, European consumer law, public procurement, enforcement of foreign judgments, international criminal law and Unidroit principles. Speaker include Prof. Marie-Elodie ANCEL, (Paris-Est Créteil, UPEC), Alessandro BONDI (University of Urbino), Robert BRAY, (European Parliament), Georges CAVALIER (Université Jean Moulin, Lyon III), Emilio DE CAPITANI, (FREE Group), Andrea GIUSSANI (University of Urbino), Francis Brendan JACOBS (University College Dublin), Jens KARSTEN (LL.M., Attorney-at-Law), Luigi MARI (University of Urbino), Triestino MARINIELLO (Edge Hill University), Fabrizio MARRELLA (University of Venice Ca' Foscari), Paolo MOROZZO DELLA ROCCA (University of Urbino), Ilaria PRETELLI (Swiss Institute of Comparative Law), Edoardo Alberto ROSSI (University of Urbino), Tuto ROSSI (Université de Fribourg), Helmut SATZGER (Ludwig-Maximilians-University Munich), Martin SVATOS (Charles University), Shlomit YANISKY-RAVID (Ono Academic College)

The whole program, as well as email addresses for further information,is available here, together with information on enrollment, accommodation, and how to get to Urbino.

14 June 2019: Symposium on the Attractiveness of the Paris International Commercial Chambers

The Paris Court of Appeal will host a symposium on "*L'attractivité de la place de Paris: Les chambres commerciales internationales: fonctionnement et trajectoire*" (The attractiveness of Paris's jurisdiction. The international Commercial Chambers: functioning and future trends) on June 14, 2019 (2pm-6pm).

Readers of this blog will remember that on February 7, 2018, the International Commercial Chamberof the Paris Court of Appeal was inaugurated.

The establishment of this specialized appellate international Commercial Chamberfollows the creation of the first International Chamber of the Paris Commercial Court of First Instance ("*Chambre de Droit International du Tribunal de Commerce*") and fits well in the current developments of the international business courts all over Europe (and out of Europe too).

The international chambers of the Paris Commercial Court and Court of Appeal (hereafter referred to as the "International Commercial Courts of Paris" or the "ICCP") are the latest examples of the modernization of French Legal System with respect to dispute resolution in commercial matters.

In the context of Brexit, the creation of the ICCP aims at enhancing the attractiveness and international competitiveness of French courts, combining flexibility, high quality and low costs.

The Paris Court of Appeal and the Faculty of Law of the *Université de Paris Est Créteil* (UPEC) will organize a symposium on June 14, 2019 at the Paris Court of Appeal. The conference will discuss the attractiveness of the Paris courts taking

into account its latest evolution: the creation of the International Commercial Courts of Paris, with a focus on how these courts work in practice.

After the opening by Chantal Arens, first president of the Paris Court of Appeal and Gilles Cuniberti, professor of law at the University of Luxembourg, the event will be divided into three parts:

1. Origins and creation of the ICCP, with a comparative approach to other commercial courts in Europe.
2. Analysis of the mechanisms allowing access to the ICCP, with practical insight into the drafting and interpretation of choice of court clauses, the types of disputes that may fall within the scope of the Chambers and the relationships with arbitration.
3. Analysis of the procedural rules before the Chambers, with a specific focus on how the Chambers work in practice, the use of the English language, the available tools for the parties, and the current rules of practice established or being discussed in the Chambers.

The conference, led by the judges sitting in the Paris international chambers, will provide a valuable feedback of 18 months of existence of the International Commercial Chamber of the Paris Court of Appeal. The future trends of the French ICCP, and their interaction with other courts in Europe will also be debated.

Emmanuel Gaillard, Visiting Professor at Yale Law School and Harvard Law School, will give the closing speech.

A detailed description of the afternoon's program can be found on the Paris Court of Appeal's website (*in French only/English version to be published soon*).

You can register by writing an email to: colloque.ca-paris@justice.fr

Links to previous relevant posts:

https://conflictoflaws.de/2011/paris-commercial-court-creates-international-division/

https://conflictoflaws.de/2018/doors-open-for-first-hearing-of-international-chamb

er-at-paris-court-of-appeal/

https://conflictoflaws.de/2018/the-domino-effect-of-international-commercial-courts-in-europe-whos-next/

Rethinking Choice of Law and International Arbitration in Cross-border Commercial Contracts

*Written by Gustavo Becker**

During the *26th Willem C. Vis Moot*, Dr. Gustavo Moser, counsel at the London Court of International Arbitration and Ph.D. in international commercial law from the University of Basel, coordinated the organization of a seminar regarding choice of law in international contracts and international arbitration. The seminar's topics revolved around Dr. Moser's recent book *Rethinking Choice of Law in Cross-Border Sales* (Eleven, 2018) which has been globally recognized as one of the most useful books for international commercial lawyers.

On April 15th, taking place at Hotel Regina, in Vienna, the afternoon seminar involved a panel organized and moderated by Dr. Moser and composed of Prof. Ingeborg Schwenzer, Prof. Petra Butler, Prof. Andrea Bjorklund, and Dr. Lisa Spagnolo.The panel addressed three core topics in the current scenario of cross-border sales contracts: Choice of law and Brexit, drafting choice of law clauses, and CISG status and prospects.

The conference started with a video presentation in which Michael Mcllwrath *(Baker Hughes, GE)* addressed his perspectives on how Brexit might impact decisions from companies regarding choice of law clauses in international contracts, its effects on the recognition of London as the leading seat for dispute

resolution, and the position of English law as the most applicable law in international contracts.

In Mr. Mcllwrath's perspective, in spite of Brexit, London will still remain a significant place for international dispute resolution as it adoptsglobally recognized commercial law principles, is an arbitration friendly state and enjoys a highly praised image as a safe seat for international cases. However, in order to try to predict the impact of Brexit in international dispute resolution, Mr. Mcllwrath collected data released by arbitral institutions and found that in the years leading up to the Brexit vote, London did not grow as a seat of arbitration significantly. Considerable growth nonetheless has been seen outside the traditional centers of international arbitration. Therefore, the big issue involving Brexit, in Mr. Mcllwrath's view, is the uncertainty that companies will face with the UK's unsettled political future. For this reason, the revision of contract policies is now likely to be undertaken and the choice of English law in international contracts might be affected.

Prof. Schwenzer pointed out that the whole discussion about Brexit and its effects on international dispute resolution depends primarily on the type of Brexit that will be chosen and the agreements between Europe and Great Britain. In her point of view, one of the main questions is whether the UK will join the Lugano Convention, which would make the enforcement of English court decisions easier in European State-members. Prof. Schwenzer also highlighted that, in terms of choice of law, there will be uncertainty issues regarding the regulations that have been imported from Europe and are now part of the English legal system. The problem might be how these rules will be developed further as the Court of Justice of the European Union will no longer be responsible for interpreting this part of English law.

Furthermore, Prof. Bjorklund stated that, whilst the choice of English law will require more caution after Brexit, the well-recognized security related to arbitration in the UK is likely to continue as long as the New York Convention, the English Arbitration Act, and the arbitration friendly character of English commercial courts will not likely change. However, in the point of view of an international arbitration counsel, certainly, the "*risks of arbitrating in the UK*" will leave some room for parties to choose arbitration in other places rather than in London or – at least – to start rethinking the classic choice for English-seated arbitration.

Concerning the choice of English law, Prof. Butler reminded the audience of two important regulations which should be analyzed in the context of Brexit: Rome I for deciding which contract law is applicable in international cases, and the Brussels Regulation to define which court is entitled to decide a case and how to enforce and recognize foreign decisions within the EU. According to Prof. Butler, under the first Brexit bill, the statutes signed within the EU regime would still apply. However, subject to confirmation from the English government, the development of these laws might no longer be applicable.

Dr. Spagnolo added that whether a country joins an international instrument sometimes has little to do with rational factors and are often "emotional". In this sense, one of the arguments that the political environment seems to emphasize nowadays under the notion of nationalism is the maintenance of sovereignty. According to Dr. Spagnolo, this is a dangerous consideration to be emphasized in an environment that relies on commercial sense and needs basic guarantees of international harmonization, such as the enforcement of foreign awards or the application of a uniform law.

Regarding the topic "drafting choice of law clauses", Mr. Mcllwrath highlighted the "emotional" features involving the choice of law. In his opinion, as Dr. Moser has demonstrated in his book, many choices of law decisions are driven by factors such as how many times a specific law had already been applied by a law firm or what law the attorneys involved in that contract were already familiar with. Considering this, Mr. Mcllwrath understands that Brexit can make lawyers rethink the application of English law, even though this might be dependant upon whether financial institutions and companies currently based in London will or will not move away from the UK.

Prof. Schwenzer highlighted that what Dr. Moser has found in his research regarding the emotional aspect of the choice of law is a proving fact of what she has experienced in practice: choice of law decisions are mostly emotionally charged and seldom rational. One example is that even though Swiss law is arguably the second most chosen law in international contracts, in Prof. Schwenzer's view, Swiss law is not predictable: in core areas of contract law, such as limitation of liability, Swiss law is not advantageous for commercial contracts in her opinion. Prof. Schwenzer added that this shows that lawyers seldom analyze the pros and cons of laws deeply before applying them in international commercial contracts.

Concluding the panel discussions, Dr. Moser brought up the topic “CISG status and prospects”. While discussing this matter, all the panelists agreed upon the urgent need of global initiatives to increase awareness and improve knowledge of the CISG for both young lawyers who are sitting for the bar exam, and for judges who will face international commercial cases and might not be familiar with the CISG or even prepared to apply its set of provisions.

*With contributions from Gustavo Moser