Corona and Private International Law: A Regularly Updated Repository of Writings, Cases and Developments

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The coronavirus has created a global crisis that affects all aspects of life everywhere. Not surprisingly, that means that the law is affected as well. And indeed, we have seen a high volume of legislation and legal regulations, of court decisions, and of scholarly debates. In some US schools there are courses on the legal aspects of corona. Some disciplines are organizing symposia or special journal issues to discuss the impact of the pandemic on the respective discipline.

For a time Private international law has been vividly discussing the relevance of the crisis for the field, and of the field for the crisis Private international law matters are crucial to countless issues related to the epidemic – from production chains through IP over possible vaccines to mundane questions like the territorial application of lockdown regulations.

Knowledge of these issues is important. It is important for private international lawyers to realize the importance of our discipline. But it is perhaps even more important for decision makers to be aware of both the pitfalls and the potentials of conflicts of law.

This site, which we hope to update continually, is meant to be a place to collect, as comprehensively as possible, sources on the interaction of the new coronavirus and the discipline. The aim is not to provide general introductions into private international law, or to lay out sources that could be relevant. Nor is this meant to be an independent scholarly paper. What we try to provide is a one-stop place at which to find private international law discussions worldwide regarding to coronavirus.

For this purpose, we limit ourselves to the discipline as traditionally understood—jurisdiction, choice of law, recognition and enforcement, international procedure. Coronavirus has other impacts on transnational private law and those deserve attention too, but we want to keep this one manageable.

Please help make this a good informative site. Please share any reference that you have – from any jurisdiction, in any legislation – and we will, if possible, share them on this site. Please contact olbing@mpipriv.de

General

In the early beginning of the Pandemic, contributions from scholars, courts, international institutes and politicians where of a more general character as it was difficult to predict the scope and duration of the new situation.

The European Law Institute for example issued a set of Principles for the COVID-19 Crisis, covering a variety of legal topics such as Democracy (Principle 3) and Justice System (Principle 5) as well as Moratorium on Regular Payments, Force Major and Hardship, Exemption from Liability for simple Negligence (Principles 12 to 14). Ending with something everybody hopes for: Return to Normality (Principle 15).

The Secretary General of the Hague Conference recorded a short online message from his home addressing the most urgent topics. Ensuing, the Permanent Bureau developed a Toolkit for resources and publications relevant to the current global situation.

The university of Oxford‘s Blavatnik School of Government collects all measures by governments around the world in the “Coronavirus Government Response Tracker”.

A German journal is dedicated solely to the topic “COVID-19 and the Law”. The journal is interesting for academics and practitioners alike, since it publishes papers on specific COVID-19 related issues, as well as an extensive overview of German judgements.

An open access project by intersentia examines the COVID-19 legislation and its consequences in European states, bringing together contributions from over 85 highly regarded academics and practitioners in one coherent, open access resource.

Matthias Lehmann discusses the role of private international law on a number of issues – the impact of travel restrictions on transportation contracts, contract law issues for canceled events, canceled or delayed deliveries, but also liability for infections.

Online Workshops, Webinars and Conferences

In time of travel restrictions and social distancing the academic exchange is still active and sometimes more diverse than bevor, since people from all around the world come together, as the great number of workshops and symposiums that are held online shows.

Mid November (17 to 19), the Mexican Academy of Private International and Comparative Law discusses during its XLIV seminar among other topics the impacts of the pandemic on international family as well as aspects surrounding vaccines. participants will discuss in Spanish and the online participation is free of charge.

Contrary to the regular sessions of The Hague Academy of International Law's Centre for Studies and Research, the upcoming edition is entirely online. The topic will be "Epidemics and International Law" and held from September 2020 to June 2021. The collective works will be published later by the Academy. You will find application and programme here.

The Minerva Center for Human Rights at Tel Aviv University hosted an international socio-legal (zoom-) workshop on 22-23 June 2021 to explore the impact of the Covid-19 crisis and its regulation on cross-border families. A call for papers expired on 28 February 2021.

Another series of events organized by the University of Sydney's Centre for Asian and Pacific Law will regularly discuss topics such as social justice, civil rights, trade and investment in light of (post) pandemic developments. Of that series one webinar on the aftermath of the pandemic in the Asia-Pacific region focussed on commercial dispute resolution and issues related to private international law.

Marc-Philippe Weller discussed in a workshop on December 1, 2020 about "Nationalism, Territorialism, Unilateralism: Managing the Pandemic Through Private International Law?" if the measures enacted due to the pandemic may have an effect on the connecting factors in European private international law. He had a particular focus on the determination of habitual residence.

A comparative analysis of reactions in Japan and Germany on COVID-19 in private and public law with scholars from both jurisdictions was the topic of an online conference (mostly in German) on August 2020. Recordings of the presentations are online.

During a live youtube conference on July 23, 2020 Humberto Romero-Muci presented with several others his views on “Migrantes, pandemia y política en el Derecho Internacional Privado”. The video is still online.

A webinar organized by experts from MK Family Law (Washington) and Grotius Chamber (the Hague) discussed pertinent issues relating to international child abduction in times of COVID-19.

Matthias Lehmann presented his views on the application of force majeure certificates and overriding mandatory provisions n international contracts in an online-workshop on “COVID-19 and IPR/IZVR”.

Another webinar was held on “Vulnerability in the Trade and Investment Regimes in the Age of #COVID19”, which is available online, as part of the Symposium on COVID-19 and International Economic Law in the Global South.

The University of New South Wales held a talk on “COVID-19 and the Private International Law” in May, which you find on youtube.

As a follow-up of a webinar on PIL & COVID-19, Inez Lopez and Fabrício Polido give “some initial thoughts and lessons to face in daily life”

A group of Brazilian scholars organized an online symposium on Private International Law & Covid-19. Mobility of People, Commerce and Challenges to the Global Order. The videos are here.

The Organization of American States holds a weekly virtual forum on “Inter-American law in times of pandemic” (every Monday, 11:00 a.m., UTC-5h). One topic of many will be on “New Challenges for Private International Law” (Monday, June 15, 2020).

State Liability

Some thoughts are given to compensation suits brought against China for its alleged responsibility in the spread of the virus. One main issue here is whether China can claim sovereign immunity.

In the United States, several suits have been brought in Florida (March 12),

Nevada (March 23) and Missouri (April 21) against the Peoples republic of China (PRC), which plaintiffs deem responsible for the uncontrolled spread of the virus, which later caused massive financial damage and human loss in the United States. Not surprisingly officials and scholars in China were extremely critical (see here and here).

But legal scholars, including Chimène Keitner and Stephen L. Carter, also think such suits are bound to fail due to China's sovereign immunity, as do Sophia Tang and Zhengxin Huo. Hiroyuki Banzai doubts that the actions can succeed since it will be difficult to prove a causal link between the damages and the (in-) actions by the Chinese Gorvernment. Lea Brilmayer suspects that such a claim will fail since it would be unlikely, that a court will assume jurisdiction. The same conclusion is drawn by Angelica Bonfanti and Chimène Keitner after a thorough analysis of the grounds on which a liability of china could be based. An overview and detailed presentation of many class actions and suits filed by states can be found here.

Until now, only very little has happened concerning the American suits. Some suits where (voluntarily) dismissed or tossed. One suit against the PRC for damages amounting to $ 800 billion was ordered to be dismissed by the District Court, since the plaintiff failed to state a claim (*James-El v the Peoples Republic of China* (M.D.N.C. 2020) WL 3619870). For a general update on the lawsuits against the PRC from January 22, 2021 see here.

In an interview with a German newspaper Tom Ginsburg lays out the legal issues that will be faced, if the claims of state liability are brought in front of a German court. Fabrizio Marrella discusses the Italian perspective on that issue. Brett Joshpe analyzes more generally China's private and public liability in the domestic and international framework.

A Republican Representative is introducing two House Resolutions urging the US Congress to waive China's sovereign immunity in this regard; such a waiver has also been proposed by a Washington Post author. The claim has also found support by Fox News.

Interestingly, there is also a reverse suit by state-backed Chinese lawyers against the United States for covering up the pandemic. Guodong Du expects this will likewise be barred by sovereign immunity.

Martins Paparinskis shares the concerns about a successful litigation against foreign states. However, he suggests to change the law of state responsibility fundamentally to be prepared for further international catastrophes such as the current pandemic.

In the UK, the conservative Henry Jackson Society published a report suggesting that China is liable for violating its obligations under the International Health Regulations. The report discusses ten (!) legal avenues towards this goal, most of them in public international law, but also including suits in Chines, UK and US courts (pp 28-30). Sovereign immunity is discussed as a severe but not impenetrable barrier.

Contract Law

Both the pandemic itself and the ensuing national regulations impede the fulfilment of contracts. Legal issues ensue. An overview of European international contract law and the implications of COVID-19 is given here and here. Two chapters of the book "*La pandemia da COVID-19. Profili di diritto nazionale, dell'Unione Europea ed internazionale*" edited by Marco Frigessi di Rattalma are dedicated to jurisdiction and applicable law in contract matters.

The UNIDROIT Secretariat has released a Note on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 health crisis.

Bernard Haftel highlights three different techniques to apply COVID-19 legislation to an international contract: as *lex contractus*, as *lois des police* and through consideration within the applicable law.

Gerhard Wagner presents COVID caused defaults under the aforementioned ELI principles.

If a contracting party is unable to perform its contractual obligations, incapacity to perform can be based on force majeure or hardship. Some contributions suggest to apply for force majeure certificates which are offered by most countries, for example by China, Russia. How such a certificate can influence contractual obligations under English and New York Law is shown by Yeseung Jang. The German perspective is given by Philip Reusch and Laura Kleiner.

Further the South Korean, French and the Common Law perspective on force majeure have been published. Bruno Ancel compares the French and American approach. The difficulty to implement appropriate force majeure clauses in a contract is shown by Matteo Winkler.

Drawing from recent cases and experiences Franz Kaps analyses the difficulties in the operation within ICC force majeure clauses and suggests how "state-of-the-art force majeure clauses" should be constructed to include an international pandemic.

Victoria Lee, Mark Lehberg, Vinny Sanchez and James Vickery go beyond force majeure implications on contracts in their expert analysis.

William Shaughnessy presents issues which might occur in international construction contracts.

Another crucial aspect is the application of overriding mandatory rules on international contracts. Ennio Piovesani discusses whether Italian decree-laws enacted in view of the pandemic can operate as overriding mandatory rules and whether that would be compatible with EU law. So does Giovanni Zarra on international mandatory rules. Aposotolos Anthimos adds the Greek perspective, Claire Debourg the French to the discussion.

The applicability of self-proclaiming mandatory provisions in Italian law in respect to package travels in general and the Directive (EU) 2015/15 on package travel in particular, is discussed by Fabrizio Marongiu Buonaiuti.

Matthias Lehmann considers more broadly possible private international law issues and responses under European law. José Antonio Briceño Laborí and Maritza Méndez Zambrano add the Venezuelan view.

The crisis hits in particular global value and production chains. Impacts are discussed by Tomaso Ferando, by Markus Uitz and Hemma Parsché and by Anna Beckers, though neither focuses specifically on private international law.

Caterina Benini explains a new Italian mandatory rule providing a minimum standard of protection for employees.

Klaus Peter Berger and Daniel Behn in their historical and comparative study on force majeure and hardship, highlight that such remedies are quite regular to find

and fit to distribute the risk emanating from such a crisis evenly.

CISG

The CISG has long been of very little importance in international contract law but now is subject to many discussions. André Janssen and Johannes Wahnschaffe dedicate a detailed analysis to exemptions from liability and cases of hardship under the CISG.

Performance on advance purchase agreements on delivering the COVID-19 vaccines, have been a major political debate recently. While asking which law is applicable on such contracts Ben Köhler and Till Maier-Lohmann suspect, that if CISG is in fact the applicable law, the consequences would be far reaching and could be the very first time the CISG enters the "global centre stage". Unfortunately, a Belgian court deciding over a claim by the EU against AstraZeneca for the delivery of doses of vaccines, did not even consider the application of the CISG.

Corporate Law

If the questions of purchasing COVID-19 vaccines shifts to buying the entire company the issue at hand becomes more political. Arndt Scheffler analyses the situation in which a foreign investor tries to purchase a company, which is crucial for the domestic battle against the pandemic and the search for a vaccine.

Employment Law

Closed borders and practically everybody working from has its impact on employment law.

In export-oriented economies such as Germany, it is very common, that employees are posted abroad on a long-term basis. COVID-19 legislation shapes and influences the legal relation between employer and employee, but also between employee and host-country. Roland Falder and Constantin Franke-Fahle discuss

these influences with particular attention to the question of the applicable law here.

Tort Law

Damages caused by an infection are mostly subject to tort law but can also arise in a contractual relation. Focusing on the applicable law on non-contractual liability Rolf Wagner explains, that sometimes damages can be claimed both, as contractual and as non-contractual. He stresses that as the substantive law on damages caused by an infection is still to evolve, applying foreign law is a particular challenge.

An extensive overview about the law applicable to damages caused by an COVID-19 infection under Indian international tort law is given by Niharika Kuchhal, Kashish Jaitley and Saloni Khanderia. Khanderia published a second article, concerning the need of a codification of Indian conflict of laws on tort in respect of a foreseeable surge in international tort proceedings, caused by the pandemic.

General implications of the coronavirus on product liability and a possible duty to warn costumers, without specific reverence to conflict of laws.

In Austria, a consumer protection association is considering mass litigation against the Federal State of Tyrolia and local tourist businesses based on their inaction in view of the spreading virus in tourist places like Ischgl. A questionnaire is opened for European citizens. Matthias Weller reports.

Florian Heindler discusses how legal measures to battle the virus could be applicable to a relevant tort case (either as local data or by special connection), by analyzing the hypothetical case of a tourist who gets infected in Austria.

Jos Hoevenars and Xandra Kramer discuss the potential of similar actions in the Netherlands under the 2005 Collective Settlement Act, WCAM.

Family Law

Implications also exist in family law, for example regarding the Hague Abduction Convention.

In an Ontario case (Onuoha v Onuoha 2020 ONSC 1815), concerning children taken from Nigeria to Ontario, the father sought to have the matter dealt with on an urgent basis, although regular court operations were suspended due to Covid-19. The court declined, suggesting this was “not the time” to hear such a motion, and in any way international travel was not in the best interest of the child. For the discussion see here.

Further sspects of travel restrictions in international abduction cases are analysed by Gemme Pérez.

A general overview of abduction in times of corona was published by Nadia Rusinova. Another article by Nadia by her covers recent case law and legislation on remote child related proceedings which were conducted during the last weeks around the world. She also highlights, that COVID-19 measures can impact Article 8 ECHR.

Also cases of international surrogacy come into mind which are affected by COVID-19, as Mariana Iglesias shows.

Personal Data

The protection of personal data in transnational environments has always been a controversial topic in conflict of laws. Jie Huang shows, that due to COVID-19 existing tensions between the EU, the USA and China are reflected in their conflict of laws approach.

The European Commission published a “toolbox for the use of technology and data to combat and exit from the COVID-19 crisis”, which was an opportunity for some contributions on the GDPR and Tracing Apps.

Economic Law

The crisis puts stress on global trade and therefore also economic law. Sophie

Hunter discusses developments in the competition laws of various countries (though with no explicit focus on conflict of laws issues).

A list of authors from around the world analyses the interrelation between "Competition law and health crises" in its international context in the current issue Concurrences.

Intellectual Property

Due to lockdowns and school closures, online work and teaching has exorbitantly increased but, as Marketa Trimble stresses, with little notion of transnational copyright issues.

To tackle those a prominently endorsed letter to the World Intellectual Property Organization, emphasizes the need to ensure that intellectual property regimes should support the efforts against the Coronavirus and should not be a hindrance.

Public Certification

In times of lockdown and closed borders notarization and public certification become almost impossible. Therefore, various countries have adjusted their legislation. You will find an overview here.

The electronic Apostille Program (e-APP)experiences a new popularity, as a considerable number of countries have implemented new components of the e-APP. For more information see here.

Dispute Resolution

In Dispute resolution two main questions are being discussed.

On the one hand the question of jurisdiction as such, for example for claims suffered within contractual or non-contractual relationships. Rolf Wagner gives the European and German perspective presenting the possible courts of jurisdiction under Brussel I Regulation (recast), the Lugano Convention and the

German code of civil procedure.

In a recent case by the Supreme Court of Queensland (AUS), the court examined the impact of COVID-19 on a foreign jurisdiction clause. You can find Jie Huang's comments on the decision here.

One the other hand, it is being discussed to what extend the requirement of physical presence in courts can conform with social distancing and travel restrictions. As a more drastic reaction some courts suspended their activities except for urgent matters all together. Developments in Italy are discussed here, developments in English law here.

On the other hand, another possibility is the move to greater digitalization, as discussed comparatively by Emma van Gelder, Xandra Kramer and Erlis Themeli. The Hague Conference on Private International Law (HCCH) published a Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention, discussed also with reference to Corona by Mayela Celis.

Using the pandemic, Gisela Rühl analyses why the potential of digitalization is so scarcely used in civil procedure and how it can be improved to serve the needs of a digital society.

Benedikt Windau analyses the German civil procedure and how international digital heraings could be possible within the existing law.

In litigation, virtual hearings become a prominent measure to overcame restrictions on physical presence. While in on some jurisdiction such hearings are possible, Luigi Malferrari discusses the question if such hearings should also be enabled before the CJEU.

Maxi Scherer takes the crisis as an opportunity to analyse virtual hearings in international arbitration. Complications and long-term effects of virtual arbitration are presented here. Mirèze Philippe however sees this development as a positive game changer not just in health aspect but also to protect the environment and saving time as well as travelling costs (further articles covering international arbitration and virtual hearings: here and here).

A very broad presentation of legislation in France, Italy and Germany in civil procedure, including cross border service and taking of evidence as well as its

implications on international child abduction and protection, is given by Giovanni Chiapponi.

Jie Huang examines the case of substitute service under the Hague Service Convention during the pandemic in the case Australian Information Commission v Facebook Inc ([2020] FCA 531).

A US project guided by Richard Suskind collects cases of so-called “remote courts” worldwide.

The EU gives information about the “impact of the COVID-19 virus on the justice field” concerning various means of dispute resolution.

Gilberto A. Guerrero-Rocca analyses the impacts of COVID-19 on international arbitration in relation to the CISG.

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Corporate responsibility in (public) international law

Written by Oliver Dörr, University of Osnabrück

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

I. Companies – responsibility

1. As for commercial entities, international law is concerned, above all, with transnational or multinational companies. The term basically describes the conglomerate of commercial entities that are acting separately in at least two different countries and which are tied together by a regime of hierarchical coordination.

2. In times of „global governance“ the international legal concept of responsibility is undergoing a process of de-formalization and, thus, encompasses the violation of social behavioural expectations, which for companies may result from international standards that are not legally binding. The resulting responsibility is a legal one insofar as the law adopts those standards and attaches negative consequences to their violation.

II. Private persons and the law of international responsibility

3. Private companies may be held responsible under international law to the extent that they are either themselves bound by primary legal obligations (direct responsibility), or their business activities are regulated by States which, in doing so, are fulfilling their own international legal obligations (indirect responsibility). A State may just as well impose such regulation without actually being under an obligation to do so (e.g. the US Alien Tort Statute).

Private persons as subjects of international legal obligations

4. Private persons being themselves bound by international legal obligations pertain to the process of de-medatization, which established the legal personality of the individual under international law.

5. Sovereign States can, by concluding international treaties, create legal obligations for private persons, including private companies, directly under international law. The personal scope of this comprehensive law-creating power of States is delimitated by their personal jurisdiction under international law. Whether an individual treaty itself gives rise to legal obligations for private persons, is, just as the creation of individual rights, a matter of treaty interpretation.

6. Genuine legal obligations have evolved for private persons under international criminal law: Here, detailed primary obligations of private persons have developed that are linked to a specific regime of individual responsibility, in

particular under the Statute of the International Criminal Court.

7. In contrast, the extension of international human rights obligations to apply directly between private persons is not yet part of the international *lex lata*. Individual texts pointing in that direction (such as art. 29 para. 1 of the Universal Declaration of Human Rights) are merely of a programmatic nature.

8. Genuine international legal obligations of companies can today be found in the rules regulating deep sea-bed activities (arts. 137, 153 para. 2 UN Convention on the Law of the Sea) and in various treaties establishing regimes of civil liability.

9. Obligations of private persons under international law, including those having direct effect within UN Member States, may also be created by the UN Security Council through resolutions under arts. 39, 41 of the UN Charter.

10. It is fairly uncertain whether the initiative, currently being undertaken within the UN Human Rights Council, to adopt a „legally binding instrument" encompassing direct human rights liability of private companies, will ever have a chance of becoming binding law.

11. To the extent that there actually are primary obligations of private persons under international law, a general principle of law requires their violation to result in a duty to make reparation. Only in exceptional circumstances could the rules of State responsibility be transferred to private persons.

Obligations to establish the responsibility of private persons

12. An indirect responsibility under international law applies to undertakings via the international legal obligation of States to criminalize certain activities, e.g. in respect of waste disposal, bribery in foreign countries, organized crime and corruption.

Responsibility of private persons under autonomous national law

13. Provisions in national law that autonomously sanction private acts for international law violations bridge with their own binding effect the fact that the private person is not itself bound by the international legal norm.

14. The French Law No. 399-2017 on the plan de vigilance is far too general and vague to serve as an example for an (indirect) international legal reporting

responsibility. The same applies to the CSR directive of the European Union of 2014.

III. Responsibility on the basis of non-binding rules of conduct

Behavioural governance without legally binding effects

15. The values contained in certain international law principles shape some social behavioural expectations that are summarized today in concepts of corporate social responsibility (CSR). As a matter of substance, those expectations relate to human rights, the environment, conditions of labour and fighting corruption.

Processes of rule-making

16. The discussion is mainly focused on certain international, cross-sector corporate codes of conduct, such as the OECD Guidelines for Multinational Enterprises (1976), die ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977), the UN Global Compact (2000) and the UN Guiding Principles on Business and Human Rights (2011).

17. In particular, with regard to human rights and environment, those rules are extremely unspecific, which means that here, law merely serves as a backdrop in order to endow social behavioural expectations with moral authority.

Responsibility by reception

18. In order to adopt and implement those business-related standards, basically all instruments of law-making and application can be used, as long as they impose normative requirements on companies and their activities. Legal certainty standards under the rule of law, as well as the rules of international law on the jurisdiction of States, can limit the reception.

19. Non-binding standards could be implemented, for example, via the legal regimes of State aid (in particular with respect to export finance), public procurement, investment protection and the rules on civil liability. So far, however, the international standards on business conduct are rarely being implemented in a legally binding manner.

IV. Conclusion

20. If the distinction of law and non-law is to be maintained, responsibility of companies in international law is a theoretical possibility, but of little practical relevance: Only in very specific circumstances are private companies themselves subjected to international legal obligations; moreover, it is similarly rare that „soft“ international standards of conduct are being adopted by „hard“ law and thereby made into specific legal duties of companies.

21. Behavioural standards that determine the international debate on CSR assign a mere „backdrop function“ to the law, as they neither identify concretely the international legal norms referred to, nor differentiate them properly. In that context, companies are simply required to publicly declare their commitment to „the good cause“, which results in duties to take precautionary measures, to exercise transparency and to publish reports.

22. That is why environmental protection, human rights etc. in relation to the activities of private companies is still mainly the responsibility of States. Tools that exist in international law in this respect, such as the rules of attribution or protective duties, must be adapted and enhanced, in order to achieve adequate solutions for detrimental business conduct on the basis of State responsibility.

Full (German) version: *Oliver Dörr*, Unternehmensverantwortlichkeit im Völkerrecht, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 133 et seq.

Webinars on Private International

Law and Covid-19: 11-22 May 2020

Gathering (or rather e-gathering) professors and researchers from Brazil, Argentina, Uruguay, Mexico, Spain, and Portugal, a series of webinars is taking place from today until 22 May, under the general topic of PIL and Covid-19: Mobility, Commerce and Challenges in the Global Order.

Subtopics are:

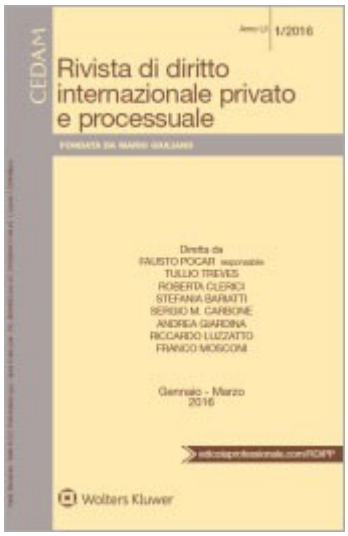
I – PIL, International Institutions and Global Governance in times of Covid-19

II – Protecting persons in mobility and Covid-19: Human Rights, Families, Migrants, and Consumers

III – International Commerce and Covid-19: Global Supply Chains, Civil Aviation, Technologies & Labor

Full programme and more information: here.

Rivista di diritto internazionale privato e processuale (RDIPP) No 1/2020: Abstracts



The first issue of 2020 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Antonietta Di Blase, Professor at the University of Roma Tre, **Sull'interpretazione delle convenzioni e delle norme dell'Unione europea in materia di diritto internazionale privato** ('On the Interpretation of the European Private International Law Conventions and Provisions'; in Italian)

- The paper provides an overview of the practice of international and national Courts relating to the interpretation of private international law conventions and EU rules, where uniform approach and autonomy from the national legal orders of Member States are construed as fundamental criteria. Some elements, especially drawn from the Court and the Italian practice, makes it evident that the national judicial organs have substantially endorsed the interpretation by the Court of Justice of the EU of the acts adopted within the framework of the judicial cooperation in civil matters. Possible gaps in EU rules could be overcome through interpretation – in keeping with the main human rights principles – taking into account that sometimes the legislation in force in the Member States follow a different approach, as in the case of family law. Finally, the paper addresses problems connected to the interpretation of conventions with Third States, also taking into account the consequences of the UK's exit from the European Union.

Gilles Cuniberti, Professor at the University of Luxembourg, **Signalling the Enforceability of the Forum's Judgments Abroad** (in English)

- The aim of this article is to document and assess the efforts made by international commercial courts to signal the enforceability of their judgments abroad. To that effect, three strategies were developed. The

first and most obvious one was to enter into agreements providing for the mutual enforcement of judgments of contracting States which could serve the same function as the 1958 New York Convention for arbitral awards. Yet, as the 2005 Hague Convention has a limited scope and the 2019 Hague Convention is not yet in force, alternative strategies were identified. Several international commercial courts are actively pursuing the conclusion of non-binding documents with other courts or even law firms suggesting that the judgments of the forum would be enforced by the courts of other States. Finally, one international court has also explored how it could convert its judgments into arbitral awards.

Laura Baccaglini, Associate Professor at the University of Trento, **L'esecuzione transfrontaliera delle decisioni nel regolamento (UE) 2015/848** ('Cross-Border Enforcement of Decisions Pursuant to (EU) Regulation 2015/848'; in Italian)

- This paper addresses the cross-border enforcement of insolvency decisions in Europe. Notably, it examines how the claims brought in the interest of an insolvency proceeding opened in one Member State can be pursued in other Member States. The topic refers to EU Regulation 848/2015 that, as of 26 June 2017, replaced EC Regulation No 1346/2000 without introducing any significant new features as regards the circulation of such judgments, which remain subject to a system of automatic recognition. The reference made by such Regulation to Regulation No 1215/2012 makes the enforcement of those judgments equally automatic, without the need for prior exequatur by the court of the State addressed but only requiring the delivery of a certificate of enforceability by the court of the State of origin. The problem is examined by taking the liquidation procedure as a model, assuming that it was opened in a Member State other than Italy, where the insolvency practitioner needs to recover assets that have been disposed of by the debtor, after the opening of the procedure. The question is addressed as to how the insolvency practitioner can prevent the continuation of individual enforcement proceedings still pending and whether he can intervene to have the assets liquidated, withholding the proceeds. More generally, the problem arises as to which rules govern the liquidation of assets located in Italy and belonging to the debtor. In all these cases, the

issue is whether the foreign judgment should be enforced and, if so, how it should be enforced.

The following comment is also featured:

Giovanna Adinolfi, Professor at the University of Milan, **L'accordo di libero scambio tra l'Unione europea e la Repubblica di Singapore tra tradizione e innovazione** ('The Free Trade Agreement between the European Union and the Republic of Singapore between Tradition and Innovation'; in Italian)

- The Free Trade Agreement (FTA) with Singapore entered into force on 21 December 2019. It is one of the so-called new generation treaties negotiated and concluded by the European Union within the framework of the trade policy strategy launched in 2006. The FTA is complemented by the Investment Protection Agreement (IPA), signed in 2018 and whose entry into force requires the ratification by all EU Member States, in addition to the EU and Singapore. The overall purpose of the contribution is to assess to what extent the parties to the two agreements have not overlooked the dense network of other treaties and conventions that already govern their cooperation in economic matters. Indeed, the substantive provisions and the dispute settlement mechanisms established under the FTA and IPA have been inspired by these external sources and by their relevant case law. The analysis focuses, first, on the FTA provisions on trade in goods and services, establishment, subsidies, government procurement and intellectual property rights (para 2-6). Thereafter, the IPA is taken into consideration for the purposes of identifying possible overlaps with the FTA rules on establishment (para 7). Finally, focus is placed on the envisaged dispute settlement mechanisms, in view of the role they may play for a proper safeguard of the businesses' interests (para 7). This issue arises because of the provisions included in both the FTA and the IPA excluding the direct effects of the two agreements in the parties' legal order. Against this framework, the investor-State dispute settlement mechanism established under the IPA is called on to play a crucial role, also in the light of the detailed provisions on the enforcement of awards under art. 3.22 IPA.

In addition to the foregoing, this issue features the following book review by *Angela Lupone*, Professor at the University of Milan: Nora Louisa Hesse, **Die**

Vereinbarkeit des EU-Grenzbeschlagnahmeverfahres mit dem TRIPS Abkommen, Mohr Siebeck, Tübingen, 2018, pp. XI-274.

Corporate responsibility and private (international) law

Written by Giesela Rühl, University of Jena/Humboldt-University of Berlin

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of all contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. Corporate social responsibility has been the subject of lively debates in private international law for many years. These debates revolve around the question of whether companies domiciled in countries of the Global North can be held liable for human rights violations committed by foreign subsidiaries or suppliers in countries of the Global South (so-called supply chain liability).

2. According to the majority view in the public international law literature, companies are not, at least not directly bound by human rights. Although numerous international law instruments, including the UN's 2011 Guidelines for Business and Human Rights (Ruggie Principles), also address companies, liability for human rights violations is, therefore, a matter of domestic law.

3. The domestic law applicable to liability for human rights violations must be determined in accordance with the provisions of (European) private international law. Direct recourse to the *lex fori*, in contrast, is not possible. The legal situation in Europe is, therefore, different from the United States where actions which are brought on the basis of the Alien Tort Claims Act (ATCA) are governed by US-American federal (common) law.

4. Claims for human rights violations committed abroad will usually be claims in tort. Under (European) private international law it is, therefore, the law of the place where the damage occurs (Article 4(1) Rome II Regulation) and, hence, foreign law which governs these claims. Exceptions apply only within narrow limits, in particular if domestic laws can be classified as overriding mandatory provisions (Article 16 Rome II Regulation) or if application of foreign law violates the *ordre public* (Article 26 Rome II Regulation).

5. In addition to tort law, claims for human rights violations may also be based on company law, namely when directors are directly held liable for torts committed by a foreign subsidiary. According to the relevant private international law provisions of the Member States these claims are governed by the law of the (administrative or statutory) seat of the foreign subsidiary. As a consequence, claims in company law are also subject to foreign law.

6. The fact that (European) private international law submits liability for human rights violations to foreign law is very often criticized in the private international law literature. Claiming that foreign law does not sufficiently protect the victims of human rights violations, a number of scholars, therefore, attempt to subject liability claims *de lege lata* to the domestic law of the (European) parent or buyer company.

7. These attempts, however, raise a number of concerns: first, under traditional (European) private international law, substantive law considerations do not inform the determination of the applicable law. Second, the wish to apply the domestic law of a European country is mostly driven by the wish to avoid poorly functioning court systems and lower regulatory standards in countries of the Global South. Neither of these aspects, however, has anything to do with the applicable tort or company law. Regulatory standards, for example, are part of public law and, therefore, excluded from the reach of private international law. Finally, the assumption that the domestic law of the (European) parent or buyer company provides more or better protection to the victims of human rights violations does not hold true *de lege lata*. Since parent and buyer companies are legally independent from their foreign subsidiaries and suppliers, parent and buyer companies are only in exceptional cases liable to the victims of human rights violations committed abroad by their foreign subsidiaries or suppliers (legal entity principle or principle of entity liability).

8. The difficulties to hold (European) parent and buyer companies *de lege lata* liable for human rights violations committed by their foreign subsidiaries or suppliers raises the question of whether domestic laws should be reformed and their application ensured via the rules of private international law? Should domestic legislatures, for example, introduce an internationally mandatory human rights due diligence obligation and hold companies liable for violations? Proposals to this end are currently discussed in Germany and in Switzerland. In France, in contrast, they are already a reality. Here, the Law on the monitoring obligations of parent and buyer companies (Loi de vigilance) of 2017 imposes human rights due diligence obligations on bigger French companies and allows victims to sue for damages under the French Civil Code. The situation is similar in England. According to a Supreme Court decision of 2019 English parent companies may, under certain conditions, be held accountable for human rights violations committed by their foreign subsidiaries.

9. The introduction of an internationally mandatory human rights due diligence obligation at the level of national law certainly holds a number of advantages. In particular, it may encourage companies to take measures to prevent human rights violations through their foreign subsidiaries and suppliers. However, it is all but clear whether, under the conditions of globalization, any such obligation will actually contribute to improving the human rights situation in the countries of the Global South. This is because it will induce at least some companies to take strategic measures to avoid the costs associated with compliance. In addition, it will give a competitive advantage to companies which are domiciled in countries that do not impose comparable obligations on their companies.

10. Any human rights due diligence obligations should, therefore, not (only) be established at the national level, but also at the European or – even better – at the international level. In addition, accompanying measures should ensure that the same rules of play apply to all companies operating in the same market. And, finally, it should be clearly communicated that all these measures will increase prices for many products sold in Europe. In an open debate it will then have to be determined how much the Global North is willing to invest in better protection of human rights in the Global South.

Full (German) version: *Giesela Rühl*, Unternehmensverantwortung und

(Internationales) Privatrecht, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 89 et seq.

Germany's Approach to Cross-border Corporate Social Responsibility of Enterprises: Latest Developments

by Marie Elaine Schäfer

The cross-border expansion of EU companies' economic activities not only leads to a globalised market, but also impacts human rights as well as the environment in countries worldwide. The recent rise of claims against EU companies for the violations committed by their subsidiaries located in third countries is a by-product of that context. With Germany being the world's third largest importing country, the question of corporate responsibility for harmful events abroad is crucial. The present post provides an overview of the most recent legal developments on that topic.

"National Action Plan" and voluntary principle

The central aspect of Germany's approach to prevent human rights violations and environmental damages caused by German companies' foreign subsidiaries is a voluntary – as opposed to binding – principle.

In 2016, the German Government adopted the "Nationaler Aktionsplan Wirtschaft und Menschenrechte" (National Action Plan on Business and Human Rights) to implement the UN guiding principles on Business and Human Rights (Ruggie Principles). This fixed framework is the first of its kind in Germany. The objective

of the National Action Plan is to delineate German enterprises' responsibility to protect human rights: at least 50 per cent of all large companies in Germany (with more than 500 employees) have to implement a system of human rights due diligence by 2020. Accordingly, "[c]ompanies should publicly express their willingness to respect human rights in a policy statement, identify risks, assess the impact of their activities on human rights, take countermeasures if necessary, communicate how they deal with risks internally and externally and establish a transparent complaints mechanism" (see the Report on the National Action Plan).

An inter-ministerial committee (on business and human rights), formed by the Government under the auspices of the German Federal Foreign Office, monitors the status of implementation of human rights due diligence. However, any tangible measures remain optional for companies and inaction entails no consequences yet.

KiK litigation

German courts faced the question of companies' liability to some extent in the KiK litigation, which ended with a judgment issued by the Court of Dortmund (Germany) in 2019.

The facts of that case are the following: the German textile importer and reseller KiK Textilen and Non-Food GmbH (hereafter, KiK) is listed amongst the ten largest providers in the German textile industry and has over 28.000 employees. In September 2012, 259 people died in a fire in a textile factory in Pakistan and 47 more were injured. The main buyer of the factory's goods was KiK. In 2015, relatives of three of the deceased victims and one of the injured workers himself started proceedings against KiK in the Regional Court of Dortmund for damages of 30.000 € each for suffering and the death of the deceased victims.

The court ruled that, based on Art. 4(1) of the Rome II Regulation, Pakistani law was applicable. In the main proceedings, that court retained expert evidence on Pakistani Law and dismissed the lawsuit due to the Pakistani limitation period for such claims that ended even before the proceedings in Germany had started. For further general discussion on Article 4(1) of the Rome II Regulation as well as on the potential relevance of Article 4(3) Rome II Regulation see here.

According to the further holdings of the court, the claimants could alternatively hold KiK liable for the events in Pakistan, had an acknowledgement of liability

been written. However, KiK had agreed on a code of conduct with the supplier, which the court and the expert on Pakistani law evaluated as an agreement to compensate on an **ex gratia** basis and not as an acknowledgement of liability. Furthermore, the court stated that, even if German law was applicable, a code of conduct would then, at most, lead to a legal binding agreement between KiK and the supplier. The suppliers' employees could not file any direct claims against KiK based on the supply contract and the code of conduct, which cannot be seen as a contract to the benefit of a third party under German law (supplementary interpretation of the contract).

In light of this, it is questionable how long the voluntary principle will remain the leading path in Germany's approach to deal with expanding supply chains and the challenges for both environmental and human rights standards.

Current legislative developments

An alliance of non-governmental institutions (similar to the coalition that launched the Swiss *initiative populaire* "entreprises responsables – pour protéger l'être humain et l'environnement" in 2016) has formed the "Initiative Lieferkettengesetz" (Supply chain Law Initiative) with the intention of establishing binding obligations as they can be found in the French Duty of Vigilance Law ("loi n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre"). Accordingly, German companies shall establish diligence plans to protect human rights and the environment in the states where their subsidiaries are located. Violations of diligence would lead to sanctions in form of shortening of government aids and high fines. In order to ensure the companies' liability for violations in German courts, the law would be formed as an overriding mandatory provision in the sense of Art. 9(1) of the Rome I Regulation.

Applied to the KiK litigation, the problem does not only lie within the applicability of German law. As the Court of Dortmund ruled, only a written acknowledgement of liability would enable employees to start proceedings. Since a mandatory system of due diligence would likely take the form of codes of conduct rather than acknowledgements of liability, violations of German law would lead to the sanctioning of the companies but would not offer a cause of action to suppliers' employees against the German enterprises.

Even though the enactment of a supply chain law remains highly disputed within the government, recent developments show that a change towards binding obligations may be on its way.
The ministers of labour and of development are of the opinion that the voluntary principle does not lead to the desired result, since only about 20 per cent of the companies affected by the National Action Plan have carried out human rights due diligence in 2019. According to Gerd Müller, the minister of development, legislation will follow if a second survey in 2020 does not show any improvement.

In addition to that, in 2019, more than 40 German companies, ranging from larger enterprises, such as Nestlé Germany to Start-Ups, publicly demanded binding obligations to ensure legal certainty and equal competitive competitions.

As shown, German Companies' responsibility is a question of voluntary implementation of the National Action Plan. In light of the KiK litigation, employees' proceedings against enterprises will likely have no success, although legislation in this field may lead to higher standards that enterprises then would have to impose to their suppliers abroad.

Still, the introduction of legislation remains uncertain as the result of a second survey on the National Action Plan's implementation will determine upcoming developments and the future of the German voluntary principle.

As was reported on this blog here, the Munich Dispute Resolution Day on 5 May 2020 was going to focus on "Human Rights Lawsuits before Civil and Arbitral Courts in Germany", but Covid-19 forced the organisors to reschedule.

Marie Elaine Schäfer, Student Research Assistant at the University of Bonn, Germany

Remote Child-Related Proceedings in Times of Pandemic – Crisis Measures or Justice Reform Trigger?

by Nadia Rusinova

The coronavirus will have an enormous impact on how we consume, how we learn, how we work, and how we socialize and communicate. It already significantly impacts the functioning of the justice system – the COVID-19 pandemic and social distancing requirements have required courts to be flexible and creative in continuing to carry out essential functions.

Six weeks ago, it was almost difficult to imagine that in a regular child-related proceeding the hearing could be conducted online, and that the child can be heard remotely. Is this the new normal in the global justice system? This post will first provide brief overview regarding the developments in the conduction of remote hearings, and discuss the limitations, but also the advantages, of the current procedures related to children. Second, it will touch upon the right of the child to be heard in all civil and administrative proceedings which concern its interest, pursuant to Article 12 of the United Nations Convention on the Rights of the Child and how this right is regarded in remote proceedings in the context of the COVID-19 situation. It will also highlight good practices, which are without doubt great achievements of the flexibility and adaptability of the professionals involved in child-related civil proceedings, which deserve to be appreciated and which may provide grounds for significant change in the future (e.g. by using remote tools much more often.)

In civil and administrative proceedings, which concern children, strict insistence on personal attendance is unlikely to be feasible during the Coronavirus pandemic, and may contravene current health guidance, putting both families and professionals at unacceptable risk. As a consequence, the number of children's hearings scheduled to take place during the Coronavirus pandemic have globally been reduced to only those required to ensure essential and immediate protection

of children or to consider orders relating to restriction of liberty. So long as restrictions regarding social distancing remain in place all over the world, many children's hearings in the next months will be conducted remotely and digital facilities are being put in place to enable a wide range of people to participate remotely in virtual hearings.

I. What the recent experience on the remote hearings shows

Worldwide, over the past month, thousands of hearings took place remotely, many of them concerning children. How did the authorities comply with the current challenges and also with the right of the child to express its views?

Some countries, like Scotland, issued special rules as an amendment to the existing national law. In the context of the emergency, the provisions in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions, issued by the Scottish Parliament as an update to the Coronavirus (Scotland) Bill, are designed to enable best use of very limited resources by local authorities, and the children's hearings system, so that efforts can be focused on safeguarding the welfare of Scotland's most vulnerable children, and on supporting families and careers who need it most. The provisions are also time-limited and will automatically expire within six months, unless the Scottish Parliament extends them for a further period of six month.

The American Bar Association has also prepared detailed rules on "Conducting Effective Remote Hearings in Child Welfare Cases" to distill some best practices and other recommendations for remote or "virtual" hearings, providing special considerations to the judges, and directions for all professionals dealing with child-related proceedings.

The case law of the domestic courts is not less intriguing. In one recent judgment of The Family Court of England and Wales – RE P (A CHILD: REMOTE HEARING) [2020] EWFC 32, delivered by Sir Andrew McFarlane, the issues surrounding the advantages and disadvantages of the remote hearing when the case concerns children are discussed in a very original way. The case concerns ongoing care proceedings relating to a girl who is aged seven. The proceedings are already one year old and they were issued as long ago as April 2019, but the possibilities for multiple appeals in the adversarial proceedings caused immense delay. It has been initiated by the local authority, which have made a series of allegations, all

aimed at establishing the child has been caused significant harm as a result of fabricated or induced illness by its mother. The allegations are all fully contested by the mother, and a full final hearing is to take place in order to be decided if the child should be return to its mother or placed in long term foster care. Since April 2019 the child has been placed in foster care under an interim care order. The 15-day hearing was scheduled to start on Monday, 20 April, but the Covid-19 pandemic has led to a lockdown and most Family Court hearings that have gone ahead are being undertaken remotely, over the telephone or via some form of video platform.

II. Challenges

In this light it might be useful to identify some of the issues that the justice system faced in the attempts to comply with the special measures amid the pandemic and the lockdown order in disputes about children.

Must a hearing take place remotely, or this is just an option to be decided on by the court?

All the guidance available aims mostly at the mechanics of the process. The question whether any particular hearing should, or should not, be conducted remotely, is not specifically discussed. In any case, the access to justice principle should in some way provide for flexibility and practicability. In this sense, the fact that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.

As Sir McFarlane said, *"In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process."* Obviously, the question is how to strike a fair balance between keeping the principle of fair trial as paramount while not putting the child into an intolerable situation that might follow as a consequence of the limitations in this pandemic situation.

In which cases it is justified to hold a remote hearing?

Given the Government's imposition of the 'stay at home' policy in many countries, requests for an attended hearing are highly unlikely to be granted unless there is a genuine urgency, and it is not possible to conduct a remote hearing, taken as a cumulative condition together. If one of these elements is not present, the respective judge should assess the emergency in the particular case.

In general, all cases are pressing when the welfare of children is to be determined. However, some of it indeed call for urgency and it is to be analyzed on a case by case basis, in accordance with the claims of the parties and available evidence. In the discussed case RE P [2020] EWFC 32 the girl was already suffering significant emotional harm by being held "in limbo", and that she could only be released from this damaging situation of simply not knowing where she is going to live and spend the rest of her childhood, at least for the foreseeable future, by the court decision. As the judge says, *"she needs a decision, she needs it now and to contemplate the case being put off, not indefinitely but to an indefinite date, is one that (a) does not serve her interests, because it fails to give a decision now, but (b) will do harm itself because of the disappointment, the frustration and the extension of her inability to know what her future may be in a way that will cause her further harm."*

Another issue to be considered is to which extent the personal impression (for which the face-to-face hearing is best suited to) and the physical presence in the courtroom as a procedural guarantee for fair trial in adversarial proceedings, are decisive in the particular case. In RE P [2020] EWFC 32 sir McFarlane holds that *"The more important part, as I have indicated, for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court."* This is a case for protection from violence, and taking into account the subjective aspect, the personal impression is crucial. Yet, it might be that other type of cases, with less impact on the life of the child, or when the balance between the urgency and the importance of personal attendance might affect the best interest of the child ,might still be held remotely. In the discussed case the judge refers explicitly to the need of the physical presence of the parties, and especially of the mother, for him to get personal impression, and to give her full opportunity to present her defense and to ensure fair trial. The Court therefore finds that a trial of this nature is simply not one that can be contemplated for remote hearing during the present crisis. It follows that, irrespective of the mother's agreement or opposition to a remote hearing, the judge holds that this hearing cannot "properly or fairly" be conducted without her physical presence in a courtroom.

A similar approach (with different outcome) has been taken in Ribeiro v Wright, 2020 ONSC 1829, Court of Ontario, Canada. The parties, currently in the process of divorce, and the plaintiff wishes to obtain a safeguard order so that the defendant's access rights are modified such that they are suspended and replaced by contacts via technological means (Skype, Facetime, etc.). Due to the ongoing divorce procedure at the stage of the application for the safeguard order, some evidence is available already. The judge recognizes that the social, government and employment institutions are struggling to cope with COVID-19 and that includes the court system. Obviously, despite extremely limited resources, the court will always prioritize cases involving children, but it is stated that parents and lawyers should be mindful of the practical limitations the justice system is facing. If a parent has a concern that COVID-19 creates an urgent issue in relation to a parenting arrangement, they may initiate an emergency motion under the domestic law – but they should not presume that raising COVID-19 considerations will necessarily result in an urgent hearing. In this case the judge refuses to start emergency proceeding (which would be conducted remotely), takes into account the behavior of the parents and urge them to renew their efforts to address vitally important health and safety issues for their child in a more conciliatory and productive manner, asking them to return to court if more serious and specific COVID-19 problems arise.

In order to determine some general criteria to be applied when the emergency assessment is to be done, a good general example can be seen in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions (Scotland). The Scottish Government seeks to empower professional staff and volunteer tribunal members to exercise sound judgment and make decisions to protect and support children and young people, based on available information and in partnership with families. It provides that this exercise of emergency powers should: i. be underpinned by a focus on children's, young people's, and families' human rights when making decisions to implement powers affecting their legal rights; ii. be proportionate – limited to the extent necessary, in response to clearly identified circumstances; iii. last for only as long as required; iv. be subject to regular monitoring and reviewed at the earliest opportunity; v. facilitate, wherever possible and appropriate, effective participation, including legal representation and advocacy for children, young people and family members, and vi. be discharged in consultation with partner agencies.

Furthermore, in the Scottish Children's Reporter Administration update paper on Children's Hearings System, issued on 20 April 2020, it is stated that the reporter assesses and considers each individual child's case and their unique circumstances, and the panel makes the best possible decision based on the information before them. Priority is given to hearings with fixed statutory timescales, or to prevent an order from lapsing. The UK Protocol Regarding Remote Hearings, issued on 26 March 2020, also sets some general criteria in par. 12 applicable to child-related proceedings, stating that it will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.

What form the "remote" hearing may take?

There is currently no 'single' technology to be used by the judiciary. The primary aim is to ensure ongoing access to justice by all parties to cases before the court, so the professionals and parties involved must choose from a selection of possible IT platforms (e.g. Skype for Business, Microsoft Teams, Zoom, etc.) At present, many courts provide laptops to magistrates with secure Skype for Business and Microsoft Teams installed.

Remote hearings may be conducted using any of the facilities available. Generally, it could be done by way of an email exchange between the court and the parties, by way of telephone using conference calling facilities, or by way of the court's video-link system, if available. In the specific child related proceedings however, it should be noted that the UN General comment No. 12 (2009) on the right of the child to be heard sets one recommendation in par. 43 – the experience indicates that the situation should have the format of a talk rather than a one?sided examination. Therefore, the use of tools allowing conversational approach, like Skype for Business, BT MeetMe, Zoom, FaceTime or any other appropriate means of remote communication can be considered. If other effective facilities for the conduct of remote hearings are identified, the situation obviously allows for any means of holding a hearing as directed by the court, so there is considerable flexibility.

The timing of the hearing of the child

Naturally, if there are rules in place regarding the timely hearing of the child, in the current situation some adjustments could be accepted. In the domestic

systems, when such provisions exist, respective temporary amendments could be a solution to facilitate the activity in these very challenging circumstances.

If we look again at the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions, it provides for situations where it will not be practicable for there to be a hearing within three working days (as prescribed by the law), due to the likely shortage of social workers, reporters, decision-makers, children and families to attend an urgent hearing in the new area. As a result, the Act amends the time limit for some particular proceedings involving children up-to seven days. It is duly noted that in order to avoid unnecessary delays, the respective professionals involved should note these extended timescales, and prepare accordingly.

Is the objection by the parties to the hearing being held remotely decisive?

The pandemic situation is very potentially convenient for the parties who seek delays for one reason or another. As an example, the passage of time could undoubtedly affect the court's decision to assign custody in parental disputes, or as pointed by the ECtHR in Balbino v. Portugal, the length of proceedings relating to children (and especially in child abduction proceedings) acquire particular significance, since they are in an area where a delay might in fact settle the problem in dispute.

The objections that deserve attention would be most likely based on two grounds: health reasons, related or not to COVID-19, and the technical issue of internet access. When we speak about health reasons, the first logical suggestion would be to request medical evidence. Sadly, in the coronavirus situation this is not the case – simply because one can have contracted it without any knowledge or symptoms, which puts the courts in difficult position having in mind the considerable danger if they take the wrong decision. Therefore, it is justified that the judges continue with the proceedings and do not accede to these kinds of applications, but to indicate that the party's health and the resulting ability to engage in the court process would be kept under review.

Regarding internet access, this might arise as a difficult issue. On one side, it is easy to say that the arrangements for the party to engage in the process, as they are currently understood, involve the party being in her/his home and joining the proceedings over the internet, and all that's needed is some basic internet access.

It can be also said that the party can go to some neutral venue, maybe an office in local authority premises, a room in a court building, and be with an attorney that they are instructing, keeping a safe socially isolated distance. However, for objective reasons the internet access available might be not sufficient, and this should not lead to a violation of the principle of a fair trial, and the judge should also take these considerations seriously.

How is security and transparency addressed?

This section will briefly touch upon only two of a multitude of issues related to the security and transparency when dealing with remote hearings – the open hearings principle and the recording of the hearing.

Obviously, all remote hearings must be recorded for the purposes of making records of the respective hearing, and it goes without saying that the parties may not record without the permission of the court. Some of the solutions might be recording the audio relayed in an open court room by the use of the court's normal recording system, recording the hearing on the remote communication program being used (e.g. BT MeetMe, Skype for Business, or Zoom), or by the court using a mobile telephone to record the hearing.

As to the second issue, remote hearings should, so far as possible, still be public hearings. Some of the proceedings concerning children are indeed not public, but this is not the rule. The UK Protocol Regarding Remote Hearings addresses how this can be achieved in times of pandemic: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorized in legislation. This way, the principles of open justice remain paramount.

It could be suggested that, in established applications moving to a remote hearing, any transparency order will need to be discharged and specific directions made. In the UK Court of protection remote hearings the authorities are satisfied that, to the extent that discharging the order in such a case engages the rights of the press under Article 10 ECHR, any interference with those rights is justified by reference to Article 10(2), having particular regard to the public health situation which has arisen, and also the detailed steps set out are designed to ensure that

the consequences on the rights of people generally and the press in particular under Article 10 are minimized.

III. How to assess if a particular child-related hearing is suitable to take place online?

As noted by Sir McFarlane, whether or not to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for its life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a "thorough, forensically sound, fair, just and proportionate manner". The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.

Therefore, it should be assessed on a case per case basis if a hearing that concerns a child can be properly undertaken over the remote system. Sometimes the proceedings prior to this moment are supporting the judge in allowing the hearing to go remotely – the allegations have been well articulated in documents, they are well known to the parties, the witnesses – members of the medical profession, school staff, social workers – gave or can give their evidence remotely over the video link and for the process of examination and cross-examination to take place. What normally goes wrong is the technology rather than the professional interaction of the lawyers and the professional witnesses. In this sense the case might be ready for hearing and the parties are sufficiently aware of all of the issues to be able to have already instructed their legal teams with the points they to make.

IV. The right of the child to be heard in the context of remote proceedings

It is natural that remote hearings and all means of online communication unavoidably affect the proceedings itself. The current situation, unprecedented as it is and with all the challenges described above, raises the question of specifically how the child should be heard, if at all, and is this an absolute right, considering that providing a genuine and effective opportunity for the child to express their views requires the court to take all measures which are appropriate to the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case?

To explore this right in the light of the COVID-19 pandemic, some background should be provided. As it is pointed in the UN General comment No. 12 (2009) on the right of the child to be heard, the right itself imposes a clear legal obligation on States' parties to recognize it and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States' parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child. Something more – in par. 19 it says that *"Article 12, paragraph 1, provides that States parties "shall assure" the right of the child to freely express her or his views. "Shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children."*

The right of the child to be heard is regulated in the same sense in Article 24(1) of the Charter of the Fundamental Rights of the EU and Article 42(2)(a) of Regulation No. 2201/2003 (Brussels II bis). The Hague convention of 25 October 1980 on the Civil Aspects of International Child Abduction also provides in Article 13 that the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Brussels IIa recast (Regulation 1111/2019, in force as of August 2022) pays special attention to the strengthening of the right of the child to express his or her view, reinforcing it with special provision – Article 26 in Chapter III "International child abduction", in compliance with a detailed Recital 39. It states that the court may use "all means available to it under national law as well as the speci?c instruments of international judicial cooperation, including, when appropriate, those provided for by Council Regulation (EC) No 1206/2001" but "in

so far as possible and always taking into consideration the best interests of the child" thus retaining some degree of discretion also in this regard.

In Joseba Andoni Aguirre Zarraga v. Simone Pelz (case C-491/10 PPU) however CJEU held that hearing a child is not an absolute right, but that if a court decides it is necessary, it must offer the child a genuine and effective opportunity to express his or her views. It also held that the right of the child to be heard, as provided in the Charter and Brussels II bis Regulation, requires legal procedures and conditions which enable children to express their views freely to be available to them, and the court to obtain those views. The court also needs to take all appropriate measures to arrange such hearings, with regard to the children's best interests and the circumstances of each individual case.

It is worth noting that in some cases the hearing of the child can be conducted indirectly or via representative, or where it is considered as harmful for the child it can be dispensed with altogether. In the case of Sahin v. Germany, on the question of hearing the child in court, the ECtHR referred to the expert's explanation before the regional court in Germany. The expert stated that after several meetings with the child, her mother and the applicant, he considered that the process of questioning the child could have entailed a risk for her, which could not have been avoided by special arrangements in court. The ECtHR found that, in these circumstances, the procedural requirements implicit in Article 8 of the ECHR – to hear a child in court – did not amount to requiring the direct questioning of the child on her relationship with her father.

So far, the question how the right of the child to be heard is regarded in the remote hearings, that had to take place recently, is not widely discussed. Therefore, at this moment we should draw some conclusions from the available case-law and emergency rules. Naturally, this right itself cannot be waived and the views of children and young people should be taken into account when emergency placements are first made; the decision at any given time must take into account the best interests of the child. The most appropriate approach would be adjusting the available domestic proceedings, and at all times the local authorities should provide pertinent information to inform this decision and the child must be at the center of all decision making, which includes the social work team listening to the child's views.

How this might look in practice? First of all, the children as a rule should be

offered the opportunity to join their hearing virtually and securely. Testing and monitoring are crucial in order to get as many children as possible able to attend. Good suggestion would be a letter giving them more information about how they can participate via their tablet laptop/PC or mobile phone, information sheet which will explain how they can join a virtual hearing, instructions to help them with the set up. This should be followed by a test to make sure everyone is prepared for the day of the hearing. In accordance with the domestic procedural rules, information about rights and reminder for the children and young people that they have the right to have a trusted adult, an advocate or lawyer attend the virtual hearing to provide support might be also useful.

However, it for sure would not be possible for every child to join its hearing remotely. In this case, they should still provide their views – e.g. by emailing the information to the local team mailbox and the judge will then ensure this information is given to the respective professionals involved in the procedure.

V. Conclusion

The rapid onset of the Covid-19 pandemic has been a shock to most existing justice systems These are times unlike any other, and extraordinary measures are being taken across the world. Many of us are already asking ourselves – why not earlier? And with those changes in place, can things go back to the way they were? Should a regular framework for the development of virtual courtrooms and remote hearings that enables all concerned, including the judges, to operate remotely and efficiently be created, and was it due even before the pandemic? There are no easy answers – but it is well-worth analyzing the options of applying and making full use of the existing online tools and resources in child-related proceedings in the future. Well summarized by Justice A. Pazaratz in *Ribeiro v Wright*: “None of us have ever experienced anything like this. We are all going to have to try a bit harder – for the sake of our children.”

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Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2020: Abstracts

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

A. Stein: **The 2019 Hague Judgments Convention – All’s Well that Ends Well?**

The Hague Convention on the Recognition and Enforcement of Foreign Judgments, which was concluded in July 2019, holds the potential of facilitating the resolution of cross-border conflicts by enabling, accelerating and reducing the cost of the recognition and enforcement of judgments abroad although a number of areas have been excluded from scope. As the academic discussion on the merits of this instrument unfolds and the EU considers the benefits of ratification, this contribution by the EU’s lead negotiator at the Diplomatic Conference presents an overview of the general architecture of the Convention and sheds some light on the individual issues that gave rise to the most intense discussion at the Diplomatic Conference.

C. North: **The 2019 HCCH Judgments Convention: A Common Law Perspective**

The recent conclusion of the long-awaited 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the “Judgments Convention”) provides an opportunity for States to reconsider existing regimes for the recognition and enforcement of foreign judgments under national law. This paper considers the potential benefits of the Judgments Convention from a common law perspective. It does so by considering the existing regime for recognition and enforcement at common law, and providing an overview of the objectives, structure and a number of key provisions of the Judgments Convention. It then highlights some of the potential benefits of the Convention for certain common law (and other) jurisdictions.

P.-A. Brand: **Recognition and enforcement of decisions in administrative**

law matters

Whereas for civil and commercial matters there are extensive rules of international and European civil procedural law on mutual legal assistance and in particular on the recognition and enforcement of civil court decisions, there is no similar number of regulations on legal assistance and for the international enforcement of administrative court decisions. The same applies to the recognition of foreign administrative acts. This article deals with the existing rules, in particular with regard to decisions in administrative matters, and concludes that the current system of enforcement assistance in the enforcement of administrative decisions should be adapted to the existing systems of recognition and enforcement of judgments in civil and commercial matters.

B. Hess: **About missing legal knowledge of German lawyers and courts**

This article addresses a decision rendered by the Landgericht Düsseldorf in which the court declined to enforce, under the Brussels Ibis Regulation, a provisional measure issued by a Greek court. Erroneously, in its decision the Landgericht held that applications for refusal of enforcement of foreign decisions (article 49 Brussels Ibis Regulation) are to be lodged with the Landgericht itself. Since the party lodged its application with the Landgericht on the last day of

the time limit, the Oberlandesgericht Düsseldorf eventually held that the application was untimely as it was not lodged with the Oberlandesgericht, instead. The Oberlandesgericht refused to restore the status quo ante because the information about the competent court had been manifestly erroneous, whereas the lawyer is expected to be familiar with articles 49 (2) and 75 lit b) of the Brussels Ibis Regulation. This article argues that jurisdiction over applications for refusal of enforcement is not easily apparent from the European and German legal provisions and that the legal literature addresses the issue inconsistently. This results in a certain degree of uncertainty as concerns jurisdiction over such applications, making it difficult to establish cases of possibly manifestly incorrect applications.

C.F. Nordmeier: **Abuse of a power of attorney granted by a spouse – The exclusion of matrimonial property regimes, the place of occurrence of the damage under Brussels Ibis and the escape clause of art. 4 (3) Rome II**

The article deals with the abuse of power of attorney by spouses on the basis of a

decision of the Higher Regional Court of Nuremberg. The spouses were both German citizens, the last common habitual residence was in France. After the failure of the marriage, the wife had transferred money from a German bank account of the husband under abusive use of a power of attorney granted to her. The husband sues for repayment. Such an action does not fall within the scope of the exception of matrimonial property regimes under art. 1 (2) (a) Brussels Ibis Regulation. For the purpose of determining the place where the damage occurred (Art. 7 No. 2 Brussels Ibis Regulation), a distinction can be made between cases of manipulation and cases of error. In the event of manipulation, the bank account will give jurisdiction under Art. 7 No. 2 Brussels Ibis Regulation. Determining the law applicable by Art. 4 (3) (2) Rome II Regulation, consideration must be given not only to the statute of marriage effect, but also to the statute of power of attorney. Particular restraint in the application of Art. 4 (3) (2) Rome II Regulation is indicated if the legal relationship to which the non-contractual obligation is to be accessory is not determined by conflict-of-law rules unified on European Union level.

P.F. Schlosser: **Governing law provision in the main contract – valid also for the arbitration provision therein?**

Both rulings are shortsighted by extending the law, chosen by the parties for the main contract, to the arbitration provision therein. The New York Convention had good reasons for favoring, in the absence of a contractual provision specifically directed to the arbitration provision, the law governing the arbitration at the arbitrators' seat. For that law the interests of the parties are much more predominant than for their substantive agreements.

F. Rieländer: **Choice-of-law clauses in pre-formulated fiduciary contracts for holding shares: Consolidation of the test of unfairness regarding choice-of-law clauses under Art. 3(1) Directive 93/13/EEC**

In its judgment, C-272/18, the European Court of Justice dealt with three conflict-of-laws issues. Firstly, it held that the contractual issues arising from fiduciary relationships concerning limited partnership interests are included within the scope of the Rome I Regulation. While these contracts are not covered by the exemption set forth in Art. 1(2)(f) Rome I Regulation, the Court, unfortunately, missed an opportunity to lay down well-defined criteria for determining the types of civil law fiduciary relationships which may be considered functionally

equivalent to common law trusts for the purposes of Art. 1(2)(h) Rome I Regulation. Secondly, the Court established that Art. 6(4)(a) Rome I Regulation must be given a strict interpretation in light of its wording and purpose in relation to the requirement "to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence". Accordingly, this exception is applicable only if the consumer needs to leave the country in which he has his habitual residence for the purpose of enjoying the benefits of the services. Thirdly, the Court re-affirmed that choice-of-law clauses in pre-formulated consumer contracts are subject to a test of unfairness under Art. 3(1) Directive 93/13/EEC. Since the material scope of this Directive is held to apply to choice-of-law clauses, such a clause may be considered as unfair if it misleads the consumer as far as the laws applicable to the contract is concerned.

U. Bergquist: **Does a European Certificate of Succession have to be valid not only at the point of application to the Land Registry, but also at the point of completion of the registration in the Land Register?**

When it comes to the evidentiary effect of European Certificates of Successions, there are different opinions on whether a certified copy of the certificate has to be valid at the time of the completion of a registration in the Land register. The Kammergericht of Berlin recently ruled that a certified copy loses its evidentiary effect in accordance with art. 69 (2) and (5) of the European Succession Regulation (No. 650/2012) after expiry of the (six-month) validity period, even if the applicant has no influence on the duration of the registration procedure. This contribution presents the different arguments and concludes – in accordance with the Kammergericht – that not the date of submission of the application but the date of completion of the registration has to be decisive for the required proof.

D. Looschelders: **International and Local Jurisdiction for Claims under Prospectus Liability**

The judgment by the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH) deals with international and local jurisdiction for a claim under prospectus liability. It is mainly concerned with the determination of the place in which the harmful event occurred, as stated in Art. 5(3) of Regulation No 44/2001. Specifying the damage location can pose significant problems due to the fact that prospectus liability compensates pure economic loss. The OGH had stayed the proceedings in order to make a reference to the European Court of Justice (ECJ)

for a preliminary ruling on several questions related to this issue. However, the decision by the ECJ left many details unsettled. This article identifies the criteria developed by the OGH in light of the case. The author agrees with the OGH to designate the damage location in this particular case as the injured party's place of residence. Nevertheless, he points out the difficulties of this approach in cases where not all investment and damage specific circumstances point to the investor's country of residence.

W.Voß: **U.S.-style Judicial Assistance – Discovery of Foreign Evidence from Foreign Respondents for Use in Foreign Proceedings**

In the future, will German litigants in German court proceedings have to hand over to the opposing party evidence located on German territory based on American court orders? In general, under German law, the responsibility to gather information and to clarify the facts of the case lies with the party alleging the respective facts, while third parties can only be forced to produce documents in exceptional circumstances. However, the possibility to obtain judicial assistance under the American Rule 28 U.S.C. § 1782(a) increasingly threatens to circumvent these narrow provisions on document production in transatlantic relations. For judicial assistance under this Federal statute provides parties to foreign or international proceedings with access to pre-trial discovery under U.S. law, if the person from whom discovery is sought "resides or is found" in the American court district. Over the years, the statute has been given increasingly broad applicability – a trend that is now being continued by the recent ruling of the Second Circuit Court of Appeals discussed in this article. In this decision, the Court addressed two long-disputed issues: First, it had to decide on whether the application of 28 U.S.C. § 1782(a) is limited to a person who actually "resides or is found" in the relevant district or whether the statute could be read more broadly to include all those cases in which a court has personal jurisdiction over a person. Second, the case raised the controversial question of whether 28 U.S.C. § 1782 allows for extraterritorial discovery.

M. Jänterä-Jareborg: **Sweden: Non-recognition of child marriages concluded abroad**

Combatting child marriages has been on the Swedish legislative agenda since the early 2000s. Sweden's previously liberal rules on the recognition of foreign marriages have been revisited in law amendments carried out in 2004, 2014 and

2019, each reform adding new restrictions. The 2019 amendment forbids recognition of any marriage concluded abroad as of 1/1/2019 by a person under the age of 18. (Recognition of marriages concluded before 1/1/2019 follows the previously adopted rules.) The marriage is invalid in Sweden directly by force of the new Swedish rules on non-recognition. It is irrelevant whether the parties had any ties to Sweden at the time of the marriage or the lapse of time. The aim is to signal to the world community total dissociation with the harmful practice of child marriages. Exceptionally, however, once both parties are of age, the rule of nonrecognition may be set aside, if called upon for "extraordinary reasons". No special procedure applies. It is up to each competent authority to decide on the validity of the marriage, independently of any other authority's previous decision. While access to this "escape clause" from the rule of non-recognition mitigates the harshness of the system, it makes the outcome unpredictable. As a result, the parties' relationship may come to qualify as marriage in one context but not in another. Sweden's Legislative Council advised strongly against the reform, as contrary to the aim of protecting the vulnerable, and in conflict with the European Convention on Human Rights, as well as European Union law. Regrettably, the government and Parliament took no notice of this criticism in substance.

I. Tekdogan-Bahçivanci: **Recent Turkish Cases on Recognition and Enforcement of Foreign Family Law Judgements: An Analysis within the Context of the ECHR**

In a number of recent cases, the Turkish Supreme Court changed its previous jurisprudence, rediscovered the ECHR in the meaning of private international law and adopted a fundamental-rights oriented approach on the recognition and enforcement of foreign judgements in family matters, i.e. custody and guardianship. This article aims to examine this shift together with the jurisprudence of the European Court of Human Rights, to find a basis for this shift by analysing Turkey's obligation to comply with the ECHR and to identify one of the problematic issues of Turkish private international law where the same approach should be adopted: namely recognition and/or enforcement of foreign judgements relating to non-marital forms of cohabitation.

Israeli Requirement of Good Faith Conduct in Enforcement of Foreign Judgments

Written by Haggai Carmon, Carmon & Carmon, an international law firm with offices in Tel Aviv and a front office in New York.

The requirement of parties' good faith conduct is fundamental in Israeli law and jurisprudence. However, only recently the Supreme Court has applied that doctrine to enforcement of foreign judgments as thus far, only lower courts have followed that doctrine.

In **Civil Appeal X [Name removed upon request of Claimant, General Editors of CoL, 26 October 2022] v. Bankruptcy Office Geneva**, the Supreme Court (per Esther Hayut, Chief Justice,) on August 27, 2019, unanimously denied an appeal over a District Court's earlier finding that procedural bad faith is independently sufficient grounds to rule against a party whose conduct during proceedings to enforce a Swiss judgment, was so egregious that it warranted such extreme measure.

"In the course of the proceedings in the case, the appellant demonstrated contempt for the court's proceedings, the counterclaimant's rights and the duties imposed on him under the Rules of Civil Procedure and the judicial decisions given in his case. In doing so, the appellant violated his duty to act fairly and reasonably to enable proper judicial proceeding. In light of all the foregoing, there is no escaping of the conclusion that the appeal before us is one of those rare instances where the appellant's bad faith conduct, who has taken practical measures to thwart the enforcement of the judgment rises to an abuse of court proceedings. Under these exceptional circumstances, in my opinion, it is justified to use the authority given to us and order the appeal be denied in limine."

Although lack of good faith or unacceptable conduct do not, pursuant to the Israeli Foreign Judgments Enforcement Law, provide independent cause to refuse

recognition or enforcement of a foreign judgment, "however certainly this carries weight in the court's considerations together with all other conditions"[1] for such recognition or enforcement. [Judge Keret-Meir's ruling in **Bankruptcy File (T.A.) 2193/08 First International Bank of Israel Ltd. v. Gold & Honey (1995) L.P. et al.**

Earlier, the Jerusalem District Court's judgment in D.C.C. (Jm.) 3137/04 **Ahava (USA) Inc. v. J.W.G. Ltd (Ahava)**[2]concerned whether a U.S. judgment precluding an Israeli company from marketing Israeli products in the United States through a website was a foreign judgment enforceable pursuant to the Enforcement Law. The court held that "the filter of 'public policy' allows us to uproot unjust outcomes that may arise from the application of a foreign law,"[3] and addressed at length the essence of public policy:[4]

What is public policy? It is a broad term, "flexible and not entirely definable" …. Some will emphasize the local nature of public policy… but it seems that the basic requirements of law, including good faith, equity, and human rights, do not carry national identities, nor do they evaporate at international borders. Recognition of this approach grew with the erosion of "the archaic definition of the sovereignty doctrine, and as territorial sovereignty boundaries between legal systems blurred" (I. Canor, *Private International Law and the Decay of Sovereignty in the Globalization Age: The Application of Foreign Public Law on International Contracts*… p. 491). This process expanded the definition of public policy and imparted it with a quality of *tikkun olam* (bettering society) in its literal sense, such that appropriate applications are made from the public and private law of foreign legal systems to a domestic forum. In this context, we can even identify certain international rules which obligate even the parties of a **purely domestic** contract (Canor, id. 513). The inclination to apply rules of **global** public policy will increase as the link between the contract and local law weakens. A component of this global public policy is the very need to enforce foreign judgments.

The District Court held essentially that the protection of intellectual property does not in and of itself violate public policy in Israel, as this includes as well the principle that prohibits taking another's work or basing one's work on it, and this principle also applies to trademark law and other protections related to the appearance of the product. In these circumstances, the court ruled that the prohibition placed by the U.S. court, on the basis of internal U.S. trademark law,

did not conflict with public policy in Israel.

In D.C.C. (T.A.) 22673-07-10 **Nader & Sons LLC et al v. Homayon Antony Namvar (Nader)**,[5] the District Court rejected arguments that a summary judgment by the Supreme Court of the state of New York was unenforceable in Israel as having been rendered in unjust and improper proceedings, so that it conflicted with the public policy of Israel. The respondent argued that the choice of such proceedings in a suit of such broad scope constituted lack of good faith and an attempt to evade thorough investigation of the claims, as well as that significant details and facts withheld from the New York court might have affected the outcome of the proceedings.

The court dismissed these arguments:[6]

As stated, external public policy, in the sense of Article 3(3) of the Foreign Judgments Enforcement Law, refers to conformance with the basic principles of Israeli law, and the argument of the respondent regarding the flaws that, in his opinion, characterize the proceedings in New York, as decisive as they may be, do not testify to any conflict with these basic principles (regardless of the validity of these claims) and are not directly connected to the content of the judgment.

In Justice Procaccia commented in C.A. 5793/05 **The Great Synagogue Shone Halachot Association v. Netanya Municipality**:[7]

It is true that the Arbitration Law, 5728-1968 does not set a binding deadline on the prevailing party in an arbitration award to file a motion for its confirmation.… Nevertheless, this does not signify that there exists no limit whatsoever for filing a motion for the confirmation of an arbitration award and that the procedural rights of the holder of such an award are everlasting. A party who prevailed in arbitration is required by procedural good faith to submit the award for confirmation within a reasonable time period, given the special circumstances of the relevant incident. A party who for years ignored the award, did not act on it, and appeared to no longer have any intention of enforcing it, is liable to face a procedural estoppel claim (Ottolenghi, *Arbitration: Law and Procedure*, 4th ed., 2005, 914-916). Like any other complaint filed with a court, a motion for confirmation of an arbitration award is also subject to the rules of procedural good faith and reasonability regarding the timing, form, and content of the filing. The civil rules of laches apply to the timing of filing, as they apply to civil suits in

the framework of statutory periods of limitations.

The question of whether this judgment, which deals with a 30-year delay in filing a motion for the confirmation of an Israeli arbitration award, will also apply to an arbitral award issued abroad under the New York Convention, remains open and has not been addressed. Because the New York Convention and the regulations for its execution make no mention of laches, it is unclear if the application of the Convention should be restricted and subjected to those principles, thus bypassing the absence of deadline for filing for confirmation under the Convention. In general, foreign arbitration takes place between commercial entities or countries, and at times, the difficulty in enforcing arbitration awards for various reasons is universal. There are many cases in which enforcement in one country encounters protracted difficulties, and then, upon locating debtor's assets in another country, the award holder applies for enforcement of the award in that country. This may be many years after the award was issued. Blocking the procedural path of the holder through laches is unjust, at least under such circumstances, and it appears that the New York Convention's silence in this context is not for naught. Presumably for the same reason, the Convention does not list laches among the grounds for refusal to recognize or enforce an award, nor does it impose a time limit for filing a motion for the confirmation of an arbitration award under the Convention.

For more informaiton, see Haggai, *Foreign Judgements in Israel — Recognition and Enforcement*, published in Hebrew by the Israeli Bar Association. Springer published an English translation.

[1] See Judge Keret-Meir's ruling in Bankruptcy File (T.A.) 2193/08 First International Bank of Israel Ltd. v. Gold & Honey (1995) L.P. et al.

[2]P.M. 5763 (2) 337 (2004).

[3] Id. at 343.

[4] Id. at 344.

[5]Nevo (May 5, 2011).

[6]Id. at 9.

[7]Nevo (Sep. 11, 2007).

A New Interesting Book on PIL Aspects of Corporate Social Responsibility

A book edited by Catherine Kessedjian & Humberto Cantú Rivera and titled "Private International Law Aspects of Corporate Social Responsibility" has just been released electronically and in hard copy. As said in the abstract of the book, "This book addresses one of the core challenges in the corporate social responsibility (or business and human rights) debate: how to ensure adequate access to remedy for victims of corporate abuses that infringe upon their human rights. However, ensuring access to remedy depends on a series of normative and judicial elements that become highly complex when disputes are transnational. In such cases, courts need to consider and apply different laws that relate to company governance, to determine the competent forum, to define which bodies of law to apply, and to ensure the adequate execution of judgments. The book also discusses how alternative methods of dispute settlement can relate to this topic, and the important role that private international law plays in access to remedy for corporate-related human rights abuses…"

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Many thanks for your attention and take care in this globally difficult time!