Golan v. Saada – a case on the HCCH Child Abduction Convention: the Opinion of the US Supreme Court is now available

Written by Mayela Celis, UNED

Yesterday (15 June 2022) the US Supreme Court rendered its Opinion in the case of Golan v. Saada regarding the HCCH Child Abduction Convention. The decision was written by Justice Sotomayor, click here. For our previous analysis of the case, click here.

This case dealt with the following question: whether upon finding that return to the country of habitual residence places a child at grave risk, a district court is *required* to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding. (our emphasis)

In a nutshell, the US Supreme Court answered this question in the negative. The syllabus of the judgment says: "A court is not categorically required to examine all possible ameliorative measures [also known as undertakings] before denying a Hague Convention petition for return of a child to a foreign country once the court has found that return would expose the child to a grave risk of harm." The Court has also wisely concluded that "Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion" (however, this is different in the European Union context where a EU regulation complements the Child Abduction Convention).

While admittedly not everyone will be satisfied with this Opinion, it is a good and well-thought through decision that will make a great impact on how child abduction cases are decided in the USA; and more broadly, on the way we perceive what the ultimate goal of the treaty is and how to strike a right balance between the different interests at stake and the need to act expeditiously.

In particular, the Court stresses that the Convention "does not pursue return exclusively or at all costs". And while the Court does not make a human rights analysis, it could be argued that this Opinion is in perfect harmony with the current approaches taken in human rights law.

In my view, this is a good decision and is in line with our detailed analysis of the case in our previous post. In contrast to other decisions (see recent post from Matthias Lehmann), for Child Abduction – and human rights law in general – this is definitely good news from Capitol Hill.

Below I include a few excerpts of the decision (our emphasis, we omit footnotes):

"In addition, the court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the Convention and ICARA. ***The Second Circuit's rule, by instructing district courts to order return "if at all possible," improperly elevated return above the Convention's other objectives***. Blondin I, 189 F. 3d, at 248. ***The Convention does not pursue return exclusively or at all costs***. Rather, the Convention "is designed to protect the interests of children and their parents," Lozano, 572 U. S., at 19 (ALITO , J., concurring), and children's interests may point against return in some circumstances. Courts must remain conscious of this purpose, as well as the Convention's other objectives and requirements, which constrain courts' discretion to consider ameliorative measures
in at least three ways.

"First, ***any consideration of ameliorative measures must prioritize the child's physical and psychological safety***. The Convention explicitly recognizes that the child's interest in avoiding physical or psychological harm, in addition to other interests, "may overcome the return remedy." Id., at 16 (majority opinion) (cataloging interests). ***A court may therefore decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave***. Sexual abuse of a child is one example of an intolerable situation. See 51 Fed. Reg. 10510. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated***. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed***. See, e.g., Walsh v. Walsh, 221 F. 3d 204, 221 (CA1 2000) (providing example of parent with history of violating court orders).

"Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute. The Convention and ICARA prohibit courts from resolving any underlying custody dispute in adjudicating a return petition. See Art. 16, Treaty Doc., at 10; 22 U. S. C. §9001(b)(4). Accordingly, ***a court ordering ameliorative measures in making a return determination should limit those measures in time and scope to conditions that would permit safe return***, without purporting to decide subsequent custody matters or weighing in on permanent arrangements.

"Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts "act expeditiously in proceedings for the return of children." Art. 11, Treaty Doc., at 9. Timely resolution of return petitions is important in part because return is a "provisional" remedy to enable final custody determinations to proceed. Monasky, 589 U. S., at ___ (slip op., at 3) (internal quotation marks omitted). The Convention also prioritizes expeditious determinations as being in the best interests of the child because "[e]xpedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child." Chafin v. Chafin, 568 U. S. 165, 180 (2013). ***A requirement to "examine the full range of options that might make possible the safe return of a child," Blondin II, 238 F. 3d, at 163, n. 11, is in tension with this focus on expeditious resolution***. In this case, for example, it took the District Court nine months to comply with the Second Circuit's directive on remand. Remember, the Convention requires courts to resolve return petitions "us[ing] the most expeditious procedures available," Art. 2, Treaty Doc., at 7, and to provide parties that request it with an explanation if proceedings extend longer than six weeks, Art. 11, id., at 9. Courts should structure return proceedings with these instructions in mind. Consideration of ameliorative measures should not cause undue delay in resolution of return petitions.

"***To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The***

court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention. A district court's compliance with these requirements is subject to review under an ordinary abuse-of-discretion standard."

U.S. Supreme Court Restricts Discovery Assistance to International Arbitral Tribunals

Written by Matthias Lehmann, University of Vienna (Austria)

On 13 June 2022, the U.S. Supreme Court ruled that U.S. courts may not help arbitral tribunals sitting abroad in the taking of evidence. This is because in the opinion of the Court, such an arbitral tribunal is not a „foreign or international tribunal" in the sense of 28 U.S.C. § 1782, which allows federal district courts to order the production of evidence for use in proceedings before such tribunals.

The decision concerned an institutional and an ad-hoc arbitration. The first, ZF v. Luxshare, was a commercial arbitration between two companies under the rules of the German Arbitration Institution (DIS). The second, AlixPartners v. Fund for Protection of Investors' Rights in Foreign States, was an investment arbitration involving a disgruntled Russian investor and a failed Lithuanian bank; it was conducted under the UNCITRAL Arbitration Rules.

The opinion, written by Amy Coney Barrett, rejects assistance by U.S. courts in both cases, whether in the pre-arbitration phase or in the main arbitration proceedings. It was unanimously adopted by the Court.

The Supreme Court first relies on a dubious literal interpretation of § 1782. While it does not dispute that arbitral tribunals may be “tribunals”, this would change by the addition of the adjectives “foreign or international”, as this would require that one or several nations have imbued the tribunal with governmental authority. Alas, the drafters of the New York Convention on recognition and enforcement of “foreign” arbitral awards were wrong, and so apparently were the signatories – among them the U.S. As for the term “international”, numerous treatises on “international commercial arbitration” will now supposedly have to be rewritten or newly titled.

The opinion further argues that the “animating purpose” of § 1782 would be “comity” with other nations, and that it would be “difficult to see how enlisting district courts to help private bodies would help that end”. Yet other nations also have an interest in efficient arbitration proceedings, as evidenced by the New York Convention. This is even particularly clear for investment arbitration because of the involvement of a state party, but it is also true in commercial arbitration. What is decisive from the point of view of many countries is that arbitration as a dispute resolution method is equivalent to litigation, and should not be treated less favourably.

The Supreme Court further argues that if § 1782 were to be extended to commercial arbitral “panels”, it would cover everything, including even a university’s student disciplinary tribunal. Yet the absurdity of this *argumentum ad absurdum* lies not in the inclusion of arbitration in § 1782 but in the extension made by the Court, which was only asked about the former and not about the latter. If need be, it would have been easy to distinguish commercial and investment arbitral tribunals established under national or international rules and covered by international agreements such as the New York Convention from student disciplinary “tribunals” (rather: panels).

Finally, the Court notes that allowing district courts to proffer evidence to a foreign arbitral tribunal would create a mismatch with the Federal Arbitration Act (FAA), which does not foresee such assistance for domestic arbitral tribunals. Yet the solution of this mismatch should have better been left to the legislator, who could either extend the FAA to discovery or exclude foreign and international arbitral tribunals from the scope of § 1782. At any rate, the worse situation of domestic arbitral tribunals does not seem a sufficient justification to also deprive arbitral tribunals abroad, who may have particular difficulties in gathering evidence in the U.S., of assistance by U.S. courts.

All in all, this is disappointing news from Capitol Hill for international arbitration. Whether on arbitration or abortion, the current Supreme Court seems to be willing to upend legal precedent and to question customary legal terminology. At least for arbitration, the consequences will not be life-threatening, because the practice will be able to adapt. But one can already see the next questions coming to the Supreme Court. How about this one: Are ICSID tribunals imbued with governmental authority?

ECJ on the interpretation of the European Succession Regulation in relation to cross-border declarations of waiver, Judgment of 2 June 2022, C-617/20 – T.N. et al. ./. E.G.

On 2 June 2022, the ECJ delivered its judgment in the case of T.N. et al. ./. E.G., C-617/20, on the interpretation of the ESR in relation to cross-border declarations of waiver of succession (on the facts of the case and AG Maciej Szpunar's Opinion in this case see our previous post).

The Court followed the AG's Opinion and concluded (para. 51) that

"Articles 13 and 28 of Regulation No 650/2012 must be interpreted as meaning that a declaration concerning the waiver of succession made by an heir before a court of the Member State of his or her habitual residence is regarded as valid as to form in the case where the formal requirements applicable before that court have been complied with, without it being necessary, for the purposes of that validity, for that declaration to meet the formal requirements of the law applicable to the succession".

This conclusion was based on a EU-law specific approach rather than by discussing, let alone resorting to, fundamental concepts of private international law (compare Question 1 by the referring national court, the Higher Regional Court of Bremen, Germany, on a potential application of the concept of substitution; compare the AG's considerations on characterisation of the issue as "substance" or "form", see Opinion, paras. 34 et seq.). Rather, the Court reformulates the question functionally (para. 32):

"*The present reference for a preliminary ruling concerns the conditions which must be satisfied in order for a declaration concerning the waiver of succession, within the meaning of Articles 13 and 28 of Regulation No 650/2012, made before the court of the State of the habitual residence of the party waiving succession, to be regarded as valid. In that regard, the referring court asks, in particular, whether and, if so, when and how such a declaration must be notified to the court having jurisdiction to rule on the succession*".

Textual as well as systematic arguments (Article 13 as part of Chapter II, Article 28 as part of Chapter III of the ESR), paras. 36 et seq., supported by Recital 32 (simplification of procedures), para. 41, as well as the general effet utile of the ESR in light of Recital 7, para. 42, lead the Court to the result that

"*as the Advocate General stated in point 64 of his Opinion, compliance with the objective of Regulation No 650/2012, which is to enable heirs to make declarations concerning the waiver of succession in the Member State of their habitual residence, implies that those heirs are not required to take further formal actions before the courts of other Member States other than those provided for by the law of the Member State in which such a declaration is made, in order for such declarations to be regarded as valid*".

Whether this result occurs, technically speaking, as a substitution – and thus by a kind of "recognition", or as a matter of characterisation of the issue as "form", is not directly spelled out, but based on the general approval of the AG's approach, the latter is certainly more likely than the former.

Additionally, in furthering the effet utile, the Court adds on the issue of communication of and time limits for a waiver declared according to the conditions of the law of the habitual residence (paras. 49 et seq.) that compliance with "formal requirements" before the court of the habitual residence must suffice as long as the court seised with the succession “has become aware of the existence of that declaration”. And the threshold for this awareness seems to be very low, but “in the absence of a uniform system in EU law providing for the communication of declarations” of the kind in question here, must be brought about by the declaring person (para. 48). As a further element of effet utile, this person is not bound by any formal requirements under the *lex successionis*, para. 48: “if those steps [by the declaring person] are not taken within the time limit prescribed by the law applicable to the succession, the validity of such a declaration <u>cannot</u> be called into question” (emphasis added). The only factual time limit therefore is that the court becomes aware before it takes its decision. Appeal, therefore, cannot be grounded directly on the fact that the court was not made aware in time, even though the declaration had existed before the court’s decision. Appeal may be available on other grounds and then the declaration may be introduced as a *novum*, if the *lex fori processualis* allows it.

Speaking of the *lex fori processualis*: As there is now an autonomous time limit, the question became irrelevant whether making the court aware of the declaration of waiver depends on any language requirements. In the concrete case, the persons declaring the waiver before a Dutch court, obviously in Dutch language, informed the German court first by submitting Dutch documents and only later with translations, but at any rate before the court’s decision. Principally speaking, however, if the court’s language is e.g. German, any kind of communication must be conducted in that language (see section 184 German *Gerichtsverfassungsgesetz*). In addition, according to the Court’s decision, only “formal requirements of the law applicable to the succession” are irrelevant. The need for translations, however, is a matter of the *lex fori processualis.* It will be an interesting question of “language law” within the EU whether the effet utile of the ESR (and comparable regulations in other instruments) might overcome principal language requirements according to the *lex fori processualis*. And on a general level it may be allowed to state the obvious: questions of characterisation (and others of general PIL methodology) will never disappear.

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.

The Applicability of Arbitration Agreements to A Non-Signatory Guarantor—A Perspective from the Chinese Judicial Practice

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It is axiomatic that an arbitration agreement is generally not binding on a non-signatory unless some exceptional conditions are satisfied or appear, while it could even be more controversial in cases relating to guarantee where a non-signatory third person provides guarantee to the master agreement in which an arbitration clause has been incorporated. Due to the close connection between guarantee contract and master agreement in their contents, parties or even some legal practitioners may take it for granted that the arbitration agreement in master agreement can be automatically extended to the guarantor albeit it is not a signatory, which can be a grave misunderstanding from judicial perspective and results in great loss thereby.

As a prime example, courts in China have long been denying the applicability of arbitration agreements to a non-signatory guarantor with rare exceptions based on specific circumstances as could be observed in individual cases, nonetheless, the recent legal documents have provided possibilities that may point to the opposite side. This short essay looks into this issue.

1. **The Basic Stance in China: Severability of the Guarantee Contract**

Statutes in China provide limited grounds for extension of arbitration agreement to a non-signatory. As set out in Articles 9 & 10 of the *Interpretation of the Supreme People's Court's (hereinafter, SPC) on Certain Issues Related to the Application of the Arbitration Law*?which was issued on 23 August 2006?, this may occur only under the following circumstances:

"(1) An arbitration clause is binding on the non-signatory who is the successor of a signed-party by means of merge, spilt-up of an entity and decease of a natural person or;

(2) where the rights and obligations are assigned or transferred wholly or partially to a non-signatory, unless parties have otherwise consented".

Current laws are silent on the issue where there is a guarantee relationship. Due to the paucity of direct instructions, some creditors seeking for tribunal's seizure of jurisdiction over a non-signatory guarantor would tend to invoke Article 129 of the *SPC's Interpretation on Certain Issues Related to Application of Warranty Law* (superseded by SPC's *Interpretation on Warranty Chapter of Civil Code* since 2021 with no material changes being made), which stipulates that the guarantee contract shall be subject to the choice of court clause as set out in the main agreement, albeit the creditor and guarantor have otherwise consent on dispute resolution. Nevertheless, courts in China are reluctant to apply Article 129 to an arbitration clause by way of *mutatis mutandis.* In the landmark case of *Huizhou Weitong Real Estate Co., Ltd v. Prefectural People's Government of Huizhou*,[1] the SPC explicitly ruled that the Guarantee Letter entered into between creditor and guarantor had created an independent civil relationship which shall be distinguished from the main agreement and thereby the arbitration clause should not be binding on the guarantor and the court seized with the case could take the case accordingly. In a nutshell, due to the independence of the guarantee contract from the main contract, where there is no clear arbitration agreement in the guarantee contract, the arbitration agreement in the main contract cannot be extended to be applicable to the guarantor.

The jurisprudence of *Weitong* has been subsequently followed and acknowledged as the mainstream opinion for the issue. In SPC's reply to Guangxi Provincial High Court regarding enforcement of a foreign-related arbitral award rendered by CIETAC on 13 September 2006?*Dongxun*?,[2] where a local government had both issued a guarantee letter and signed the main agreement, the SPC opined that as there was no term of guarantee provided in the text of main agreement, the issuance of guarantee letter and signature of main agreement was not sufficient to make the government a party to the arbitration clause. In light of this, SPC agreed with the Guangxi Court's stance that the dispositive section regarding execution of guarantee obligation as set out in the disputed arbitral award had exceeded the tribunal's power and thus shall be rejected to be enforced. In the same vein, in its reply on 20 March 2013 to Guangdong Provincial High Court regarding the annulment of an arbitral award[3], the SPC held that the disputed arbitral award shall be partially vacated for the arbitral tribunal's lack of jurisdiction over the guarantee for which the guarantor was a natural person. Hence, it can be drawn that whether the guarantor is a governmental institution or other entity for public interest is not the determining factor to be considered for this type of cases.

2. **Controversies and Exceptions**

Theoretically, it is correct for the SPC to unfold the autonomous nature of arbitration jurisdiction, which shall be distinguished from that of litigation. Parties' autonomy to designate arbitration as a method of dispute resolution and the existence of an arbitration agreement are key elements for a tribunal to be able to obtain the jurisdiction. By this logic, the mere issuance of guarantee letter or signature of a standing-alone guarantee is not sufficient to prove parties' consent to arbitration as expressed in the main contract. The SPC is not alone in this respect. Actually, one of the much-debated cases by foreign courts is the decision made by the Swiss Supreme Court in 2008 which opined that a guarantor providing guarantee by virtue of a standing-alone letter was not bound by the arbitration clause as provided in the main agreement to which the guarantee letter has been referred, except there was an assumption of contractual rights or obligations, or a clear reference to the said arbitration clause. [4]

All that being said, the SPC's proposition has given rise to some controversies for the sacrifice of efficiency through a dogmatic understanding of arbitration. Moreover, the segregation of the main contract and guarantee contract may produce risks of parallel proceedings and conflicting legally-effective results. As some commentators have indicated, albeit the severability of guarantee contract in its formality, its content is tight with the main agreement. In the light of the tight connection,[5] the High Court of England ruled in *Stellar* that it was predictably expectable for a rational businessman to agree on a common method of dispute resolution as set out in the main contract, where the term of guarantor's endorsement was involved, based on the close connection between the two contracts.[6]

A like but nuanced approach, however, has been developed through individual cases in China, to the author's best knowledge, one of the prime cases is *Li* v. *Yu* decided by Hangzhou Intermediate Court on 30 March 2018 concerning an annulment of an award handed down via arbitration proceedings.[7] The case concerns a main agreement entered into by the creditor, the debtor and the guarantor (who was also the legal representative of the debtor), which had set out a general guarantee term but did not provide detailed obligations. The guarantor subsequently issued a guarantee letter without any clear reference to arbitration clause as stated in main agreement. After the dispute arose, the creditor lodged arbitration requests against both the debtor and the guarantor, the tribunal ruled in creditor's favor after tribunal proceedings started. The guarantor then applied for annulment of the arbitral award on the basis that there was no valid arbitration agreement between the guarantor and the creditor, contending tribunal's lack of jurisdiction over the guarantor. The court, however, opined that the guarantor's signature in the main agreement, in combination of the general guarantee clause incorporated therein, was sufficient to prove the existence of arbitration agreement between the creditor and the guarantor and the guarantor’s consent thereby. Therefore, the annulment application was dismissed by the court.

Admittedly, the opinion as set out in *Li* is sporadic and cannot provide certainty, largely relying on specific circumstances drawn from individual cases, hence it is difficult to produce a new principle hereby. However, the case does have some novelties by providing a new track for extension of arbitration agreement to a guarantor who is not clearly set out as one of the parties in main agreement. In other words, the presumption of severability of guarantee relationship is not absolute and thus rebuttable. To reach that end, creditors shall furnish proof that the guarantor shall be well aware of the details of the main contract (including arbitration clause) and has shown inclination to be bound thereby.

3. **New Rules That Shed New Light**

On 31 December 2021, the SPC released *Meeting Note of the National Symposium on Foreign-related Commercial and Maritime Trials*, which covers judicial review issues on arbitration agreements. Article 97 of the *Meeting Note* provides systematical approach in reviewing arbitration agreement where an affiliated agreement?generally refers to guarantee contract or other kinds of collateral contract?is concerned, which can be divided into two facets:

First, where the guarantee contract provides otherwise dispute resolution, such consent is binding on the guarantor and thus shall be enforceable. As a corollary, the arbitration agreement in main agreement is not extensible to the guarantor.

Secondly, while the guarantee contract is silent on the issue of dispute resolution, the arbitration agreement as set forth in the main agreement is not automatically binding on the guarantor unless the parties to the guarantee contract is the same as that of main agreement.

In summary, the *Meeting Note* has sustained the basic stance while providing an exception where the main agreement and the guarantee contract are entered into by the same parties. As indicated by one commentator, the *Meeting Note* is not a judicial interpretation which can be adopted by the courts to decide cases directly but it to a large extent reflects consensus of judges among China, [8] and hence will produce impact on judicial practice across the whole country.

Nevertheless, some uncertainties may still arise, for instance, whether a mere signature in the main contract by the guarantor is sufficient to furnish the proof about “the same parties”, or shall be in combination with the scenario where an endorsement term of guarantor is incorporated in the main contract. On the contrary, it is also unclear whether a mere existence of term of guarantee is sufficient to make a non-signatory guarantor a party to the main contract.

Another more arbitration-friendly method can be observed from the draft for Revision of Arbitration Law that has been released for public consultation since 30th July of 2021, Article 24 of which provides that the arbitration clause as set out in the main agreement shall prevail over that in the guarantee contract where there is a discrepancy; where the guarantee contract is silent on dispute resolution, any dispute connected thereto shall be subject to the arbitration agreement as set out in main agreement. This article is a bold one which will largely overturn the SPC’s current stance and makes guarantee relationship an exception. A piece of more exciting news comes from the newly-released law-making schedule of 2022 by the Standing Committee of the National People’s Congress,[9] according to which the revision of Arbitration Law is listed as one of the top priorities in 2022 whilst it is still to be seen whether Article 24 in the draft can be retained after scrutiny of the legislature.

4. **Concluding Remarks**

It is not uncommon that a guarantee for certain debts is provided by virtue of a standing-alone document which is separated from the main contract, whether it is a guarantee contract or a unilaterally-issued guarantee letter. It shall be borne in mind that the close connection between the guarantee document and main contract alone is not sufficient to extend the arbitration agreement as set out in main agreement to a non-signatory guarantor per the consistent legal practice in China over the past 20 years. While the new rules have provided more arbitration-friendly approaches, uncertainties and ambiguities will probably still exist.

From a lawyer’s perspective, as the mainstream opinion in judicial remains unchanged currently, it is necessary to attach higher importance while reviewing a standing-alone guarantee contract which is separated from a master agreement in its formality. In the light of avoiding prospective parallel proceedings incurred thereby, the author advances two options in this respect:

The first option is to insert an article endorsing guarantee's obligation into the master agreement, and require the guarantor to sign the master agreement, which resembles the scenario in *Stellar* and *Li*. Whereas this approach may be less feasible in the post-negotiation phase of master agreement when all terms and conditions are fixed and endorsed, the option mentioned below can be served as an alternative.

The second option is to incorporate into guarantee document a clause which unequivocally refers to the arbitration agreement as set out in master agreement, in lieu of any revision to the master agreement. This approach is in line with Article 11 *SPC on Certain Issues Related to the Application of the Arbitration Law* which provides that parties can reach an arbitration agreement by reference to dispute resolution clauses as set out in other contracts or documents. While it is noteworthy that from judicial practice in China, such reference shall be specific and clear, otherwise the courts may be reluctant to acknowledge the existence of such arbitration agreement.

[1] Case No: 2001 Min Er Zhong No. 177.

[2] Case No: 2006 Min Si Ta No. 24.

[3] Case No: 2013 Min Si Ta No. 9.

[4] Case No. 4A_128/2008,decided on August 19, 2008, decided by Tribunal federal(Supreme Court) of Swiss, as cited in *Extension of arbitration clause to non-signatories (case of a guarantor) – Arbitration clause by reference to the main contract (deemed too general and therefore not admitted),* available at https://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua.

[5] See Yifei Lin: Is Arbitration Agreement in Master Agreement Applicable to Guarantee Agreement? Available at http://www.360doc.com/content/16/0124/11/30208892_530188388.shtml.

[6] Stellar Shipping Co Llc v Hudson Shipping Lines [2010] EWHC 2985 (Comm) (18 November 2010).

[7] Case No: 2018 Zhe 01 Min Te No. 23.

[8] Lianjun Li *et al?China issues judicial guidance on foreign related matters,* Reed Smith In-depth?25 April 2022??available at https://www.reedsmith.com/de/perspectives/2022/04/china-issues-judicial-guidance-on-foreign-related-matters.

[9] For more details, please see the news post available at https://m.thepaper.cn/baijiahao_18072465. Moreover, per the news report released in late May of 2022, The National Committee of Chinese People's Political Consultative Conference had discussed the revision of Arbitration Law in its biweekly symposium held on 30 May 2022, where the attendees had stressed the significance of party autonomy in commercial arbitration, available at: http://www.icppcc.cn/newsDetail_1092041.

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.

German Judges Travel to Peru in Climate-Change Trial

In a widely reported trip, members of the 5th Civil Chamber of the Higher Regional Court of Hamm, Germany, together with two court-appointed experts, travelled to Peru to collect evidence in one of Germany's first climate-change lawsuits. The highly symbolic case has been brought by Saúl Luciano Lliuyas, a Peruvian farmer, who claims that man-made climate change and the resulting increased flood risk threatens his house in the Andes, which is located right below a glacial lake. Supported by two German NGOs, he seeks compensation from RWE, Europe's single biggest emitter of carbon dioxide, for the equivalent of its contribution to worldwide human carbon dioxide emissions, i.e. 0.47 percent, of the additional protective measures he had to take to flood-prove his house.

The trip had already been scheduled in 2019 but was delayed by the Covid-19 pandemic. Its main purpose appears to have been the proper instruction of the two experts, who are charged with assessing the climate-change-related risk for the claimant and the extent of RWE's potential contribution to it.

In terms of private international law, the case is straightforward. The German courts have international jurisdiction on the basis of Articles 4(1), 63(1) Brussels Ia as RWE has its statutory seat and central administration in Germany. As far as the applicable law is concerned, the claimant can rely on the privilege awarded to the (alleged) victims of environmental torts by Art 7 Rome II, according to which they may opt for the law of the country in which the event giving rise to the damage occurred (as opposed to the law of the country in which the damage occurred, which generally applies pursuant to Art. 4(1) Rome II), i.e. for German law in the case of pollutions caused by RWE's power plants in Germany. Thus, the usual PIL problems of climate-change lawsuits (international jurisdiction based on Art. 7(2) or 8(1) Brussels Ia, immunity of state-owned corporations, predictability of the law of the place of the damage, application of Art. 17 Rome II, …) do not arise in this case.

Regarding the application of substantive German law, the case is much more open. In the first instance, the Regional Court of Essen outright rejected the claim for lack of a sufficient causal connection between RWE's contribution to climate change and the specific risk of the claimant. This is in line with what might still be the majority position in German scholarship, according to which individual contributions to global climate change cannot trigger civil liability in tort or property law. The fact that the second-instance court has now started to collect evidence implies, however, that it considers the claim to succeed on the basis of the claimant's submissions. Seen together with the German Constitutional Court quashing national legislation for being incompatible with Article 20a of the Constitution and international commitments to limit global warming in 2021, the lawsuit in Hamm may be a sign of German courts slowly adopting a more active position in the global fight against climate change, including with regard to civil liability.

Conflicting Views on the Restatement (Third) of Conflict of Laws

The American Law Institute is currently drafting the *Restatement (Third) of Conflict of Laws*. Lea Brilmayer (an eminent scholar of conflict of laws and a professor at Yale Law School) and Kim Roosevelt (the Reporter for the *Restatement (Third)* and a professor at the University of Pennsylvania Carey Law School) recently engaged in a spirited debate about the current state of that project. Brilmayer and Daniel Listwa argued here that the current draft needs less theory and more blackletter rules. Roosevelt argued in response that the critics identify a problem that does not exist and propose a solution that would make things worse.

This exchange — the latest back-and-forth in a conversation between these interlocutors — is likely to prove illuminating to anyone curious about the status of the *Restatement (Third)* in the United States.

Can Blockchain Arbitration become a proper ‘International Arbitration’? Jurors vs. arbitrators

Written by Pedro Lacasa, Legal Consultant, Universidad Nacional de Asunción

There is no doubt that the use of emerging technologies has impacted the international arbitration arena. This tech revolution was unprecedently accelerated by the 2020 pandemic whilst national States’ borders were closed, and travel activity diminished (if not directly forbidden by some States).

The increase of the application of the Blockchain technology in commercial contracts and the proliferation of smart contracts (even though some think they are in essence merely a piece of software code[1]) have reached the point of being a relevant part of international commerce and suddenly they demand more attention than before (see the overview of these new technologies and its impact in arbitration here http://arbitrationblog.kluwerarbitration.com/2019/01/27/2018-in-review-blockchain-technology-and-arbitration/).

The omnipresence of technology in arbitration and the application of the blockchain technology to dispute resolution mechanisms in the international arena led to the naissance of the ‘blockchain arbitration’.

But just because a method focuses on dispute resolution, is not *ipso facto* a proper ‘*arbitration*’.

While the utilization of a trusted chain of information enhanced by technology is encouraged in arbitration proceedings, particularly in international arbitrations, we must underscore the fact that not any dispute resolution mechanism is a proper ‘*arbitration*’… not even if based on the blockchain.

Blockchain arbitration models do not share some of the essential features of arbitration. The parties cannot choose the arbitrator in charge freely. They cannot easily choose aspects like the language of the procedure, the nationality of the arbitrators, the qualification of the arbitrators, the applicable law, etc. If the parties choose the arbitrators based on their qualifications or nationality, such choices can directly impact the *availability* of the existing 'blockchain arbitrators'. *A fortiori*, the parties cannot choose the applicable law to the arbitration itself or to the merits of the dispute either.

Nominating the arbitrators

In Kleros, one of the most popular blockchain arbitration applications, the candidates for adjudicators first self-select themselves into specific courts (i.e., specific types of disputes) and then, the final selection of the adjudicators is done randomly (meaning a party cannot directly nominate someone in particular as an arbitrator for the underlying dispute). As it specifies in its whitepaper[2] "*contracts will specify the options available for jurors to vote*", meaning the contract itself is the first factor that restrain party autonomy. In Kleros anyone can be an adjudicator. The probability of being drawn as an adjudicator for a dispute is proportional to the amount of tokens such user stakes within the platform.

Whilst other platforms such as Aragon[3] use the same drafting (of adjudicators) system, networks such as Jur[4], Mattereum and Sagewise[5] use a system that go a step closer to the International Arbitration legal framework (like the 1958 New York Convention, the UNCITRAL Model Law, etc.) in order to make their awards more enforceable worldwide but still lack the flexibility of a wider private autonomy and the role of the conflicts of laws, both present in classical international commercial arbitration processes.

These blockchain-based dispute resolution adjudicators are referred also as 'jurors'[6]. 'Jurors' are Blockchain users elected to vote in favor of one of the parties to the underlying dispute utilizing the Schelling Point method.

But without even analyzing what the Schelling Point methodology has to do with the art of rendering justice in a definitive and final manner, we must ask the question: if the 'jurors' have more features of a jury and not of an arbitrator, why do we call a mechanism that solves disputes through decisions made by jurors and not by arbitrators *arbitration*?

Moreover, these jurors, like users of the Blockchain, have a direct economic interest in serving as jurors in the dispute at hand[7]. However, to think that an arbitrator decided to assume the task of being a part of an arbitral tribunal in an international arbitration constituted to resolve an international dispute, only because that would mean eventually more money to him, is an obscure idea at best. Such arbitrator was elected because of his or her qualities, experience, background, and reputation. This also occurs in domestic arbitrations. Nonetheless, such private autonomy is not possible in some blockchain arbitrations.

It is one thing to refer to such mechanisms as blockchain-based methods. But it is completely different is to maintain that such mechanisms are indeed 'arbitrations' *stricto sensu**[8]***, just like suggested by many authors[9] and professional associations such as the Blockchain Arbitration Society

Although the global society must embrace all the tech innovations regarding dispute resolution, the clear definition of what is an '*arbitration'* and what is not should be a healthy practice.

Conclusion

Overall, the technology evolution within the dispute resolution mechanisms is here to stay. This disruption needs a twofold adaptation: on one hand, the parties on an international contractual commercial relationship must adapt themselves to the new ways of solving disputes. The same goes for Sovereign States, that must update their domestic and international legislation to recognize and somehow regulate such new dispute resolution mechanisms.

On the other hand, these platforms for dispute resolution must adapt to the historical surrounding of the conflict solving industry, calling a dispute resolution mechanism for what it is and avoid euphemisms.

Lastly, the misconception on the dispute resolution mechanisms and international arbitration procedures may provoke a confusion to the detriment of the users of such digital networks.

[1] See Charlie Morgan 'Will the Commercialisation of Blockchain Technologies

Change the Face of Arbitration?' [Kluwer Arbitration Blog, March 5, 2018] available at http://arbitrationblog.kluwerarbitration.com/2018/03/05/topic-to-be-confirmed/.

[2] Kleros white paper [September 2019] available at https://kleros.io/whitepaper.pdf.

[3] See "Juror staking" and " Juror drafting" https://github.com/aragon/whitepaper.

[4] See "Open Justice Platform" in Jur's whitepaper V 3.0.0 [March 2021], available at https://jur.io/wp-content/uploads/2021/03/jur-white-paper-v.3.0.0.pdf.

[5] See Darcy W.E. Allen, Aaron M. Lane & Marta Poblet, 'The Governance of Blockchain Dispute Resolution' [Harvard Negotiation Law Review, vol. 25, issue 1, Fall 2019] 75-102.

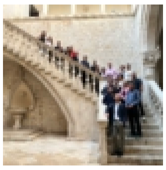
[6] Maxime Chevalier, 'From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order' [*Journal of International Dispute Settlement*, vol. 12, issue 4, December 2021] 558 – 584 https://academic.oup.com/jids/article-abstract/12/4/558/6414874?redirectedFrom=PDF.

[7] Kleros white paper [September 2019] available at https://kleros.io/whitepaper.pdf.

[8] See for example Sharath Mulia & Romi Kumari, 'Blockchain Arbitration: The Future of Dispute Resolution' [Fox Mandal, November 2021] available at https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/.

[9] For example, see Ritika Bansal, 'Enforceability of Awards from Blockchain Arbitrations in India [August 2019] available at: http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/.

Conference Report: EAPIL YRN Conference on National Rules on Jurisdiction and the Possible Extension of the Brussels Ia Regulation



The following conference report has been provided by Benjamin Saunier, Research Assistant at the Université Paris 2 Panthéon-Assas and Doctoral Candidate at the Université Paris 1 Panthéon-Sorbonne.

The EAPIL Young Research Network held a conference on the topic J**urisdiction over non-EU defendants – Should the Brussels Ia Regulation be extended?** on Saturday 14 and Sunday morning 15 May. The conference took place in Dubrovnik, Croatia, at the International University Centre operated by the University of Zagreb, which had co-funded the event together with the EU Commission. It gathered specialists from all over the world, including the non-EU Member States.

The conference was part of an ongoing research project directed by Drs Tobias Lutzi (Cologne/Augsburg), Ennio Piovesani (Torino) and Dora Zgrabljic Rotar (Zagreb). As explained by the organisers at the outset of the conference, the project, launched in June 2021, was inspired by Article 79 of the Brussels Ia Regulation, which provides for the EU Commission to come up with a report on the application of the Regulation, addressing in particular the need to extend its rules to defendants not domiciled in a member state. While the report has yet to be released, the organisers rightly felt it was of great interest to compare the practice of Member States for those cases where the defendant is not subject to rules of direct jurisdiction in the Regulation.

A questionnaire on autonomous, national law on international jurisdiction was sent last year to the 23 participants in the project, who cover 17 Member States of the EU. The questionnaire contained the following questions (here summarised):

> – What are the sources of rules on international jurisdiction in your country?
> – How is the domicile defined for jurisdictional purposes? Is there a general rule of jurisdiction based on a ground other than domicile of the defendant?
> – Is there a *forum necessitatis*? What are the equivalents of the Regulation Article 7(1) for contractual claims, 7(2) for torts, 8(1) for close connection between defendants, and the equivalents of protective heads of jurisdiction such as the one for consumer law disputes?
> – Is your country party to any (bilateral or multilateral) treaty that provides direct rules of jurisdiction in civil and commercial matters?

The national reports were submitted last February and the organisers were able to share some of their (preliminary) conclusions, which will eventually make their way into a book along with the national reports and some of the interventions heard in Dubrovnik. Not all of the findings could be introduced in this report, which only serves as a short teaser for the book.

Tobias Lutzi pointed out that most of the states surveyed, which already make up for the majority of the EU Member States, have adopted specific rules for international jurisdiction. Some of these countries have already extended the rules of the Regulation, or taken substantial inspiration from them. Even courts of the member states that have not adopted specific rules on international jurisdiction did on some occasion take some inspiration from the EU rules when applying the principle of 'double functionality', which sees international jurisdiction as entailed by local jurisdiction. This was addressed in details by the members of the first panel of Saturday, which focused on the topic of the influence of EU law on national rules and was composed of **Tess Bens**, Dr **Stefano Dominelli**, Dr **Dafina Sarbinova** and **Benjamin Saunier**.

Dora Zgrabljic Rotar remarked that in most countries, the same definition of the domicile was applied in international and domestic cases for jurisdictional purposes (which is not to say that the definition itself is the same in all those countries). The majority of the jurisdictions surveyed use the statutory seat as well as the actual seat in order to determine the domicile of a legal person. As for bases of general jurisdiction apart from the defendant's domicile, most of the countries surveyed seem to have one, be it habitual residence, mere presence, or property of the defendants. Only two of these countries still give relevance to nationality of either party to a litigation in that regard. The existence of a *forum necessitatis* is also a distinctive feature of the countries implementing it. Speakers of the second panel of Saturday (**Vassiliki Marazopoulo**, **Giedirius Ožiunas**, Dr **Ioannis Revolidis**, Dr **Anna Wysocka-Bar**), dealing with the peculiarities of autonomous law of the Member States, all had the opportunity of explaining, among other things, whether or not, and why, their home jurisdiction had a forum necessitatis rule.

The third panel of Saturday, composed of Professors **Ronald Brand**, **Burkard Hess** and **Margerita Salvadori** addressed the issue of "extending the Brussels Ia Regulation", which echoes the project title "should the Regulation be extended?". The panellists put things in a broad perspective, addressing the discrimination (Ronald Brand) and recognition and enforcement of judgements issues (Burkard Hess) that would be associated with an extension (or non-extension) of the Regulation, as well as the possibility of following a method based on reciprocity in an extended Regulation (Margerita Salvadori).

Participants were also provided with a look at the "bigger picture" thanks to the presentations on Sunday. Dr **Johannes Ungerer** for the UK and Dr **Marko Jovanovic** for Serbia both presented third state perspectives. Finally, Dr **Ning Zhao** gave a thorough presentation of the negotiations held in the Hague Conference since the early 1990s on the issues discussed at the conference, their achievements so far (2005 Choice-of-Court Agreements and 2019 Judgements conventions) and orientations.

The interventions and exchange among participants made for two very pleasant days. The gorgeous setting of Dubrovnik also played its part in making the conference a great success. As Ronald Brand put it, the question asked in the project title raises multiple further questions, so that it can be hoped that no matter what the future holds for the Brussels Ia Regulation, projects such as this one will be happening more and more.