First View Article on ICLQ

A first view article was published online on 12 April 2024 in *International and Comparative Law Quarterly.*

Raphael Ren, “The Dichotomy between Jurisdiction and Admissibility in International Arbitration”

The dichotomy between jurisdiction and admissibility developed in public international law has drawn much attention from arbitrators and judges in recent years. Inspired by Paulsson’s ‘tribunal versus claim’ lodestar, attempts have been made to transpose the distinction from public international law to investment treaty arbitration, yielding a mixed reception from tribunals. Remarkably, a second leap of transposition has found firmer footing in commercial arbitration, culminating in the prevailing view of the common law courts in England, Singapore and Hong Kong that arbitral decisions on admissibility are non-reviewable. However, this double transposition from international law to commercial arbitration is misguided. First, admissibility is a concept peculiar to international law and not embodied in domestic arbitral statutes. Second, its importation into commercial arbitration risks undermining the fundamental notion of jurisdiction grounded upon the consent of parties. Third, the duality of ‘night and day’ postulated by Paulsson to distinguish between reviewable and non-reviewable arbitral rulings is best reserved to represent the basic dichotomy between jurisdiction and merits.

Lex Fori Reigns Supreme: Indian High Court (Finally) Confirms Applicability of the Indian Law by

‘Default’ in all International Civil and Commercial Matters

Written by Shubh Jaiswal, student, Jindal Global Law School, Sonipat (India) and Professor Saloni Khanderia, JGLS.

In the landmark case of *TransAsia Private Capital vs Gaurav Dhawan*, the Delhi High Court clarified that Indian Courts are not automatically required to determine and apply the governing law of a dispute unless the involved parties introduce expert evidence to that effect. This clarification came during the court’s examination of an execution petition stemming from a judgment by the High Court of Justice Business and Property Courts of England and Wales Commercial Court. The Division Bench of the Delhi High Court invoked the precedent set by the United Kingdom Supreme Court in *Brownlie v. FS Cairo*, shedding light on a contentious issue: the governing law of a dispute when parties do not sufficiently prove the applicability of foreign law.

The Delhi High Court has established that in the absence of evidence proving the applicability of a foreign law identified as the ‘proper law of the contract’, Indian law will be applied as the default jurisdiction. This decision empowers Indian courts to apply Indian law by ‘default’ in adjudicating international civil and commercial disputes, even in instances where an explicit governing law has been selected by the parties, unless there is a clear insistence on applying the law of a specified country. This approach aligns with the adversarial system common to most common law jurisdictions, where courts are not expected to determine the applicable law proactively. Instead, the legal representatives must argue and prove the content of foreign law.

This ruling has significant implications for the handling of foreign-related civil and commercial matters in India, highlighting a critical issue: the lack of private international law expertise among legal practitioners. Without adequate knowledge of the choice of law rules, there’s a risk that international disputes could always lead to the default application of Indian law, exacerbated by the absence of codified private international law norms in India. This situation underscores the need for specialized training in private international law to navigate the complexities of international litigation effectively.

Facts in brief

As such, the dispute in *Transasia* concerned an execution petition filed under Section 44A of the Indian Civil Procedure Code, 1908, for the enforcement of a foreign judgment passed by the High Court of Justice Business and Property Courts of England and Wales Commercial Court. The execution petitioner had brought a suit against the judgment debtor before the aforementioned court for default under two personal guarantees with respect to two revolving facility loan agreements. While these guarantee deeds contained choice of law clauses and required the disputes to be governed by the 'Laws of the Dubai International Finance Centre' and 'Singapore Law' respectively, the English Court had applied English law to the dispute and decided the dispute in favour of the execution petitioner. Accordingly, the judgment debtor opposed the execution of the petition before the Delhi HC for the application of incorrect law by the Court in England.

It is in this regard that the Delhi HC invoked the 'default rule' and negated the contention of the judgment debtor. The Bench relied on the decision rendered by the Supreme Court of the United Kingdom in *Brownlie v. FS Cairo,* which postulated that "*if a party does not rely on a particular rule of law even though it would be entitled to do so, it is not generally for the court to apply the rule of its own motion.*"

The HC confirmed that foreign law is conceived as a question of fact in India. Thus, it was for each party to choose whether to plead a case that a foreign system of law was applicable to the claim, but neither party was obliged to do so, and if neither party did, the court would apply its own law to the issues in dispute. To that effect, the HC also relied on *Aluminium Industrie Vaassen BV,* wherein the English Court had applied English law to a sales contract even when a provision expressly stipulated the application of Dutch law—only because neither party pleaded Dutch law.

Thus, in essence, the HC observed that courts would only be mandated to apply the chosen law if either party had pleaded its application and the case was 'well-founded'. In the present dispute, the judgment debtor had failed to either plead or establish that English law would not be applicable before the Court in England and had merely challenged jurisdiction, and thus, the Delhi HC held that the judgment could not be challenged at the execution stage.

Choosing the Proper Law

The mechanism employed to ascertain the applicable law under Indian private international law depends on whether the parties have opted to resolve their dispute before a court or an arbitral tribunal. In arbitration matters, the identification of the applicable law similarly depends on the express and implied choice of the parties. Similarly, in matters of litigation, courts rely on the common law doctrine of the 'proper law of the contract' to discern the applicable law while adjudicating such disputes on such obligations. Accordingly, the proper law depends on the express and implied choice of the parties. When it comes to the determination of the applicable law through the express choice of the parties, Indian law, despite being uncodified, is coherent and conforms to the practices of several major legal systems, such as the UK, the EU's 27 Member States, and its BRICS partners, Russia and China – insofar as it similarly empowers the parties to choose the law of any country with which they desire their disputes to be settled. Thus, it is always advised that parties keen on being governed by the law of a particular country must ensure to include a clause to this effect in their agreement if they intend to adjudicate any disputes that might arise by litigation because it is unlikely for the court to regard any other factor, such as previous contractual relationships between them, to identify their implied choice.

Questioning the Assumed: Manoeuvring through the Intricate Terrain of Private International Law and Party Autonomy in the Indian Judicial System

By reiterating the 'default rule' in India and presenting Indian courts with another opportunity to apply Indian law, this judgment has demonstrated the general tendency on the part of the courts across India to invariably invoke Indian law – albeit in an implicit manner – without any (actual) examination as to the country with which the contract has its closest and most real connection. Further, the lack of expertise by the members of the Bar in private international law-related matters and choice of law rules implies that most, if not all, foreign-related civil and commercial matters would be governed by Indian law in its capacity as the *lex fori*. Therefore, legal representatives should actively advocate for disputes to be resolved according to the law specified in their dispute resolution clause rather than assuming that the court will automatically apply the law of the designated country in adjudicating the dispute.

Foreign parties may not want Indian law to apply to their commercial contracts,

especially when they have an express provision against the same. Apart from being unclear and uncertain, the present state of India's practice and policy debilitates justice and fails to meet the commercial expectations of the parties by compelling litigants to be governed by Indian law regardless of the circumstance and the nature of the dispute—merely because they failed to plead the application of their chosen law.

This would inevitably lead to foreign parties opting out of the jurisdiction of the Indian courts by concluding choice of court agreements in favour of other forums so as to avoid the application of the Republic's ambiguous approach towards the law that would govern their commercial contracts. Consequently, Indian courts may rarely find themselves chosen as the preferred forum through a choice of court agreement for the adjudication of such disputes when they have no connection to the transaction. In circumstances where parties are unable to opt out of the jurisdiction of Indian courts – perhaps because of the lack of agreement to this effect, the inconsistencies would hamper international trade and commerce in India, with parties from other jurisdictions wanting to avoid concluding contracts with Indian businessmen and traders so as to avert plausible disputes being adjudicated before Indian courts (and consequently being governed by Indian law).

Therefore, Indian courts should certainly reconsider the application of the 'default rule', and limit the application of the *lex fori* in order to respect party autonomy.

Out now: RabelsZ 88 (2024), Issue 1

The latest issue of RabelsZ has just been released. In addition to the following articles it contains fantastic news (mentioned in an earlier post today): Starting with this issue RabelsZ will be available open access! Enjoy reading:

Symeon C. Symeonides, **The Torts Chapter of the Third Conflicts Restatement: An Introduction,** pp. 7–59, DOI: https://doi.org/10.1628/rabelsz-2024-0001

This article presents the torts chapter of the Restatement (Third) of Conflict of Laws, as approved by the American Law Institute in May 2023. That chapter steers a middle ground between the broad, inflexible rules of the First Restatement of 1934 and the exceedingly equivocal directives of the Second Restatement of 1971. It accurately captures the judicial decisional patterns emerging in the more than forty US jurisdictions that have abandoned the old lex loci delicti rule and joined the choice-of-law revolution of the 1960s. It recasts them into new, narrow, and "smart" rules that incorporate the revolution's methodological advances but without reproducing its excesses. The most noteworthy features of these rules are: (1) the distinction between conduct-regulating and loss-allocating tort rules; (2) the application of the law of the parties' common domicile in loss-allocation conflicts; (3) a rule giving victims of cross-border torts the option of requesting the application of the law of the state of injury, if the occurrence of the injury there was objectively foreseeable; and (4) the general notion that the choice of the applicable law should depend not only on a state's territorial contacts, but also on the content of its law.

Yves-Junior Manzanza Lumingu, Jules Masuku Ayikaba, **Accessibilité des sociétés commerciales de droit étranger à l'espace OHADA – Sur la reconnaissance de leur personnalité juridique selon la jurisprudence de la CCJA,** pp. 60–86, DOI: https://doi.org/10.1628/rabelsz-2024-0008

The Access of Foreign Commercial Companies to the OHADA Area – Recognition of Legal Personality under CCJA Case Law. – The Organization for the Harmonization of Business Law in Africa (OHADA) is striving to make its geographical area more attractive, particularly to foreign investors and foreign commercial companies. This should be achieved by adopting, at a supranational level, uniform and modern legal standards which can be readily embraced by the business community and by ensuring legal certainty through the establishment of the Common Court of Justice and Arbitration (CCJA). To date, however, OHADA has not yet adopted any provision recognizing the legal personality of companies operating throughout its region. However, the recognition of such entities is essential with regard to their participation – particularly as shareholders or partners – in a commercial company incorporated under OHADA law or in relation to the establishment of branches or subsidiaries within OHADA member states. The CCJA has, however, issued a number of rulings on this issue. This study examines these decisions and recommends the adoption of an OHADA-wide procedure for recognizing the legal personality of foreign commercial companies.

Eckart Bueren, Jennifer Crowder. **Mehrstimmrechte im Spiegel von Rechtsvergleichung und Ökonomie,** pp. 87–150, DOI: https://doi.org/10.1628/rabelsz-2024-0015

Multiple Voting Rights Through the Lenses of Comparative Law and Economics. – Multiple voting rights have been gaining ground internationally with several jurisdictions authorizing them in little more than a decade, including for listed companies. Germany recently followed suit with its "Zukunftsfinanzierungsgesetz", and the EU Commission intends to do the same as part of the Listing Act. This article explains these developments with a view to contemporary conditions and law and economics conceptions. It then contrasts them with developments in the United States, Asia, and Europe and

sheds light on their relationship to other trends in corporate law. Particular attention is paid to findings that may help to properly calibrate mechanisms against abuse, e. g. a possible segment specificity, limitations on resolution items, variations in terms of sunsets or time-phased voting (loyalty shares). The article concludes with considerations on how multiple voting rights and other key legislative objectives of recent years, namely stewardship, sustainability, and corporate purpose, can be coherently developed.

Chinese Journal of Transnational Law (Vol. 1, Issue 1) was released

The first issue of the Chinese Journal of Transnational Law (Vol.1 Issue 1, 2024) was recently published by SAGE. It includes three articles relevant to private international law.

Consensus and Compulsion: The Extra-territorial Effect of Chinese Judicial and Specially-Invited Mediation in Common Law Countries, Jie (Jeanne) Huang
This article conducts exhaustive research on case law in major common law jurisdictions (Australia, Canada, Hong Kong, New Zealand, Singapore, the UK, and the US) regarding the recognition and enforcement of Chinese judicial mediation decisions (MTS). In contrast to the rich literature criticizing the systematic deficiency of Chinese judicial mediation where an adjudicator plays the dual role of mediator and judge in the same case and the consequent injustice to the parties, the deficiency is not an issue currently in recognition and enforcement of MTS in common law jurisdictions. Why is this so and what would be the future trend? Answering these questions, this article explores the recent expansion from judicial mediation to Specially-Invited Mediation at the people's courts in China and discusses whether the features of Specially-Invited Mediation impact the recognition and enforcement of MTS at the common law jurisdictions. It also addresses controversies on applicable law, challenges to the enforceability of civil liability clauses, debates on the finality of MTS, and recognition and

enforcement of MTS under China's judicial assistance agreements, the Hague Choice-of-Court Convention, the Hague Judgments Convention, and the Singapore Mediation Convention.

Procedural Estoppel in International Commercial Arbitration Proceedings, Ilias Bantekas

This article argues that arbitral practice has effectively given rise to a general principle whereby the parties to arbitral proceedings are deemed to have waived rights arising from a procedural rule where they have failed to timely raise an objection against a procedural irregularity. Tribunals do not refer to such a process as abuse of right, or procedural estoppel, but as a tacit waiver of procedural rights. Even so, the effects are the same. This rule is well enshrined in article 4 of the UNCITRAL Model Law on International Commercial Arbitration. There is a line of domestic case law suggesting that the presumption in favour of the waiver does not apply where the party in question had no knowledge of the facts giving rise to the breach; where failure to apply it was not predicated on bad faith and/or; where the delay in exercising the right was not significant.

Consumer Jurisdiction and Choice of Law Rules in European and Chinese Private International Law, Zhen Chen

This article compares consumer jurisdiction and choice of law issues in China and the EU. It aims to answer the following questions. What is the notion of consumer? Are farmers, package travel tourists and timeshare tourists consumers? Are dual-purpose contracts consumer contracts? Is a consumer jurisdiction rule needed in China and if yes, under what ground and with what conditions? Is choice of court agreement in consumer contracts valid? How to limit the exercise of party autonomy and what role mandatory provisions may play? Shall consumer contract and tort claims be subject to the same applicable law? Based on a comparative analysis with European law, this article concludes that to improve cross-border consumer protection, China should reform its law to include package travel contracts and timeshare contracts into consumer contracts and determine the nature of dual-purpose contracts pursuant to their primary purpose. Moreover, the current limitation on party autonomy should be lifted by providing freedom to both parties and relying on mandatory provisions as a safety valve. The consumer choice of law rule and its interaction with the general contract choice of law and tort choice of law rule needs to be reexamined.

Conference on Informed Consent to Dispute Resolution Agreements, Bremen, 20–21 June 2024

On 20 and 21 June 2024, Gralf-Peter Calliess and Nicholas Mouttotos (Institute for Commercial Law, University of Bremen) will convene a conference on 'Informed Consent to Dispute Resolution Dispute Agreements' in Bremen. They have shared the following announcement with us:

Dispute Resolution Agreements (DRA) are a very special kind of contract. They allow parties to make a choice on the rights (applicable law) and remedies (competent forum, including procedural rules), which govern their relationship. Party autonomy, i.e. the freedom to enter into DRA, enables international merchants to provide for legal certainty and to bargain on the 'law market' for the most efficient institutional framework for their transactions. However, where DRA are included in the fine print of standard form contracts with less sophisticated contract parties, the question of legitimacy arises. For instance, where mandatory consumer rights or constitutional rights to a remedy are waived, a higher quality of consent might be required, one that is informed, instead of a simple manifestation of assent to the transaction. However, 'informed' consent has been criticized as a legal fiction.

DRA are regulated by diverse instruments on the national, supra-, and international level. Despite their similarities they are rarely discussed in a consistent fashion. The conference convenes leading scholars of private international law, international civil procedure, international arbitration, and standard form contracts from both sides of the Atlantic in an effort to develop a coherent framework.

In addition to the organizers, the conference will feature Symeon C. Symeonides, Daniel D. Barnhizer, Hannah Buxbaum, John F. Coyle, Nikitas Hatzimihail, Nancy S. Kim, Laura Little, Peter McColgan, Marta Pertegás Sender, Frederick

Rieländer, Kermit Roosevelt, Stefan Thönissen, Camelia Toader, and Stephen J. Ware as speakers.

Further information can be found here.

Giustizia consensuale No 2/2023: Abstracts

The second issue of 2023 of *Giustizia consensuale* (published by Editoriale Scientifica) has just been released, and it features:

Giuseppe Trisorio Liuzzi (Professor at the Università degli Studi di Bari "Aldo Moro"), ***La composizione negoziata. Una soluzione consensuale della crisi d'impresa*** (*The negotiated settlement. A consensual solution to the business crisis*; in Italian)

> This article examines the main features of the 'Negotiated Settlement of the Business Crisis' (Composizione Negoziata della Crisi d'Impresa), introduced in the Business Crisis and Insolvency Code (Codice della Crisi d'Impresa e dell'Insolvenza) in place of the initially envisaged 'Alert Procedure' (Procedura di Allerta). Notably, the author highlights the consensual and extrajudicial nature of the Negotiated Settlement of the Business Crisis, also focusing on the protective and precautionary measures, on the one hand, and on the authorisation to take out loans and to transfer the company or its branches, on the other, which contemplate the intervention of the court in the instant procedure.

Monica Delsignore (Professor at the Università degli Studi di Milano-Bicocca) e **Marsela Mersini** (Ph.D. at the Università degli Studi di Milano-Bicocca), ***Gli strumenti per la composizione dei conflitti ambientali nella realizzazione delle infrastrutture per la crescita*** (*Tools for conflict resolution in environmental law in the implementation of infrastructure for growth*; in Italian)

This article aims to provide an overview of the tools available for resolving environmental conflicts stemming from the construction of large infrastructure and public works. While crucial for the development of the country, these projects pose a definite impact on the surrounding environment. Recognising that courts may not be the optimal forum for conflict resolution in this domain, this academic contribution will question the effectiveness and challenges of existing mechanisms and discuss a proposal to introduce a professional mediator in the administrative proceeding.

Olga Fuentes Soriano (Professor at the Universidad "Miguel Hernández", Alicante), ***Riflessioni sulla fattibilità della mediazione penale nei casi di violenza di genere*** (*Reflections on the feasibility of criminal mediation in cases of gender-based violence*; in Italian)

In 2004, Spain enacted the Law on Integral Protection Measures against Gender Violence. This legislation marked a significant advancement in combating this societal issue. It explicitly prohibited using mediation as a means of justice for such crimes, a notable departure from previous Spanish laws. While prior legislation contained limited references to criminal mediation – prohibiting it in gender violence cases and allowing it in juvenile justice – the subsequent implementation of the Victims' Statute in 2015 explicitly mentioned the incorporation of restorative justice mechanisms into the criminal field. This shift, following the 2012 European Directive, reignited a contemporary debate on the advantages and disadvantages of employing mediation in criminal cases, particularly in cases of gender violence. However, due to the inherent imbalance between the involved parties and the power dynamics characterising these violent situations, utilising consensual dispute resolution methods is deemed inadvisable.

Vincenzo Ansanelli (Professor at the Università degli Studi di Genova), ***Qualche minimo* update *sulla composizione del conflitto tramite consulenza tecnica preventive*** (*Some updates on conflict resolution through preliminary expert consultation*; in Italian)

The 'Preliminary Expert Consultation for the Settlement of Disputes' (*Consulenza tecnica preventiva ai fini della composizione della lite*) was introduced into the Italian legal system in 2005. Regulated by Article 696 bis

of the Italian Civil Procedure Code, this instrument is based on the assumption that the resolution of the decisive technical issue of the case would facilitate an amicable settlement. The paper offers an in-depth analysis of the most recent literature and case-law on this instrument. In particular, it focuses on its admission phase and examines two recent judgements of the Italian Constitutional Court – No. 222 of December 21, 2023, and No. 202 of November 10, 2023 – that partially redefine its scope of application.

Observatory on Legislation and Regulations

Cassio Scarpinella Bueno (Professor at the "Pontifícia Universidade Católica de São Paulo"), ***Meccanismi di giustizia consensuale nel diritto processuale brasiliano. Un'introduzione in chiave comparata*** (*Mechanisms of consensual justice in Brazilian procedural law. An introduction from a comparative perspective*; in Italian)

> This article argues that the analysis of consensual conflict resolution methods has the power to influence the traditional understanding of civil procedural law itself and to promote an ad hoc study of conflict resolution techniques without court intervention. To this end, the paper seeks to provide a portrait of non-judicial methods of conflict resolution in the Brazilian legal system based on their provision in the Brazilian Code of Civil Procedure of 2015, with the aim of promoting a fruitful comparison with other legal systems. In this perspective, the article deals mainly with conciliation, mediation, arbitration and procedural agreements, highlighting their importance for a greater awareness of the parties themselves in voluntarily resolving their conflicts or establishing different procedural rules to allow for a more adequate resolution of disputes through judicial proceedings.

Elena Mattevi (Researcher at the University of Trento), ***Strutture e figure professionali nella disciplina organica della giustizia riparativa. Il ruolo della formazione del mediatore esperto*** (*Structures and professional figures in the regulation of restorative justice. The role of the expert mediator training*; in Italian)

The *Cartabia Reform* (Law 27 September 2021 No 134 reforming criminal procedure in Italy) regulated for the first time in Italy the professional figure of the mediator in criminal matters and the organizational structure called to manage restorative justice programs. The mediator plays a decisive role in the system and, precisely for this reason, Legislative Decree No 150 of 2022 and its implementing decrees provided for a highly articulated training course with an interdisciplinary slant, to acquire the necessary qualification to carry out the activity. The analysis conducted in this article focuses on these aspects and the complexity of the mediator's role, which justifies the demand for very serious training. Universities – called to collaborate with the Restorative Justice Centres in the organization of the courses – will have a leading role, and thus the opportunity to open new perspectives in post-graduate training, but also to invest in research and curricular training on restorative justice.

Observatory on Practices

Michael S. Coffee (Professorial Lecturer in Law at the George Washington University Law School in Washington, D.C.) and **Melissa A. Kucinski** (International family law expert based in Washington, D.C.), ***Arbitrating a Multi-Jurisdictional Children's Dispute***

Arbitration remains a relatively new dispute resolution process in family law cases in the United States, and some jurisdictions within the United States differ in terms of process, selection of an arbitrator, and whether certain discrete issues, such as those that relate to parenting and children, can be arbitrated. This may create additional complications for cross-border families who find themselves living in the United States but with connections to another country, and a contractual requirement that they engage in arbitration of their family law dispute. This article will walk readers through a situation of a family who had previously agreed, at the time the spouses married, to arbitrate future family law disputes, and, after moving to the United States from their home country, are now faced with the layer of laws and complications over how to actually proceed.

Annalisa Atti (Researcher at the University of Bologna), ***Profili deontologici***

della professione del mediatore e dell'avvocato in mediazione (*Deontological profiles of the mediator and lawyer's activity in mediation*; in Italian)

> This article aims to examine the role, duties and styles of the mediator and the lawyer who assists the parties in mediation, in the light of the regulatory and deontological provisions in force, including non-domestic ones, and of the application made of them by civil and disciplinary jurisprudence. The intertwining between competence and professional training, correct information to the client, behaviour according to loyalty and correctness, diligence in the fulfilment of the professional service, in the different but complementary civil and deontological levels is then outlined, not only for the best client satisfaction but also for the best solution of conflicts.

In addition to the foregoing, this issue features the following **Conference Proceedings**:

Tommaso Greco (Professor at the University of Pisa), ***La giustizia consensuale, alle radici del diritto*** (*Consensual justice, at the roots of law*; in Italian)

> During a presentation of journal *Giustizia consensuale*, held on 4 May 2023 at the University of Pisa, the theme linking 'justice' and 'consensus' was the subject of fruitful discussions from different standpoints. The Author retraces the introductory remarks he delivered on that occasion and puts forward the idea that consensual justice goes to the roots of the law, enhancing its horizontal and cooperative dimension.

Pierluigi Consorti (Professor at the University of Pisa, Affiliate Professor at the "Istituto Dirpolis, Scuola Superiore Sant'Anna di Pisa"), ***Oltre la mitezza, la gentilezza del diritto*** (*Beyond meekness, the kindness of law*; in Italian)

> This essay discusses the possibility of considering a soulful role of the law. In principle, law is mainly conceived as a self-referential institution that bases its ability upon the exercise of power. This power-based notion of the law does not always assist it in performing its social function effectively. In this essay the author takes into consideration the theses on 'mild law' and

advances the proposal of a 'kind law', which takes care of personal relationships and tries to make the dimension of listening prevail over that of assertiveness, as well as to make unitive elements prevail over divisive ones; a 'kind law' does not rely on the exercise of power but, rather, on the search for consensus.

Valentina Bonini (Associate Professor at the University of Pisa), ***Consenso e giustizia penale: dal mercato globale alla bottega sartoriale*** (*Consent and criminal justice: From the global marketplace to the tailor's workshop*; in Italian)

Criminal procedure used negotiated justice since 1988 to achieve procedural economy through the defendant's waiver of fundamental rights and guarantees in exchange for better terms with respect to punishment. Despite problems of compatibility with the system of simplified procedures such as the so-called plea bargaining, the legislator has progressively expanded the availability of negotiated justice. Only in more recent times other mechanisms have been implemented to enhance the defendant's will not only for the goal of efficiency but also to offer a different justice response: this is the case with the trial probation and, even more markedly, restorative justice, which proposes an autonomous justice paradigm aimed at bringing people's needs back to the center, offering a way of actively overcoming the offence perpetrated by the author and suffered by the victim.

Luciana Breggia (formerly Judge at the Florence Tribunal), ***Una giustizia plurale tra autonomia, responsabilità e autorità*** (*A plural justice between autonomy, responsibility and authority*; in Italian)

We are amidst a significant transformation within the justice system, embracing a diverse array of methodologies while championing individual autonomy and accountability. The journal *Giustizia consensuale* is not merely an outcome of this transformation; it stands as a harbinger of future growth and innovation.

Finally, it features the following **Book Reviews**:

One book review is by ***Cristina M. Mariottini*** *(European Institute of Public Administration):* **Werner HASLEHNER, Timothy LYONS KC, Katerina**

PANTAZATOU, Georg KOFLER, Alexander RUST (eds), *Alternative Dispute Resolution and Tax Disputes*, Cheltenham-Northampton, Edward Elgar Publishing, 2023, vii-xxv, 1-341.

Another book review is by ***Angela M. Felicetti*** (University of Bologna): **Emma VAN GELDER, *Consumer Online Dispute Resolution Pathways in Europe. Analysing the Standards for Access and Procedural Justice in Online Dispute Resolution Procedures***, The Hague, Eleven, 2022, 1-329.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2024: Abstracts

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

H.-P. Mansel/K. Thorn/R. Wagner: **European Conflict of Law 2023: Time of the Trilogue**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January 2023 until December 2023. It presents newly adopted legal instruments and summarizes current projects that are making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the CJEU as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague

Conference of Private International Law.

H. Kronke: **The Fading of the Rule of Law and its Impact on Choice of Court Agreements and Arbitration Agreements**

Against the background of declining standards of the rule of law in an increasing number of jurisdictions, the article identifies and discusses problematic choices of a forum or of an arbitral seat as well as solutions developed by courts and legal doctrine in private international law, civil procedure and arbitration law. Businesses and their legal advisers are encouraged to anticipate risks and consider appropriate measures when drafting contracts.

L. van Vliet/J. van der Weide: **The Crimean treasures**

In 2013, a collection of highly important archaeological objects, the "Crimean treasures" had been loaned by four Crimean museums to the LVR-Landesmuseum in Bonn, Germany, and the Allard Pierson Museum in Amsterdam for exhibition purposes. During the exhibition at the Allard Pierson Museum, the Crimean Peninsula was illegally annexed by the Russian Federation. The question then arose to whom the Crimean treasures should be returned by the Allard Pierson Museum: to the Crimean museums (de facto in possession of the Russian Federation) or to the State of Ukraine? The legal proceedings concentrated on the interpretation of the notion of "illicit export" in the UNESCO Convention 1970 and on the application of the concept of overriding mandatory rules in the area of property law. As to the UNESCO Convention 1970, the question was whether the concept of illicit export includes the case where protected cultural property is lawfully exported on the basis of a temporary export licence and is not returned to the country that issued the licence after the expiry of the term in the licence. The drafters of the UNESCO Convention did not consider this case. These proceedings are most probably the first to raise and answer this question. The 2015 Operational Guidelines to the UNESCO Convention contain a definition of illegal export that explicitly includes the case of non-return after temporary export. In our opinion, this allows for a broad interpretation of the UNESCO Convention.

The Dutch courts had international jurisdiction because the claims of the Crimean

museums were based on the loan agreements and the real right of operational management falling within the scope of the Brussels I Regulation. For the claims of the State of Ukraine, a clear basis for international jurisdiction does not exist when it acts in its state function. Claims iure imperii do not fall under Brussels I or Brussels I bis.

Having ruled that there was no illicit export, the Court of Appeal Amsterdam had to decide whether the contractual and property rights of the Crimean museums to restitution might be set aside by Ukrainian laws and regulations, including Order no. 292 requiring that the Crimean treasures be temporarily deposited with the National Museum of History of Ukraine in Kiev. The Court held that this Order applied at least as an overriding mandatory rule within the meaning of art. 10:7 of the Dutch Civil Code. The Dutch Supreme Court upheld the Court of Appeal's judgment, agreeing with the Court of Appeal's application of the concept of overriding mandatory rules. However, the Supreme Court could not give its view on the interpretation of the UNESCO Convention 1970.

W. Hau: **Litigation capacity of non-resident and/or foreign parties in German civil proceedings: current law and reform**

This article deals with the litigation capacity (Prozessfähigkeit) of non-resident and/or foreign parties in German civil proceedings, both de lege lata and de lege ferenda. This question can arise for minors and for adults who are under curatorship or guardianship. Particular attention is paid here to the determination of the law applicable to the litigation capacity in such cases, but also to the relevance of domestic and foreign measures directed to the protection of the party.

S. Schwemmer: **Jurisdiction for cum-ex liability claims against Non-EU companies**

In the context of an action for damages brought by investors in a cum-ex fund against the Australian bank that acted as leverage provider, the German Federal Supreme Court (BGH) had to deal with questions regarding the application of the Brussels Ibis Regulation to non-EU companies. The court not only arrived at a

convincing definition of the concept of principal place of business (Article 63 (1) c) Brussels Ibis-Regulation), but also ruled on the burden of proof with regard to the circumstances giving rise to jurisdiction. However, one core question of the case remains open: How should the conduct of third parties, especially senior managers, be taken into account when determining the place of action in the sense of Article 7(2) of the Brussels Ibis Regulation?

M. Fehrenbach: **In the Thicket of Concepts of Establishments: The Principal Place of Business within the Meaning of Art. 3 (1) III EIR 2017**

The Federal Court of Justice (Bundesgerichtshof) referred to the CJEU, among other things, the question whether the concept of principal place of business (Hauptniederlassung) within the meaning of Art. 3 (1) III EIR 2017 presupposes the use of human means and assets. This would be the case if the principal place of business were to be understood as an elevated establishment (Niederlassung) within the meaning of Art. 2 (10) EIR 2017. This article shows that the principal place of business within the meaning of Art. 3 (1) III EIR 2017 is conceived differently from an establishment within the meaning of Art. 2 (10) EIR 2017. Neither follows a requirement of the use of human means and assets from the desirable coherent interpretation with Art. 63

M. Lieberknecht: **Jurisdiction by virtue of perpetuatio fori under the Insolvency Regulation**

In this decision, the German Federal Supreme Court weighs in on the doctrine of perpetuatio fori in the context of international insolvency law. The court confirms that, once the insolvency filing is submitted to a court in the Member State that has international jurisdiction under Art. 3(1) EU Insolvency Regulation, the courts of that Member State remain competent to administer the insolvency proceedings even if the debtor shifts its centre of main interest (COMI) to a different Member State at a later point in time. In line with the EJC’s recent decision in the Galapagos case, the ruling continues the approach to perpetuatio fori established under the previous version of the EU Insolvency Regulation. In addition, the court clarifies that international jurisdiction established by way of perpetuatio fori remains unaffected if the initial insolvency filing has been submitted to a court

lacking local jurisdiction under the respective national law.

D. Martiny: **Arbitral agreements on the termination of sole distribution agreements in Belgium**

The Belgian Supreme Court has ruled that disputes on the termination of sole distribution agreements can be submitted to arbitration (April 7, 2023, C.21.0325.N). The Court followed the reasoning of the Unamar judgment of the European Court of Justice of 2013 and applied it to the relevant provisions of Article X.35–40 of the Belgian Code of Economic Law. According to the judgment, these provisions mainly protect "private" interests. Since they are not essential for safeguarding Belgian fundamental public interests, they are therefore not to be considered as overriding mandatory provisions in the sense of Article 9 para. 1 Rome I Regulation. Hence, the question whether a dispute can be subject to arbitration does not depend on whether the arbitrator will apply Belgian law or not. It is also not necessary that foreign law gives the distributor the same level of protection as Belgian law. This means that disputes on the termination of exclusive distribution agreements with Belgian distributors are now arbitrable and that choice of law clauses will be respected.

Th. Granier: **The Strabag and Slot judgments from the Paris Court of Appeal: expected but far-reaching decisions**

In two decisions issued on 19.4.2022, the Paris Court of Appeal held that it was sufficient for an investment protection agreement not to expressly exclude the possible application of laws of the European Union to establish the incompatibility of dispute settlement clauses in investment protection treaties with laws of the European Union. That incompatibility therefore applies to all clauses in those treaties that do not expressly exclude the application of the laws of the European Union by the arbitral tribunal. The Court of Appeal followed decisions of the ECJ in Achmea, Komstroy and PL Holding, by which it is bound. These decisions highlight the increasing difficulties in the recognition and enforcement of arbitral awards rendered pursuant to investment treaties in the European Union.

E. Schick/S. Noyer: **Acquisition of property according to the law applicable to contracts? A critical analysis of thte existing French private international property law in the light of oft he 2022 draft law**

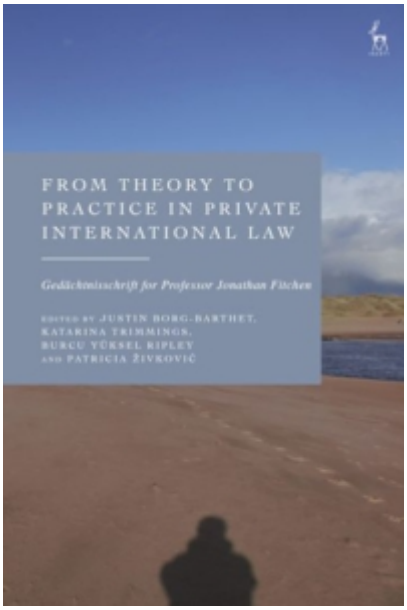
While the private international law of contracts is unified in the Rome I Regulation, the conflict of laws rules for property are still defined individually by member states of the European Union. Autonomous French private international law remains largely uncodified and the product of the jurisprudence of the Cour de cassation, with significant regulatory gaps. The draft legislation for private international law issued by the responsible committee on 31.3.2022 aims to codify large parts of this established jurisprudence and therefore also sheds new light on the conflict rules applicable in France de lege lata. In the field of private international property law, the proposed art. 97–101 feature conflicts rules which do not only appear to the German jurist as exotic, but even raise questions as to the scope of application of the Rome I Regulation. Focusing on the contractual transfer of movable property – an area where contract law and property law are intricately linked – this article offers an account of the applicable French conflicts of laws rules by examining the relevant jurisprudence and scholarly doctrine. The codification proposal and the problems it creates will also be critically analysed.

N. Dewitte/L.Theimer: **A century of the Hague Academy, 31 July to 18 August 2023, The Hague.**

From Theory to Practice in Private International Law: Gedächtnisschrift for Professor

Jonathan Fitchen

Written by Justin Borg-Barthet, Katarina Trimmings, Burcu Yüksel Ripley and Patricia Živkovic



Note: This post is also available via the blog of the European Association of Private International Law.

When our colleague and friend Prof Jonathan Fitchen passed away on 22nd January 2021, we were comforted in our grief by an outpouring of messages of condolence from private international lawyers around the world. We had known, of course, of the impact and importance of Jonathan's work to the world of private international law scholarship. His monograph on authentic instruments, for example, will remain an essential reference on that subject for many years to come. Jonathan's impact on the world of private international law scholars was, to a degree, less obvious. He was an unassuming man. He did not seek to command the attention of every gathering he attended, and he might have been surprised to realise how often he did just that. He was tremendously well-liked and well-respected for his wit, his self-deprecating sense of humour, and his empathy.

This book seeks to capture in it some of the immense esteem in which Jonathan was held. That much will of course be of interest to the many scholars and practitioners who had the privilege of Jonathan's acquaintance. The intellectual generosity of the contributing authors will ensure, however, that this volume will also be of great value to those who encounter Jonathan for the first time in these pages. Taken together, the chapters in this book address the major conceptual

and practical challenges of our time: from stubborn definitional dilemmas, such as the deployment of key terms in international child abduction cases, to contemporary concerns about disruptive technologies like cryptocurrencies, to core conceptual challenges regarding the unintended consequences of our discipline's professed neutrality.

The collection is divided into three main parts. Following a preface in which Prof Xandra Kramer paints a vivid picture of Jonathan's humanity, humour and wit, and an introduction by ourselves as the editors, Part I includes four chapters which address conceptual matters relating to the nature and scope of private international law. Part II is made up of seven chapters concerning civil and commercial matters in private international law. Part III includes two chapters on family matters in private international law.

Part I: The Evolving Nature and Scope of Private International Law

The first substantive chapter is a tour de force by Alex Mills in which he explores the unsettled relationship between private international law and legal pluralism. Mills observes that private international law is both a product and producer of pluralism, in addition to being internally pluralist in its self-conception. Mills' analysis will be of great interest to readers seeking to discern private international law's place in the taxonomy of the study of law, whether they are observing that taxonomy from the perspective of a comparatist, a conflicts scholar, or a public international lawyer.

The following chapter also engages with the problem of pluralism in private international law. Thalia Kruger focuses specifically on mediated settlements with a view to illuminating their meaning for the purposes of transnational law. Kruger does a wonderful job of building on Jonathan Fitchen's work by providing technical and normative analysis of the public faith to be accorded to private agreements. Ultimately, she welcomes a movement towards the upholding of settlement agreements but cautions against potential abuse of vulnerable parties.

The problem of vulnerability is the central focus of the next chapter, by Lorna Gillies. Gillies provides robust, systematic analysis of the theory and practice of our discipline's treatment of vulnerable parties. This is, of course, one of the central problems in a discipline whose professed neutrality is capable of

furthering and entrenching inequalities. Gillies argues persuasively that the application of Fredman's four pillars of asymmetrical substantive equality would equip private international law better to address inherent risks of vulnerability.

Asymmetries of private power remain the focus of discussion in the following chapter on the under-explored relationship between our discipline and feminist scholarship, authored by two of the editors. Justin Borg-Barthet and Katarina Trimmings set out to contribute to a nascent discussion about sex-based vulnerability and how this is (un)seen by much of the literature and law. It is argued, ultimately, that private international law requires more sustained engagement with feminist scholarship if it is to avoid acting as an instrument for the entrenchment of substantive inequalities.

Part II: Civil and Commercial Matters in Private International Law

Unsurprisingly, given the focus of much of Jonathan Fitchen's written work, Part II on civil and commercial matters makes up around half of the volume. It begins with Andrew Dickinson's meticulous analysis of the meaning of "damage" in EU private international law. Dickinson notes that, despite the central importance of the term to the operation of much of EU private international law, there is little clarity as to its meaning. His chapter sets out to remedy this shortcoming through the articulation of a hitherto undeveloped taxonomy of "damage" which promises to become an essential tool in the arsenal of students, teachers, practitioners, and adjudicators of private international law.

Another editor, Burcu Yüksel Ripley, authored the next chapter, which addresses cryptocurrencies. Our discipline's continued preoccupation with definitional clarity remains very much in evidence in this discussion of challenges posed by disruptive technologies. Yüksel Ripley notes that attempts to characterise cryptocurrencies as a thing/property are unsatisfactory in principle, and that they therefore lead to conceptually unsound outcomes. She proposes instead that analogies with electronic fund transfers provide more promise for the determination of the applicable law.

In the next chapter, by Laura Carballo Piñeiro, the volume returns to another major theme of Jonathan Fitchen's scholarly output, namely the effectiveness of collective redress mechanisms. Carballo Piñeiro observes that access to justice

remains restricted in most jurisdictions, and that a common EU approach remains lacking. Although the courts have provided some routes to collective redress, Carballo Piñeiro argues that a robust legislative response is paramount if corporate accountability for environmental harm is to be realised in Europe.

Private international law's ability to engage with concerns regarding environmental sustainability remains a key focus of analysis in Carmen Otero García-Castrillón's chapter concerning the discipline's place in international trade agreements. The chapter advocates the bridging of an artificial systemic separation between the private and the public in the international system. It is argued that the extent of private power in the international system merits attention in trade agreements if sustainable development goals are to be attained.

Giesela Rühl also addresses concerns regarding private international law's ability to be deployed in matters which are traditionally reserved to public and public international law. Her chapter considers innovations introduced through the German Supply Chain Due Diligence Act (Lieferkettensorg-faltspflichtengesetz – LkSG) which establishes mandatory human rights due diligence obligations in German companies' international supply chains. Rühl laments the lack of attention paid to private international law in German law. She makes an especially compelling case for any future EU interventions to recognise the need to engage with private international law if legislation is to be effective.

The uneasy public-private divide in transnational law remains in evidence in Patricia Živkovi?'s chapter concerning what she describes as "creeping substantive review" in international arbitration. Živkovi? decries a lack of conceptual clarity in courts' treatment of arbitral determinations, particularly insofar as public policy is deployed as an instrument of substantive review of private adjudication. She argues that international legislative intervention is needed if prevailing inconsistencies of treatment are to be resolved.

Fittingly, Part II is rounded off with a discussion of that part of private international law to which Jonathan Fitchen made his most enduring scholarly contribution, namely authentic instruments. Zheng Tang and Xu Huang discuss authentic instruments in Chinese private international law. Like Jonathan's work, this chapter provides readers of English language scholarship with a rare example of in-depth analysis of concepts which are unfamiliar in the Anglo-American tradition. The chapter's compelling arguments for legal refinements will

also be of use, however, to readers who wish to identify possible improvements to Chinese law.

Part III: Family Matters in Private International Law

The final part of the book turns to family law, an area in which Jonathan provided ample instruction to students, but which was not especially in evidence in his written work. In keeping with the previous parts of the book, our discipline's need for definitional clarity and consistency are very much apparent in the chapters in this part, as is the somewhat existential concern regarding the proper delineation of the public and the private. As the authors in this part observe, each of these matters has far-reaching effects on the apportioning of rights and obligations in circumstances which are deeply meaningful to the lives of litigants.

Aude Fiorini's chapter considers flawed reasoning in the US Court of Appeals judgment in *Pope v Lunday.* Fiorini illustrates the substantive flaws in the Court's treatment of the habitual residence of neonates, but also highlights a broader concern regarding the potential for unconscious bias in judicial decision-making. Through the judgment in *Pope*, Fiorini raises alarms regarding inconsistent judicial treatment of similar situations which turn on appreciation of circumstances establishing the habitual residence of a child. She argues, particularly compellingly in our view, that the interests of justice require greater conceptual clarity and consistency.

In the final chapter, by Anatol Dutta, the interactions of the public and the private return to the fore. Taking his cue from Jonathan Fitchen's work on authentic instruments, Dutta explores the concept of private divorce under the Brussels IIter Regulation. Concerns regarding decisional autonomy are very much in evidence in this chapter, which considers the meaning of private divorces and the extent to which they enjoy recognition in the EU private international law system. Ultimately, Dutta welcomes measures which restrict private divorce tourism in the EU.

Conclusions

This book was born of a collective wish to remember and honour a much-loved scholar of private international law. In that, we trust that it has already fulfilled its purpose. However, each chapter individually and the book taken as a whole also capture the state of the art of private international law. Ours remains a discipline in search of systemic normative clarity and in episodic need of technical refinement. This collection provides tantalising glimpses of possible answers to both the essential question of the treatment of the private in the attainment of public goods, and in relation to longstanding vexing technical questions.

To preserve and further Jonathan Fitchen's legacy as an educator of private international lawyers, editorial royalties from the sale of the book will be donated to the Jonathan Fitchen Fund of the Development Trust at the University of Aberdeen. Direct individual donations to the fund are also welcome and appreciated.

First Issue for Lloyd's Maritime and Commercial Law Quarterly in 2024

The first issue for *Lloyd's Maritime and Commercial Law Quarterly* in 2024 was published recently. It contains the following articles and case notes.

Articles:

Andrew Dickinson, "Electronic trade documents and the conflict of laws in the United Kingdom"

The Electronic Trade Documents Act 2023, which entered into force on 20 September 2023, seeks to facilitate the use of trade documents (including bills of exchange, promissory notes and bills of lading) in electronic form by assimilating these instruments, and their legal effects, to the equivalent paper trade documents, provided that the systems used to process the relevant information

meet certain technological requirements. However, the Act contains no provision that expressly addresses the legislation's cross-border dimension or its relationship to the United Kingdom's conflict of laws rules. This article considers how these matters should best be addressed in order to secure the Act's promised economic benefits.

Shane Herbst and Simon Allison, "Breaking the Hague-Visby Rule's Silence on choice of law and forum clauses: Article 3 revisited"

It is generally assumed that the Hague-Visby Rules are silent on choice of law and forum clauses. However, Art.3(8) can potentially operate to invalidate such clauses; and the general assumption is challenged by reference to Australia's cargo liability regime. This reality could incentivise jurisdictions wanting to uphold such clauses to construe the Hague-Visby Rules uniformly. Despite this, the limits of Art.3(8) should be clarified. In Australia, reform efforts should address this and other issues with arbitration agreements. As Art.3(8) currently stands, parties must consider its potential effects on dispute resolution provisions in sea-carriage documents.

Case Notes:

Adrian Briggs, "The empire strikes back"

Andreas Giannakopoulos and Adnan Khaliq, "Damages for breach of dispute resolution agreements and EU public policy"

Adrian Briggs, "When arbitration matters"

Out now: New International Commercial Courts

Over the past two decades, various jurisdictions around the world have created new specialised domestic courts to resolve international commercial disputes. Located in the Gulf region (Abu Dhabi, Dubai, Qatar), in Asia (Singapore, China, Kazakhstan) and in Europe (Germany, France, the Netherlands), these courts enrich the current landscape of the resolution of international commercial disputes. In particular, they present themselves as alternatives to litigation before ordinary courts, on the one hand, and to international commercial arbitration on the other.

In a recently published book – edited by Man Yip from Singapore Management University and me – we study international commercial courts from a comparative perspective and through various strands of inquiry. First, we offer a detailed analysis of the reasons for the creation of these courts and examine their jurisdictional, institutional and procedural features. Second, we scrutinise the motivations and/or constraints of jurisdictions that have decided against launching their own versions of 'international commercial courts'. Finally, and most crucially, we systematically review the impact and the success of these courts addressing questions such as: what are the metrics of success, and is success wholly dependent on size of the docket? What role do the courts play in international commercial dispute resolution? What contributions can we expect from them in the future? Are these courts necessary? In addressing these questions, we hope that the book advances our understanding of the role of international commercial courts in the resolution of cross-border disputes.

The book is the result of comparative study prepared for the General Congress of

the International Academy of Comparative Law that was held in 2022 in Asunción (Paraguay). It contains 21 national and special reports written by a stellar group of authors:

- Martin Bernet *(Bernet Arbitration/ Dispute Management, Switzerland)*
- Pamela Bookman *(Fordham University, United States)*
- Michael Byrne *(Dubai International Financial Centre Courts, Dubai),*
- Tatiana Cardoso Squeff *(Federal University of Rio Grande do Sul, Brazil)*
- Gustavo Cerqueira *(University of Côte d'Azur, France)*
- Edyta Figura-Góralczyk *(Cracow University of Economics, Poland),*
- David Foxton *(High Court of England and Wales, United Kingdom),*
- Hoang Thao Anh *(University of Law, Hue University, Vietnam),*
- Zhengxin Huo *(China University of Political Science and Law, People's Republic of China)*
- Saloni Khanderia *(OP Jindal Global University, India)*
- Kwan Ho Lau *(Singapore Management University, Singapore),*
- Seipati Lepele *(University of Pretoria, South Africa)*
- Claudia Lima Marques *(Federal University of Rio Grande do Sul, Brazil)*
- Chien-Chung Lin *(National Yang Ming Chiao Tung University, Taiwan)*
- Michele Angelo Lupoi *(University of Bologna, Italy)*
- María Blanca Noodt Taquela *(University of Buenos Aires, Argentina),*
- Peter Nørgaard *(Danish Ministry of Justice, Denmark)*
- Maria Panezi *(University of New Brunswick, Canada)*
- Thomas Riehm *(University of Passau, Germany)*
- Clement Salung Petersen *(University of Copenhagen, Denmark),*
- Elsabe Schoeman *(University of Pretoria, South Africa)*
- Florian Scholz-Berger *(University of Vienna, Austria)*
- S.I. Strong *(Emory University, United States)*
- Willem Theus *(KU Leuven and UCLouvain, Belgium)*
- Quirin Thomas *(University of Passau, Germany)*
- Geert Van Calster *(KU Leuven, Belgium)*
- Vu Thi Huong *(University of Law, Hue University, Vietnam)*
- Marlene Wethmar-Lemmer *(University of South Africa)*

More information about the book is available here.