More on the Validity of the PDVSA 2020 Bonds

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Governments with no realistic prospect of paying their debts often gamble for redemption, trying desperately to avoid default. Political leaders, with good reason, fear that a debt default will get them thrown out of office. But in trying to hold power, sometimes by borrowing even more, they often make matters worse for the country and its people. A prime example involves the collateralized bonds issued by Venezuelan state oil company, PDVSA.

Venezuela's Gamble

In 2016, PDVSA was about to default on its debt, as was the Venezuelan state itself. At that stage, it was already well beyond the point where the debt should have been restructured, given worsening domestic conditions. Instead, the Maduro government gambled. It conducted a debt swap in which investors exchanged unsecured PDVSA bonds for new ones due in 2020. To sweeten the deal, the PDVSA 2020s were backed by collateral in the form of a 50.1% interest in CITGO Holding, the parent company of U.S. oil refiner CITGO Petroleum. The deal bought a few extra years but put at risk the country's primary asset in the United States.

Even at the time, it was uncertain whether Venezuelan law authorized the transaction. The Venezuelan Constitution requires legislative approval for contracts in the national public interest. Maduro did not seek approval because opposition lawmakers controlled the National Assembly and had made clear they would not grant it. The deal went ahead anyway.

Times have changed. The United States recognizes Juan Guaidó as Venezuela's interim president (for now). The PDVSA 2020 bonds are in default. The bondholders want their collateral. PDVSA has challenged the validity of the bonds. But the bonds include a choice-of-law clause designating the law of New

York. Does this mean that validity is to be determined under New York law? John Coyle recently wrote a terrific post about the case and its significance on this blog. We write to provide some broader context, drawing from our article, Unlawfully Issued Sovereign Debt.

Sovereign Debt and Choice-of-Law Clauses

The story of the PDVSA 2020 bonds is a common one in government debt markets. A government borrows money in dodgy ways or at a time of financial distress. Arguably, the debt contravenes domestic law, although the government may obtain legal opinions affirming its validity. The debt also includes a choice of law clause providing for the application of foreign law, typically that of New York or England. Later, a new government comes to power and disputes the validity of the debt. We have seen this pattern in Venezuela, Mozambique, Ukraine, Zambia, Liberia, Puerto Rico, and in other sovereign and sub-sovereign borrowers. (The pattern goes back even further – for a delightful treatment of the hundreds of such cases from the 1800s involving municipal debt, see here).

These cases raise what seems like a simple question: Does an international bond—i.e., one expressly made subject to foreign law—protect investors against the risk that the bond will later be deemed in violation of the issuer's domestic law? Despite seeming simple, and how frequently the question arises, there is little clarity about the answer. New York law governs a big part of the sovereign debt markets, and the choice-of-law question in the PDVSA 2020 case has been certified to the New York Court of Appeals. Will that court's decision offer clarity?

Variations in Clause Language

Count us skeptical. The problem is not just the unpredictability of choice of law rules. It is that many choice-of-law clauses are drafted in perplexing ways, which leave unclear the extent of protection they offer to investors. Consider three examples. The first is from the PDVSA 2020 bond itself where the relevant language is capitalized (as if capitalization has some magic effect):

> *THIS INDENTURE AND THE NOTES SHALL BE CONSTRUED IN ACCORDANCE WITH, AND THIS INDENTURE AND THE NOTES AND ALL MATTERS ARISING OUT OF OR RELATING IN ANY WAY WHATSOEVER TO THIS INDENTURE AND THE NOTES (WHETHER IN CONTRACT, TORT OR*

> *OTHERWISE) SHALL BE GOVERNED BY, THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO THE CONFLICTS OF LAW PROVISIONS THEREOF (OTHER THAN SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW)*

This clause apparently seeks to extend New York law to the widest possible range of questions. Whether that includes the question of whether the bonds were validly issued is, as John's post puts it, the "billion-dollar question." And the answer is not clear. The decision by the New York Court of Appeals might provide some clarity on it . . . maybe.

But now consider this clause, from a Brazilian bond (emphasis ours):

> *The indenture and the debt securities will be governed by, and interpreted in accordance with, the laws of the State of New York without regard to those principles of conflicts of laws that would require the application of the laws of a jurisdiction other than the State of New York . . .;* ***provided, further, that the laws of Brazil will govern all matters governing authorization and execution of the indenture and the debt securities by Brazil.***

Does the bold text mean that investors cannot enforce a loan issued in violation of Brazilian law? We aren't sure. As we discuss in the paper, it can be hard to identify questions of "authorization" and "execution," especially in the context of sovereign borrowing. Consider the question whether a loan violates a constitutional or statutory debt limit. Does the debt limit negate the sovereign's capacity to borrow, limit the authority of government officials to bind the sovereign, or make the loan illegal or contrary to policy? How one categorizes the issue will affect the answer to the choice-of-law question. Carve outs like this—which reserve questions of authorization and execution for resolution under local law—appear in around half the New York-law sovereign bonds we examined.

Finally, consider this clause from a Turkish bond (again, emphasis ours):

> *[The] securities will be governed by and interpreted in accordance with the laws of the State of New York, except with respect to the authorization and execution of the debt securities on behalf of Turkey* ***and any other matters required to be governed by the laws of Turkey, which will be governed***

by the laws of Turkey

What now? This "other matters" carve out is even odder than the one for questions of authorization and execution. It hints that additional, unspecified matters might be governed by the sovereign's local law. Indeed, it implies that the sovereign's own law might determine which issues fall within the "other matters" exception. If so, the clause potentially allows the government to create new exceptions to the governing law clause.

Conclusion

Our discussions with senior sovereign debt lawyers have done little to dispel our uncertainty about the meaning of these clauses. They seem just as confused as we are. All we can say with confidence is that many choice of law clauses include traps for unwary investors. Until drafting practices converge on a consistent and coherent model, the choice-of-law question is likely to remain fodder for litigation.

[This post is cross-posted at Transnational Litigation Blog.]

The Billion-Dollar Choice-of-Law Question

Choice-of-law rules can be complex, confusing, and difficult to apply. Nevertheless, they are vitally important. The application of choice-of-law rules can turn a winning case into a losing case (and vice versa). A recent decision in the U.S. Court of Appeals for the Second Circuit, *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, is a case in point. The Second Circuit was called upon to decide whether to apply the law of New York or the law of Venezuela to determine the validity of certain notes issued by a state-owned oil company in Venezuela. Billions of dollars were riding on the answer.

In this post, I first review the facts of the case. I then provide an overview of the relevant New York choice-of-law rules. Finally, I discuss the choice-of-law question that lies at the heart of the case.

The Bonds

In 2016, Venezuela's state-owned oil company, Petróleos de Venezuela, S.A. ("PDVSA") approved a bond exchange whereby holders of notes with principal due in 2017 (the "2017 Notes") could exchange them for notes with principal due in 2020 (the "2020 Notes"). Unlike the 2017 Notes, the 2020 Notes were secured by a pledge of a 50.1% equity interest in CITGO Holding, Inc. ("CITGO"). CITGO is owned by PDVSA through a series of subsidiaries and is considered by many to be the "crown jewel" of Venezuela's strategic assets abroad.

The PDVSA board formally approved the exchange of notes in 2016. The exchange was also approved by the company's sole shareholder and by the boards of the PDVSA's subsidiaries with oversight and control of CITGO.

The National Assembly of Venezuela refused to support the exchange. It passed two resolutions – one in May 2016 and one in September 2016 – challenging the power of the executive branch to proceed with the transaction and expressly rejecting the pledge of CITGO assets in the 2020 Notes. The National Assembly took the position that these notes were "contracts of public interest" which required legislative approval pursuant to Article 150 of the Venezuelan Constitution. These legislative objections notwithstanding, PDVSA followed through with the exchange. Creditors holding roughly $2.8 billion in 2017 Notes decided to participate and exchanged their notes for 2020 Notes.

In 2019, the United States recognized Venezuela's Interim President Juan Guaidó as the lawful head of state. Guaidó appointed a new PDVSA board of directors, which was recognized as the legitimate board by the United States even though it does not control the company's operations inside Venezuela. The new board of directors filed a lawsuit in the Southern District of New York against the trustee and the collateral agent for the 2020 Notes. It sought a declaration that the entire bond transaction is void and unenforceable because it was never approved by the National Assembly. It also sought a declaration that the creditors were prohibited from executing on the CITGO collateral.

Choice of Law

If the 2020 Notes were validly issued, they are binding on PDVSA, and the CITGO assets may be seized by the noteholders in the event of default. If the notes were not validly issued, they are not binding on PDVSA, and the CITGO assets may not be seized by the noteholders in the event of default. Whether the Notes were validly issued depends, in turn, on whether the court applies New York law or Venezuelan law. This is the billion-dollar choice-of-law question. If New York law applies, then the notes will almost certainly be deemed valid and the noteholders can seize the pledged collateral. If Venezuelan law is applied, then the notes may well be deemed invalid and the noteholders will be stymied. With the stakes in mind, let us now turn to the applicable choice-of-law rules.

A federal court sitting in diversity must look to the choice-of-law rules of the state in which it sits—here, New York—to decide which jurisdiction's law to apply. N.Y. General Obligations Law 5-1401 states that a New York choice-of-law clause should be enforced whenever it appears in a business contract worth more than $250,000 in the aggregate. The 2020 Notes contain New York choice-of-law clauses. Since the aggregate value of the 2020 Notes is far greater than $250,000, and since the 2020 Notes have no relation to personal, family or household services, it may seem that the court should simply apply New York law and call it a day.

There is, however, another New York choice-of-law rule that may trump Section 5-1401. Section 5-1401 states that it shall not apply to any contract "to the extent provided to the contrary in . . . section 1-301 of the Uniform Commercial Code." Section 1-301(c) states that if N.Y Commercial Code Section 8-110 "specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified." Section 8-110(a), in turn, states that "[t]he local law of the issuer's jurisdiction . . . governs . . . the validity of a security."

All of this suggests that the applicable choice-of-law rule may not be the one laid down in Section 5-1401. Section 8-110 directs courts to apply the local law of the issuer's jurisdiction—here, Venezuela—to resolve issues relating to the "validity" of the security. The billion-dollar question is what exactly the word "validity" means in this context.

On the one hand, the term may be interpreted broadly to refer to *both* the corporate law of Venezuela *and* to Venezuelan law more broadly. Under this interpretation, the 2020 Notes may not be validly issued because they were never approved by the National Assembly as required under Article 150. On the other hand, the term "validity" may be interpreted to refer only to the corporate law of Venezuela. Under this narrower interpretation, it is irrelevant whether the National Assembly approved the 2020 Bonds because all of the corporate formalities needed to validly issue a security—approval by the board of directors, approval by the shareholders, etc.—appear to have been followed.

Interpretation in the District Court

In a lengthy decision decided on October 16, 2020, the U.S. District Court for the Southern District of New York (Judge Katherine Polk Failla) concluded that the term "validity" should be given a narrow interpretation and that New York contract law governed the issue of validity.

The court began its analysis by observing that the strongest argument in support of a broad interpretation is based on plain language. This term "validity" is not generally understood to refer solely to corporate formalities. It is understood to encompass the many reasons why a contract may not be enforceable as a matter of contract law. While this plain language reading is compelling at first glance, the court ultimately concluded that it did not mandate the application of general rules of Venezuelan law given the broader context of Article 8.

The court first quoted the following language from the Prefatory Note to Article 8:

> *[Article 8] deals with the mechanisms by which interests in securities are transferred, and the rights and duties of those who are involved in the transfer process. It does not deal with the process of entering into contracts for the transfer of securities or regulate the rights and duties of those involved in the contracting process (emphasis added).*

The court observed that if the term "validity" were given a broad scope, it would "swallow whole any choice of law analysis involving the formation of a contract for securities." The court cited state legislative history indicating that the term "validity" in Article 8 referred merely to whether a security "ha[d] been issued pursuant to appropriate corporate or similar action." The court also quoted the authors of a leading treatise on Article 8 as saying that:

> *Obviously, the concept of "invalidity" as used in this section must have a narrower scope than one might encounter in other legal contexts, e.g., in a dispute about whether the obligation represented by the security is "enforceable" or "legal, valid, and binding."*

Finally, the district court noted the virtual absence of any New York case law supporting the broad interpretation of the validity favored by the plaintiffs. If the term was as sweeping as the plaintiff claimed, the court reasoned, there would be more cases where the courts had applied Section 8-110. The lack of any such cases cut against giving the term a broad interpretation. The district court's analysis of this issue has attracted support from some commentators and criticism from others.

After concluding that the term "validity" in Section 8-110 should be interpreted narrowly to select only Venezuelan corporate law, the district court applied New York contract law. It held that the 2020 Notes were valid and enforceable and that the defendant trustee was entitled to judgment in the amount of $1.68 billion. The plaintiffs appealed.

Interpretation in the Second Circuit

On October 13, 2022, the U.S. Court of Appeals for the Second Circuit declined to provide a definitive answer as to the interpretive question discussed above. After reviewing the various arguments for and against a broad interpretation of "validity," the court certified the question to the New York Court of Appeals. In so doing, the court commented on the issue's importance to "the State's choice-of-law regime and status as a commercial center." It also noted the importance of the choice-of-law issue to the ultimate outcome in the case:

> *If the court concludes New York choice-of-law principles require the application of New York law on the issue of the validity of the 2020 Notes, and that Article 150 and the resolutions have no effect on the validity of the contract under New York law, then we would affirm the district court's decision to apply New York law and uphold the validity of the bonds. On the other hand, if the court concludes Venezuelan law applies to the particular issue of PDVSA's legal authority to execute the Exchange Offer, then we would likely remand for an*

> *assessment of Venezuelan law on that question and, if necessary, for consideration of the Creditors' equitable and warranty claims.*

The fate of the 2020 Notes—and the billions of dollars those notes represent—is now in the hands of the New York Court of Appeals.

Conclusion

There will be additional updates and commentary on *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.* at Transnational Litigation Blog in the weeks and months ahead. In the meantime, please feel free to mention this case the next time a student or a colleague questions the importance of choice-of-law rules. These rules matter. A lot.

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What is an international contract within the meaning of Article 3(3) Rome I? – Dexia Crediop SpA v Provincia di Pesaro e Urbino [2022] EWHC 2410 (Comm)

The following comment has been kindly provided by Sarah Ott, a doctoral student and research assistant at the University of Freiburg (Germany), Institute for Comparative and Private International Law, Dept. III.

On 27 September 2022, the English High Court granted summary judgment and declaratory relief in favour of the Italian bank Dexia Crediop SpA ("Dexia") in its lawsuit against the Province of Pesaro and Urbino ("Pesaro"), a municipal authority in the Marche region of Italy. This judgement marks the latest development in a long-running dispute involving derivative transactions used by Italian municipalities to hedge their interest rate risk. Reportedly, hundreds of Italian communities entered into interest rate swaps between 2001 and 2008 having billions of Euros in aggregate notional amount. It is also a continuation of the English courts' case law on contractual choice of law clauses. Although the judgments discussed in this article were, for intertemporal reasons, founded still on Art. 3(3) of the Rome Convention, their central statements remain noteworthy. The Rome Convention was replaced in almost all EU member states, which at the time included the United Kingdom, by Regulation (EC) No 593/2008 ("Rome I"), which came into effect on 17 December 2009. Article 3 Rome I Regulation contains only editorial changes compared to Article 3 of the Rome Convention. As a matter of fact, Recital 15 of the Rome 1 Regulation explicitly states that despite the difference in wording, no substantive change was intended compared to Article 3(3) of the Rome Convention.

In the case at hand, Pesaro and Dexia entered into two interest rate swap transactions in 2003 and 2005. Each of the transactions was subject to the 1992 International Swap Dealers Association ("ISDA") Master Agreement, Multicurrency – Cross Border and a Schedule therto. During the 2008 financial crisis, the swaps led to significant financial burdens for Pesaro. In June 2021, Pesaro commenced legal proceedings in Italy seeking to unwind or set aside these transactions. Dexia then brought an action in England to establish the transactions were valid, lawful and binding on the parties.

A central question of the dispute was the law applicable to the contract. Pesaro claimed breaches of Italian civil law in its proceedings, while Dexia argued that only English law applies. As correctly stated by the court, the applicable law is determined by the Rome Convention, as the transactions between the parties took place in 2003 and 2005. According to Article 3(1) Rome Convention, a contract is governed by the law chosen by the parties. The ISDA Master Agreement in conjunction with the Schedule contained an express choice of law clause stating that the contract is to be governed by and construed in accordance with English law. Of particular importance therefore was whether mandatory provisions of Italian law could nevertheless be applied via Article 3(3) Rome Convention. This is the case if "*all the [other] elements relevant to the situation at the time of the choice are connected with one country only […]*". In order to establish weather Article 3(3) applied, the court referred to two decisions of the English Court of

Appeal. Both cases also concerned similar interest rate swap transactions made pursuant to an ISDA Master Agreement with an expressed choice of English law.

In *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, the Court of Appeal extensively discussed the scope of this provision in connection with the principle of free choice of law, more precisely, which factors are to be considered as "*elements relevant to the situation*". This was a legal dispute between the Portuguese Santander Bank and various public transport companies in Portugal. First, the Court of Appeal emphasised that Article 3(3) Rome Convention is an exception to the fundamental principle of party autonomy and therefore is to be construed narrowly. Therefore, "*elements relevant to the situation*" should not be confined to factors of a kind which connect the contract to a particular country in a conflict of laws sense. Instead, the Court stated that it is sufficient if a matter is not purely domestic but rather contains international elements. Subsequently the court assessed the individual factors of the specific case. In so far, the Court of Appeal confirmed all factors the previous instance had taken into account. Relevant in the case was the use of the "Multi-Cross Border" form of the 1992 ISDA Master Agreement instead of the "Local Currency-Single Jurisdiction" form, that the contract included the right to assign to a foreign bank and the practical necessity for a foreign credit institution to be involved, as well as the foreseeability of the conclusion of hedging arrangements with foreign counterparties and the international nature of the swap market. These factors were found sufficient to establish an international situation.

In *Dexia Crediop S.P.A. v. Comune di Prato* [2017] EWCA Civ 428, the Court of Appeal addressed the issue again and concluded that already the fact that the parties had used the "Multi-Cross Border" form of the 1992 ISDA Master Agreement in English, although this was not the native language of either party, and the conclusion of back-to-back hedging contracts in connection with the international nature of the derivatives market was sufficient.

In the present case, Dexia again relied on the use of the ISDA Master Agreement, Multicurrency – Cross Border and on the fact that Dexia hedged its risk from the transactions through back-to-back swaps with market participants outside Italy. But as the relevant documents were not available, the second circumstance could not be taken into account by the court. Nevertheless, the court considered that the international element was sufficient and Article 3(3) of the Rome Convention was not engaged.

Thus, this new decision not only continues the very broad interpretation of the Court of Appeal as to which elements are relevant to the situation, but also lowers the requirements even further. This British approach appears to be unique. By contrast, according to the hitherto prevailing opinion in other Member States, using a foreign model contract form and English as the contract language alone was not sufficient to establish an international element (see, e.g., *Ostendorf* IPRax 2018, p. 630; *Thorn/Thon* in Festschrift Kronke, 2020, p. 569; *von Hein* in Festschrift Hopt, 2020, p. 1405). Relying solely on the Master Agreement in order to affirm an international element seems unconvincing, especially when taking Recital 15 of the Rome I Regulation into account. Recital 15 Rome I states that, even if a choice of law clause is accompanied by a choice of court or tribunal, Article 3(3) of the Rome I Regulation is still engaged. This shows that it is the purpose of this provision to remove the applicability of mandatory law in domestic matters from the party's disposition. The international element must rather be determined according to objective criteria. With this interpretation, Article 3(3) of the Rome I Regulation also loses its *effet utile* to a large extent.

Unfortunately, the Court of Appeal considered its interpretation to be an *acte clair* and therefore refrained from referring the case to the CJEU. Since Brexit became effective, the Rome I Regulation continues to apply in the United Kingdom in an "anglicised" form as part of national law, but the English courts are no longer bound by CJEU rulings. As a result, a divergence between the English and the Continental European assessment of a choice of law in domestic situations is exacerbated.

This also becomes relevant in the context of jurisdiction agreements. In the United Kingdom, these are now governed by the HCCH 2005 Choice of Court Convention which is also not applicable according to article 1(2) if, "*the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*". As there is a great interest in maintaining the attractiveness of London as a the "jurisdiction of choice", it is very likely that the Court of Appeal will also apply the standards that it has developed for Article 3(3) Rome I to the interpretation of the Choice of Court Convention as well.

One can only hope that in order to achieve legal certainty, at least within the European Union, the opportunity for a request for referral to the CJEU will present itself to a Member State court as soon as possible. This would allow the Court of Justice to establish more differentiated standards for determining under which circumstances a relevant foreign connection applies.

CJEU ruling in FNV v. Van Den Bosch: follow-up in Dutch courts

As previously reported on conflictoflaws (inter alia), on 1 December 2020, the Grand Chamber of the CJEU ruled in the *FNV* v. *Van Den Bosch* case. It ruled that the highly mobile labour activities in the road transport sector fall within the scope the Posting of Workers Directive (C-815/18; see also the conclusion of AG Bobek). As regards to the specific circumstances to which the directive applies, the CJEU sees merit in the principle of the 'sufficient connection'. To establish sufficient connection between the place of performance of the work and a Member State's territory, 'an overall assessment of all the factors that characterise the activity of the worker concerned is carried out.' (*FNV* v. *Van Den Bosch*, at [43]).

Following the preliminary ruling, on 14 October 2022, the Supreme Court of the Netherlands has ruled in cassation on the claims, which had led to the questions for preliminary rulings (see also the conclusion of AG Drijber). The Dutch Supreme Court referred the assessment of the 'sufficient connection' on the facts of the case back to the lower courts.

Although the Dutch Supreme Court's ruling is not surprising, the eventual application the CJEU's preliminary ruling to the facts of this dispute (and its further follow-up in lower courts) might still provide food for thought for companies in the transnational transport sector, which use similar business models.

Limitation Period for Enforcement of Foreign Judgments: Australian Court Recognized and Enforced Chinese Judgment Again

Written by Zilin Hao*

On 15 July 2022, the Supreme Court of New South Wales ("NSW") recognized and enforced a Chinese judgment issued by the Shanghai Pudong New Area People's Court 12 years ago in Tianjin Yingtong Materials Co Ltd v Young [2022] NSWSC 943.[1] It ruled that the defendant Katherine Young ("Ms. Y") pay the plaintiff Tianjin Yingtong Materials Co Ltd ("TYM") outstanding payment, interest and costs. This marks the second time that the court of NSW in Australia enforces Chinese judgment after Bao v Qu; Tian (No 2) [2020] NSWSC 588.[2]

I. The Fact

On 7 April 2009, the original plaintiff, TYM, sued Shanghai Runteyi Industrial Co., Ltd ("first original defendant"), Shanghai Runheng International Trading Co., Ltd ("second original defendant") and Ms. Y (named as "Hong Yang" in Chinese Judgment) before Shanghai Pudong New Area People's Court ("the Chinese Court"). According to the Chinese judgment, TYM had acted as agent for the first original defendant and the second original defendant based on seven Import Agent Agreements signed by three of them. Subsequently, TYM and each original defendant, including Ms. Y entered into a Supplementary Agreement confirming and specifying the guarantee under the seven Import Agent Agreements, pursuant to which Ms. Y was a guarantor in favour of the plaintiff. However, the two original defendants failed to fulfill their liability for repayment as agreed while the Plaintiff has performed the contract obligations.

On 29 March 2010, the Chinese Court rendered a judgment and supported the TYM's claims that the two original defendants shall pay the debt and overdue fine, Ms. Y shall assume joint and several liability for the payment obligation of the two original defendants. The Chinese judgment came into effect and finality when an appeal was dismissed on 1 June 2010. Due to the lack of sufficient assets of the two original defendants and the disappearance of Ms. Y, the Chinese Court only executed more than 4 million yuan in place for three years, and finally ended the enforcement procedure in 2014. The recovery of the relevant funds has subsequently reached an impasse.[3]

On 9 August 2021, after discovering the defendant's property clues, TYM filed an application for recognition and enforcement of the Chinese judgment with the Supreme Court of NSW pursuant to Australia's common law principles. The NSW court upheld the plaintiff's claim after examining four conditions accordingly of Chinese judgment with: (1) the Chinese court has international jurisdiction where Ms. Y submitted to by arguing or appearing to argue the merits of the case; (2) the Chinese judgment is conclusive and final; (3) the identity of parties in recognition proceeding consisted with Chinese proceeding; (4) the Chinese judgment was for a fixed sum. The plaintiff has established the prima facie enforceability of the Chinese judgment and there are no refusal grounds exist.

The most important issue at the NSW proceeding is the limitation period for enforcement.[4] The plaintiff noted that it has been over 11 years since Chinese judgment came into conclusive and effective, which means it may not be enforced at the same time by Chinese court, if there is enforceable property in China, because the application will exceed the two-year enforcement limitation period stipulated by Chinese law.[5] However, according to section 17 "Judgment" of the Limitation Act 1969 (NSW)[6], the limitation period for action upon a foreign judgment is 12 years from the date on which the judgment becomes enforceable in the place where judgment was given. Therefore, the judge of Supreme Court of NSW held that relevant limitation period has not yet expired. Hence there is no time bar to the current proceeding for enforcement of the Chinese Judgment.[7]

II. Comments

1. **Applicable Law to Limitation Period for Enforcement**

Limitation period is a controversial issue when classifying whether it is a procedural or substantial matter under private international law, which decides the application of law concerning it. Generally, courts apply *lex fori* in matter with procedure issues, while choose *lex causae* by conflict rules dealing with substance issues. States distinguish limitation period as procedure or substantive issue differently, which represented by Germany and Japan who regard the limitation period as a substance issue and stipulates it in their civil codes, not specific legislation. Some common law countries, such as England, Australia and Singapore, made Limitation Acts to deal with the enforcement limitation issue in the domestic legislation.[8]

In China, the limitation of action is stipulated in Civil Code and is deduced as a substance issue.[9] While the statute of limitations for enforcement is a two-year period for creditors to apply to the court for execution based on a successful and legal effective document, which is provided in Civil Procedural Law of China and deemed as a procedure issue. In terms of recognition and enforcement of foreign judgments, conflicts of classification on the legal nature of enforcement limitation period between the State of requested and the State of origin will arise in the first place. When a judgment complies with the law of the requested State regarding the statute of limitations for applying an enforcement, but it has exceeded the limitations period of enforcement under the law of the State of origin, how does the court of requested State ascertain legal rules to decide? In *TYM v Ms. Y* above, the judge of Supreme Court of NSW applied Australian law to hold that there was no time bar to enforce the Chinese judgment even though the relevant limitation period has expired in China, which illustrates that enforcement limitation period of judgments is a substance issue for Australia.

2. **Expiration of Limitation Period and Grounds for Refusal**

Except the list of conditions to be used by the court requested or addressed to ascertain whether the judgment is eligible for recognition and enforcement, there are grounds for refusal as well. Under the common law principles for recognizing a foreign judgment in Australia, where the four conditions for recognition and enforcement, referred to Overview part, have been established, the recognition of the foreign judgment can then only be challenged on limited grounds including a) where granting enforcement of the foreign judgment would be contrary to Australian public policy; b) where the foreign judgment was obtained by fraud; c) where the foreign judgment is penal or a judgment for a revenue debt; and d) where enforcement of the decision would amount to a denial of natural justice.

However, exceeding the limitation period for an application for enforcement under the law of the original State does not constitutes any of the grounds above for refusal of recognition and enforcement by the court of the requested State. In the case of *TYM v Ms. Y*, the Australian court did not consider the expiration of enforcement limitation of Chinese judgment under Chinese law as a refusal ground to recognize and enforce it.

3. **Expiration of Limitation Period and Lack of Enforceability**

There are international standards to recognize and enforce a judgment, such as enforceability, provided by the 2005 Hague Convention on Choice of Court Agreements ("2005 Hague Convention") and 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("2019 Judgments Convention", collectively as "Hague Conventions"). Article 8 (3) of the 2005 Hague Convention and article 4 (3) of the 2019 Judgments Convention stipulated in same way that "A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin", which was believed that if the limitation period in the State of origin expires, the judgment will not be entitled to circulation under the Convention.[10] Pursuant to Civil Procedural Law of China, within the limitation period of enforcement, if the judgment creditor submits a request prescribed by law, the court will compel the debtor to perform the obligations undertaken. Otherwise, the court will still accept the applicant for enforcement, at the same time, however, the participant subject to enforcement may raise an objection to the limitation period for enforcement, and if the court finds that the objection is established upon review, it rules not to enforce it.[11] In *TYM v Ms. Y*, the plaintiff submitted a summon to recognize and enforce the Chinese judgment, which was rendered 11 years ago by Chinese court then, before the court of NSW Australia. Apparently, the limitation period of applying for enforcement of the Chinese judgment concerned in China has expired the maximum 2 years, which means the judgment may not be enforced compulsorily by courts upon application of winning party when the other party raise an objection.

At the same time, Article 14 of the 2005 Hague Convention and Article 13 of 2019 Judgments Convention stipulate that the enforcement procedures are governed by the law of the requested State unless these Conventions provide otherwise.[12] In referring to the procedure for enforcement, Article 13 of 2019 Judgments

Convention is intended to include the rules of the law of the requested State that provide a limitation period for enforcement of a judgment unless itself provides otherwise, which is stipulated in Article 4 (3) that enforcement in the requested State depends on the judgment being enforceable in the State of origin.[13] Therefore, a longer period of limitation for enforcement in the requested State will not extend the enforceability of a foreign judgment that is no longer enforceable in the State of origin. Conclusively, a foreign judgment whose limitation period expires under the law of the State of origin will not be enforced by the State of requested under the Hague Conventions. In *TYM v Ms. Y*, limitation for enforcing the Chinese judgment has expired in China though, the Australian court registered and enforced it, holding that Chinese judgment is not unenforceable because it was still within the 12-year limitation period from the date of the judgment issued according to Australian law.

China and Australia are neither contracting parties to Hague Conventions, it's reasonable for Australian court to recognize and enforce Chinese judgment even if the limitation period of it has expired, because the court regarded which as a procedural issue and applied *lex for*i to ascertain it. However, the outcome of *TYM v Ms. Y* will be negative if the Hague Conventions come into force between China and Australia. Furthermore, there is another problem about reciprocity. The limitation period for enforcement of judgments in China is much shorter that it in Australia, which means the situation is common where an Australian judgment sought to bring enforcement proceedings in China during the period of enforceability of the judgment under the law of Australia but after the limitation period for enforcement under the law of China has expired. Under the principle of reciprocity, Chinese court may enforce Australian judgments according to Article 288 of Civil Procedural Law of China.[14] However, pursuant to Article 545 of Supreme People's Court Interpretation of Civil Procedural Law of China, the provisions of Article 246 of the Civil Procedure Law shall apply to the period during which a party applies for recognition and enforcement of a legally effective judgment or ruling rendered by a foreign court, which means the period for applying for enforcement of foreign judgments is two years. Therefore, a Chinese court will probably not enforce an Australian judgment when the application expires two-year limitation period and there is an objection from the judgment debtor.

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[1] File number: 2021/226856, available at https://www.caselaw.nsw.gov.au/decision/181ff033dcea3902d40b24ea, accessed 10 October 2022.

[2] Jeanne Huang, 'The first Mainland China monetary judgment enforced in NSW Australia: Bao v Qu; Tian (No 2) [2020] NSWSC 588' (*conflict of laws.net*, 20 May 2020); Meng Yu, 'Court of NSW Australia Recognizes Chinese Judgment for the First Time' (*China Justice Observer*, 26 September 2021).

[3] Li Zhang, Shuting Chen, 'Lao Lai Hides Abroad for More Than a Decade Still Can't Escape the Law, The Australian court has once again recognized and enforced the Chinese court judgment' (*Legal Insights*, 17 September 2022).

[4] The limitation period in this article referred to only relates to the enforcement of a foreign judgment and should not be conceptually confused with the limitation period governing the original substantive right or claim at stake, i.e., the limitation period to bring a legal action on the merits before a court.

[5] Article 246 of Civil Procedural Law of China provides "the period of application for enforcement is two years".

[6] Available at https://jade.io/article/276236/section/54, accessed 10 October 2022.

[7] Para 42, (n 1).

[8] Guiqiang Liu, 'Study on the Limitation Period in the Enforcement of Foreign Judgments' (2020)4 *China Journal of Applied Jurisprudence* 109.

[9] Yongping Xiao, *Principles of Private International Law* (2003) Law Press China, p.4.

[10] Permanent Bureau, Limitation period on the Enforcement of Foreign Judgments in the Context of the 2018 Draft Convention, No 11 of May 2019.

[11] Lina Guo, 'How much is known about implementation period' (jszx.court.gov.cn, 14 July 2019), available at https://jszx.court.gov.cn/main/ExecuteCase/227653.jhtml, access 10 October

2022.

[12] “The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.”

[13] Francisco Garcimartín, Geneviève Saumier, ‘Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters’ HCCH Permanent Bureau, para 310.

[14] Article 288 of Civil Procedural Law of China provides “If a legally effective judgment or ruling made by a foreign court requires recognition and enforcement by a people’s court of the People’s Republic of China, the party concerned may directly apply for recognition and enforcement to the intermediate people’s court with jurisdiction of the People’s Republic of China. Alternatively, the foreign court may, pursuant to the provisions of an international treaty concluded between or acceded to by the foreign state and the People’s Republic of China, or in accordance with the principle of reciprocity, request the people’s court to recognize and execute the judgment or ruling.”

Just released: EFFORTS Report on EU Policy Guidelines

A new Report on EU Policy Guidelines was just posted on the website of **EFFORTS (Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU)**, an EU-funded Project conducted by the University of Milan (coord.), the Max Planck Institute Luxembourg for Procedural Law, the University of Heidelberg, the Free University of Brussels, the University of Zagreb, and the University of Vilnius.

The Report was authored by Marco Buzzoni, Cristina M. Mariottini, Michele Casi, and Carlos Santaló Goris.

Building upon the outcomes of the national and international exchange seminars and the Project's analytical reports, this Report formulates policy guidelines addressed to EU policymakers and puts forth suggestions to improve the current legal framework provided under the EFFORTS Regulations (namely: the Brussels I-bis Regulation and the Regulations on the European Enforcement Order, the European Small Claims Procedure, the European Payment Order, and the European Account Preservation Order) with regard to the enforcement of claims.

This Report was among the outputs and findings discussed at the Project's Final Conference, hosted by the University of Milan on 30 September 2022, which provided an international forum where academics, policymakers, and practitioners discussed the Project's key findings and exchanged their views on the national implementation of – and the path forward for – the EFFORTS Regulations. The content of the Final Conference will enrich the Final Study, which is forthcoming on the Project's website.

Regular updates on the EFFORTS Project are available via the Project's website, as well as LinkedIn and Facebook pages.

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Now or Then? The Temporal Aspects of Choice-of-Law Clauses

Several years ago, I published a paper that examined how U.S. courts interpret choice-of-law clauses. That paper contains a detailed discussion of the most common interpretive issues—whether the clause selects the tort laws of the chosen jurisdiction in addition to its contract laws, for example—that arise in litigation. There was, however, one important omission. The paper did not consider the question of whether the word "laws" in a choice-of-law clause should be interpreted to select the laws of the chosen jurisdiction (1) at the time the contract was signed, or (2) at the time of litigation.

In declining to address this issue, the paper was in good company. Neither the *Restatement (Second) of Conflict of Laws* (§ 2) nor the draft *Restatement (Third) of Conflict of Laws* (§ 1.02) discuss the relationship between choice-of-law and time. Nevertheless, the omission bothered me.

In the spring of 2021, I saw that Jeff Rensberger at the South Texas College of Law had posted a paper to SSRN entitled *Choice of Law and Time*. After downloading and reading the paper, I discovered that it contained no discussion of choice-of-law clauses. It was devoted solely to the question of how courts should address the issue of temporality in cases where the parties had declined to select a law in advance. After reading the paper, I wrote to Jeff to propose that we collaborate on a second paper that specifically addressed the temporal question in the context of choice-of-law clauses. When we spoke on the phone to discuss the project, however, we did not agree on the answer. Jeff argued for the laws at the time of signing. I argued for the laws at the time of litigation.

In early 2022, Jeff sent me a draft of his new paper, *Choice of Law and Time Part II: Choice of Law Clauses and Changing Law*, which makes the case for interpreting choice-of-law clauses to select the law at the time of signing. In response, I drafted an essay arguing that they should be interpreted to select the law at the time of litigation. A draft of my essay, *The Canon of Evolving Law*, is now available for download on SSRN.

If you happen to be one of the small number of people in the world interested in this fascinating (though obscure) interpretive issue, I would encourage you to download both papers and decide for yourself who has the better of the argument.

[This post is cross-posted at Transnational Litigation Blog.]

US District Court dismisses the case filed by Mexico against the US weapons industry regarding non-contractual obligations

Written by Mayela Celis

On 30 September 2022, a US District Court in Boston (Massachusetts, USA) dismissed the case filed by Mexico against the US weapons manufacturers regarding non-contractual obligations (among them, negligence and unjust enrichment). According to Reuters, the reason given by the judge to dismiss the case is that "federal law [Protection of Lawful Commerce in Arms Act] 'unequivocally' bars lawsuits seeking to hold gun manufacturers responsible when people use guns for their intended purpose" and that none of the exceptions contained therein applied.

One statement worthy of note as stated in multiple news media is: "While the court has considerable sympathy for the people of Mexico, and none whatsoever for those who traffic guns to Mexican criminal organizations, it is duty-bound to follow the law."

The full case citation is Estados Unidos Mexicanos (plaintiff) vs. SMITH & WESSON BRANDS, INC.; BARRETT FIREARMS MANUFACTURING, INC.; BERETTA U.S.A. CORP.; BERETTA HOLDING S.P.A.; CENTURY INTERNATIONAL ARMS, INC.; COLT'S MANUFACTURING COMPANY LLC; GLOCK, INC.; GLOCK GES.M.B.H.; STURM, RUGER & CO., INC.; WITMER

PUBLIC SAFETY GROUP, INC. D/B/A INTERSTATE ARMS (defendants), Case 1:21-cv-11269, filed in 2021.

In a nutshell, the allegations made by Mexico are the following (as stated in the complaint):

1. Defendants have legal duties to distribute their guns safely and avoid arming criminals in Mexico;
2. Defendants are fully on notice that their conduct causes unlawful trafficking to Mexico;
3. Defendants actively assist and facilitate trafficking of their guns to drug cartels in Mexico:
4. Defendants actively assist and facilitate the unlawful tracking because it maximizes their sales and profits;
5. The Government has taken reasonable measures to try to protect itself from defendants' unlawful conduct;
6. Defendants cause massive injury to the government.

Claims for relief are (as stated in the complaint):

Negligence, public nuisance, defective condition – unreasonably dangerous, negligence *per se*, gross negligence, unjust enrichment and restitution, violation of CUTPA [Connecticut Unfair Trade Practices Act], Violation of Mass. G.L. c. 93A [Massachusetts Consumer Protection Act], punitive damages.

In addition to the argument given by the judge, I believe that it would be very hard to establish personal jurisdiction over the defendants. Think for example of the minimum contacts and the reasonableness test, in particular what are the contacts of the defendants with the state of Massachusetts (but see for example: Smith & Wesson is indeed based in Massachusetts until 2023), the existence of justified expectations that may be protected or hurt, and the forum State's [the United States of America} interest in adjudicating the dispute.

Moreover, and aside from jurisdictional issues, given that the actual damage occurred overseas, an important issue would be to prove the causation link between the conduct of the defendants and the damage. This will prove particularly difficult considering all the intermediaries that exist in the weapons' trade (legal and illegal, second-hand sales, pawn shops, etc.).

Nevertheless, this is a very interesting initiative and perhaps it is a battle worth fighting for (if only to raise public awareness). One thing is for sure: the Mexican Government has shown its increasing concern about the illicit traffic of firearms in its territory and its commitment to end it.

The Mexican Federal Government will appeal the judgment. The official statement is available here.

We will post any new updates on this blog. Stay tuned!

Conference Report from Luxemburg: On the Brussels Ibis Reform

On 9 September 2022, the Max Planck Institute for Procedural Law Luxembourg hosted a conference on the Brussels Ibis Reform, in collaboration with the KU Leuven and the EAPIL.

The Brussels Ibis Regulation is certainly the fundamental reference-instrument of cross-border judicial cooperation in civil matters within the European Union. Since its establishment in 1968, it has been constantly evolving. At present, the European Commission is required to present a report on the application of the Regulation and to propose improvements. Against this background, a Working Group was set up within the network of the European Association of Private International Law (EAPIL) to draft a position paper. The group is led by Burkhard Hess (MPI Luxembourg) and Geert van Calster (KU Leuven). Members of the working group answered a questionnaire, reporting the application and possible shortcomings of the Brussels Ibis Regulation in their respective jurisdictions.

The topics of the conference were based on the 19 reports that were received from 16 working group members and 3 observers. Additional experts presented topics ranging from insolvency proceedings to third state relationships. The aim of the conference is to prepare a position paper. The paper will be presented to the European Commission to advise it on the evaluation process. EAPIL Members are invited to join the Members Consultative Committee (MCC) of the EAPIL Working Group on reforming Brussels Ibis.

After welcome notes by Burkhard Hess (MPI Luxembourg), Andreas Stein (Head of Unit, DG JUST – A1 "Civil Justice", European Commission European Commission, connected via Video from outside), Gilles Cuniberti (University of Luxemburg/EAPIL) and Geert van Calster (KU Leuven), the first panel, chaired by Marie-Élodie Ancel, Paris, focused on the role and scope of the Brussels Ibis Regulation in European Procedural Law. Dário Moura Vicente, Lisbon, highlighted the Regulation's indispensable function as a "backbone" of European civil procedural law, reaching far beyond civil and commercial matters into e.g. family law, in order to increase consistency. Room for improvement in this respect was identified, inter alia, for the definition of the substantive scope, in particular in relation to arbitration, the subjective or personal scope, in particular in relation to third state domiciled defendants, and for coordinating the relationships with other instruments such as the GDPR. Following up on the latter aspect, Björn Laukemann, Tübingen, analysed the delineation of the Regulation and the European Insolvency Regulation with a view to annex actions and preventive restructuring proceedings. No imminent need for textual reform was seen for the former, whereas for the latter suggestions for amendments of the Recitals were submitted. Vesna Lazic, Utrecht/The Hague, discussed the controversial judgment of the ECJ in London Steamship that certainly put again on the table the question whether the arbitration exception of the Regulation should be drafted more precisely. Whereas some argued that the large differences in the arbitration laws of the Member States would not allow any unifying approach based on notions of mutual trust, others held that there was some sense in the ECJ's attempt not to get blocked the Spanish judgments in the UK via arbitration. As to the suggestion of a full-fledged European Arbitration Regulation, one reaction was that this might result in unintended consequences, namely exclusive external competence by the EU on arbitration. Further, the question came up whether in light of the ECJ's judgment in London Steamship its earlier decision in Liberato should be rectified in the reform. In Liberato, the ECJ held that a violation of the lis pendens rules of the Regulation does not amount to a ground for refusal of recognition whereas in London Steamship the Court held that the lis pendens rules formed part of the fundamental principles of the

Regulation to be respected under all circumstances. Speaking of lis pendens, another question in the discussion was whether a backbone instrument like the Brussels Ibis Regulation would or should allow *de lege lata* transferring certain core elements, such as the rules on lis pendens, to other instruments without any rules on lis pendens, such as the European Insolvency Regulation. The ECJ in Alpine Bau GmbH had rejected the application of Article 29 Brussels Ibis Regulation by way of analogy, as it considered the EIR as a special and distinct instrument of its own kind, so the question was whether analogies from the "backbone" should be encouraged expressly where appropriate in the concrete constellation.

The second panel, chaired by Burkhard Hess, dealt with collective redress. François Mailhé, Picardy, Stefaan Voet, Leuven, and Camelia Toader, Bucharest, discussed intensely the cross-border implications of the new Representative Actions Directive, in particular the potential need for specific heads of jurisdiction, as the Directive was described as subtly seeking to encourage pan-European actions but at the same time leaves a number of options to the Member States. Obviously, this means that provision and allocation of – ideally one-stop – jurisdiction would be of the essence, e.g. by extending the forum connexitatis of Article 8 (1) Brussels Ibis Regulation to connected claimants, possibly even for third state domiciled claimants. However, concerns were formulated that the Brussels Ibis Regulation should not be "politicized" (too strongly). In addition, the importance of other aspects were highlighted such as coordinating and consolidating proceedings, the delineation of settlements and court judgments in respect to court-approved settlements (probably to be characterised as judgments) and the essential role of funding. The overall tendency in the room seemed to be that one should be rather careful with (at least large-scale) legislative interventions at this stage.

The third panel, chaired by Thalia Kruger, Antwerp, focused on third state relations. Chrysoula Michailidou, Athens, discussed potential extensions of heads of jurisdiction for third state domiciled defendants, in particular in respect to jurisdiction based on (movable) property and a forum necessitatis. Alexander Layton, London, focused on the operation of Articles 33 and 34 and reiterated the position that discretion of the court to a certain extent was simply inevitable, also in a distributive system of unified heads of jurisdiction, as it is provided for e.g. in these Articles, in particular by the tool of a prognosis for the chances of recognition of the future third state judgment (“Anerkennungsprognose”) in Article 33(1) lit. a and Article 34(1) lit. b, and by the general standard that the later proceedings in the Member State in question should only be stayed if the Member State court is satisfied that a stay is necessary for the proper administration of justice (Articles 33(1) lit. b and 34(1) lit. c). Further, the question was posed why Articles 33 and 34 would only apply if the proceedings in the Member State court are based on Articles 4, 7, 8 or 9, as opposed to e.g. Articles 6(1) and sections 3, 4 and 5 of Chapter II. The author of these lines observed that relations to third states should be put on a consistent basis including all aforementioned aspects as well as recognition and enforcement of such judgments. Further, need for clarification, e.g. in the respective Recitals, was identified for the question whether there is an implicit obligation of the Member State courts not to recognize third state judgments that violate Articles 24, 25 and the said sections 3, 4 and 5 of Chapter II. This could be framed as a matter of the Member States’ public policy, including fundamental notions of EU law (see ECJ in Eco Swiss on another fundamental notion of EU law as an element of the respective Member State’s public policy). The central point, however, was the suggestion to correct the latest steps in the jurisprudence of the ECJ towards allowing double exequatur, if a Member State’s lex fori provides for judgments upon foreign judgments (see ECJ in H Limited). Options for doing so would be either adjusting the relevant Recitals, 26 and 27 in particular, or the definition of “judgment” or inserting another specific ground for refusal outside the general public policy clause, thereby in essence restating the principle of “no double exequatur” within the mechanics of the Regulation as understood by the ECJ, or limiting the effects of a judgment upon judgments for the purposes of the Brussels system, a method (altering the effects of a judgment under its lex fori) employed by the ECJ in Gothaer Versicherung in respect to other effects of a judgment from a Member State court, or, finally, by introducing an entire set of rules on the recognition and enforcement of third state judgments. In the latter case, all measures would have to be coordinated with the latest and fundamental development within the EU on third state judgments, namely the (prospective) entering into force of the HCCH 2019 Judgments Convention on 1 September 2023. Anyone who is interested in what this Convention could offer should feel warmly invited to participate and discuss, inter alia, the interplay between the Brussels and the Hague systems at the Bonn / HCCH Conference on 9 and 10 June 2023.

The next panel, chaired by Geert van Calster, related to certain points on jurisdiction and pendency to be reformed. Krzystof Pacula, Luxemburg, discussed Articles 7 no. 1 and no. 2 and, inter alia, suggested abstaining from a general reformulation of these heads of jurisdiction but rather opted for concrete measures for improving the text in light of lines of case law that turned out to be problematic. Problems identified were, inter alia, the delineation of the personal scope of Article 7 no. 1 in light of the principle of privity of contracts ("Relativität des Schuldverhältnisses") and the concurrence of claims under Article 7 no. 1 and no. 2. In this regard, it was discussed whether both of these heads should allow to assume annex competence in regard to each other. Marta Requejo Isidro, Luxemburg, discussed the intricate interplay of Article 29 and 31 and, inter alia, considered increased obligations of the two Member State courts involved to coordinate conclusively the proceedings, for example by inserting certain time limits and, in case only the non-designated court is seized, powers to order the parties to institute proceedings at the designated court within a certain time limit. Otherwise the court seized should decline jurisdiction finally. Victória Harsági, Budapest, discussed the implications of the judgment of the ECJ in Commerzbank in respect to balancing consumer protection with foreseeability when the consumer, after a Lugano Convention State court has been seized with the matter, transferred its domicile to another (Lugano Convention) State, thereby creating the only international element of the case. Burkhard Hess dealt with reforming Article 35 of the Brussels Ibis Regulation after the ECJ in Toto and observed that there was no express hierarchy between measures under that Article and measures by the court of the main proceedings, and the Court did not infer any such hierarchy in its decision. The suggestion, therefore, was to think about introducing express coordination, be it along the lines of Rules 202 et seq. of the 2020 European Model Rules of Civil Procedure, be it along those of Article 6(3) of the 2022 Lisbon Guidelines on Privacy (on these see here and here), be it along those of Article 15 (3) Brussels IIter Regulation. Good reasons for the latter approach were identified, and this led back to the fundamental question to what extent the notion of a coherent "Brussels system" might allow even *de lege lata* not only to apply concepts from the Brussels Ibis Regulation, the "backbone" of that system, to other instruments by analogy, but also vice versa from the latter instruments to the former.

The last panel started with a submission by Gilles Cuniberti, Luxemburg, to remove Article 43, based on a number of reasons, as the Brussels I Recast aimed at removing “intermediate measures” such as exequatur, which rendered it inconsistent to uphold the intermediate measure foreseen in Article 43 – service of the certificate of Article 53 upon the judgment debtor. This was held to be all the more so, as this measure would primarily protect the debtor, already adjudged to pay, to an unjustifiable degree. Marco Buzzoni, Luxemburg, discussed the adaptation of enforcement titles under Article 54, a provision that was held to be one of the major innovations of the last Recast but turned out to be of little practical relevance. A similar provision had been proposed in the preparatory works for the HCCH 2019 Judgments Convention (February 2017 Draft Convention, Article 9), but was ultimately dropped, as opposed to the 2022 Lisbon Guidelines on Privacy (see its Article 12(2) Sentence 2). Vesna Rijavec, Maribor (unfortunately unable to attend for compelling reasons, but well represented by the chair, Geert van Calster) presented proposals on refining Articles 45(1) lit. c and d, mainly arguing that these should connect to pendency (as had already been proposed by the Heidelberg Report for the Recast of the Brussels I Regulation).

An overall sense of the conference was that no radical revolutions should be expected in the forthcoming Recast, which should be taken as another sign for the overall success of the backbone of the Brussels system, but that there was quite some room for specific and well-reasoned improvements. The conference contributed to preparing these in a truly excellent and inspiring way and in outstanding quality.

Developments in Third-Party Litigation Funding in Europe and Beyond

Written by Adrian Cordina, PhD researcher at Erasmus School of Law, project member of the Vici project ‘Affordable Access to Justice’ which deals with costs and funding of civil litigation, financed by the Dutch Research Council (NWO)

This blog post reports on a conference on Third Party Litigation funding (TPLF) as well as some other activities in the area of costs and funding, including a new project by the European Law Institute on TPLF.

(1) Conference 'The Future Regulation of Third-Party Funding in Europe'

22 June 2022, Erasmus University Rotterdam

The right of access to civil justice continues to be constrained by the cost, complexity and delays of litigation and the decline in legal aid. Private litigation funding methods litigation like third-party litigation funding (TPLF) and alternative dispute resolution (ADR) methods have been developing, which address these challenges to a certain extent. The debate on whether and to what extent TPLF should be regulated in Europe has also been gathering pace. On the one hand, proponents argue that it facilitates access to civil justice whilst, on the other hand, critics say that there may be risks of abuse. These issues were critically discussed during the conference 'The Future Regulation of Third-Party Funding in Europe' held on the 22nd of June 2022. It concluded the online seminar series on 'Trends and Challenges in Costs and Funding of Civil Justice' organised by Erasmus School of Law in the context of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO). Team members of the project are project leader Xandra Kramer, and Eva Storskrubb, Masood Ahmed, Carlota Ucin, Adriani Dori, Eduardo Silva de Freitas, Adrian Cordina, assisted by Edine Appeldoorn.

The series commenced in December 2021 with a general session that addressed several topics related to access to justice and costs and funding, including collective redress and litigation costs reforms, and a law-and-economics perspective. The second seminar in January 2022 was dedicated to legal mobilisation in the EU. The third one in February addressed the impact of public interest litigation on access to justice, and the fourth one in March, litigation funding in Europe from a market perspective. The April seminar focused in on austerity policies and litigation costs reforms, and the May session was dedicated to funding and costs of alternative dispute resolution (ADR).

The aim of this seventh and final conference of the seminar series was to reflect on the need and type of regulation of TPLF from different points of view. By seeking to engage representatives from both academia and stakeholders, the conference aimed to foster a lively exchange and contribute to the debate. The event was introduced by a keynote speech by Professor Geert Van Calster (KU Leuven, Belgium) who examined the key issues in TPLF.

The first panel was chaired by Xandra Kramer and addressed the current status quo of the regulation of TPLF and the possibilities of further regulation. Paulien van der Grinten outlined the situation of TPLF in the Netherlands from the point of view Senior Legislative Lawyer at the Ministry of Justice and Security. The presentation of Johan Skog (Kapatens, Sweden) highlighted the lack of factual basis in the European Parliament Research Service Study for the concern of TPLF giving rise to excessive and frivolous litigation. David Greene (Edwin Coe, England) centred his presentation around a critical outlook on litigation costs and funding and the merits and demerits of TPLF in England and Wales. Following the presentations of the first panel, a discussion among the participants and attendees ensued, including discussant Quirijn Bongaerts (Birkway, The Netherlands). Amongst others, the question of disclosure of funding was debated.

The second panel was chaired by Eva Storskrubb (Uppsala University and Erasmus University Rotterdam) and focused on the modes and levels of regulation of TPLF. With respect to the Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation, also examined in an earlier entry in this blog, Kai Zenner (European Parliament, Head of Office (MEP Axel Voss)) focused on the process which led up to the Draft Report and the risks of TPLF. Victoria Sahani (Professor, Arizona State University) approached the issue of TPLF from the perspective of arbitration, both commercial and investor-State arbitration. Finally, wrapping up the second panel and providing reflections connected to the preceding panelists, Albert Henke (Professor, Università degli Studi di Milano) addressed the issue of regulation and the multiple variables it faces.

The conference was held in hybrid format. In spite of some coordination challenges that this posed, both the live audience and online attendants found the opportunity to comment on the presentations and interact with the speakers, also with the use of the chat function. The discussions and interventions showed how opportune the timing of the conference was, as it was held at a period when the Draft Report is being deliberated and scrutinised, and when the debate on regulating TPLF is taking centre stage at a European and international level.

A more extensive conference report is scheduled for publication in the Dutch-Flemish journal for mediation and conflict management (Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement (TMD).

(2) Further activities and publications on costs and funding

Recently, a special issue of Erasmus Law Review, edited by Vici members Masood Ahmed and Xandra Kramer on Global Developments and Challenges in Costs and Funding of Civil Justice (available open access). This Special Issue contains ten articles and is introduced by an editorial article by Ahmed and Kramer. It includes articles on different aspects of costs in six jurisdictions. John Sorabji focuses on legal aid insurance and effective litigation funding in England and Wales; David Capper on litigation funding in Ireland; Michael Legg on litigation funding in Australian class actions; Nicolas Kyriakides, Iphigeneia Fisentzou and Nayia Christodoulou on affordability and accessibility of the civil justice system in Cyprus; Jay Tidmarsh on shifting costs in American discovery; and Dorcas Quek Anderson on costs and enlarging the role of ADR in civil justice in Singapore. Three papers focus on general topics. Ariani Dori inquires in her paper whether the fact-finding process that supports the preparation of the EU Justice Scoreboard, as well as the data this document displays, conveys reliable and comparable information. Adrian Cordina critically examines, including from a law-and-economics perspective, the main sources of concern leading to the scepticism shown towards TPF in Europe, and how the regulatory frameworks of England and Wales, the Netherlands, and Germany in Europe, and at the European Union level, the Representative Actions Directive addresses these concerns. In view of the UKSC's finding of non-infringement of Article 6 ECHR in Coventry v. Lawrence [2015] 50, Eduardo Silva de Freitas argues that a more holistic view of the procedural guarantees provided for by Article 6 ECHR is called for to properly assess its infringement, considering mainly the principle of equality of arms.

Some of the papers will be presented during an online seminar that will take place at the end of 2022.

(3) ELI project on Third Party Litigation Funding

The importance of Third Party Litigation Funding is also highlighted by the adoption of a new project by the European Law Institute (ELI) on TPLF. The commencement of the two-year-long project was approved by the ELI Council in

July 2022. It will be conducted under the supervision of three reporters (Professor Susanne Augenhofer, Ms Justice Dame Sara Cockerill, and Professor Henrik Rothe) assisted by researchers Adriani Dori and Joseph Rich, and with the support of an International Advisory Committee. The project's main output will be the development of a set of principles (potentially supplemented by checklists) to identify issues to be considered when entering into a TPLF agreement. Adriani will participate as a project member (together with Mr Joseph Rich). The final outcome is expected in September 2024.