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

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

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

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

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

If you happen to be one of the small number of people in the world interested in

this fascinating (though obscure) interpretive issue, I would encourage you to download both papers and decide for yourself who has the better of the argument.

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

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

Written by Mayela Celis

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

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

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

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

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

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

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

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

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

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

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

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

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

Conference Report from Luxemburg: On the Brussels Ibis Reform

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

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

The topics of the conference were based on the 19 reports that were received from 16 working group members and 3 observers. Additional experts presented topics ranging from insolvency proceedings to third state relationships. The aim

of the conference is to prepare a position paper. The paper will be presented to the European Commission to advise it on the evaluation process. EAPIL Members are invited to join the Members Consultative Committee (MCC) of the EAPIL Working Group on reforming Brussels Ibis.

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

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

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

The third panel, chaired by Thalia Kruger, Antwerp, focused on third state relations. Chrysoula Michailidou, Athens, discussed potential extensions of heads of jurisdiction for third state domiciled defendants, in particular in respect to jurisdiction based on (movable) property and a forum necessitatis. Alexander Layton, London, focused on the operation of Articles 33 and 34 and reiterated the position that discretion of the court to a certain extent was simply inevitable, also in a distributive system of unified heads of jurisdiction, as it is provided for e.g. in these Articles, in particular by the tool of a prognosis for the chances of

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

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

The last panel started with a submission by Gilles Cuniberti, Luxemburg, to remove Article 43, based on a number of reasons, as the Brussels I Recast aimed

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

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

Developments in Third-Party Litigation Funding in Europe and Beyond

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

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

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

22 June 2022, Erasmus University Rotterdam

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

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

The aim of this seventh and final conference of the seminar series was to reflect on the need and type of regulation of TPLF from different points of view. By seeking to engage representatives from both academia and stakeholders, the

conference aimed to foster a lively exchange and contribute to the debate. The event was introduced by a keynote speech by Professor Geert Van Calster (KU Leuven, Belgium) who examined the key issues in TPLF.

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

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

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

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

(2) Further activities and publications on costs and funding

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

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

(3) ELI project on Third Party Litigation Funding

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

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

Enforceability of CAS awards in Greece – a short survey

Introductory remarks

Applications to recognize and enforce CAS awards are not part of Greek court's daily order business. About ten years ago, the first decision of a Greek court was published, which accepted an application to declare a decision of the Court of Arbitration for Sports (CAS) enforceable. For this ruling, see here (in English), and here (in Spanish). Two recent decisions are added to this short list of judgments, where the corresponding decisions of the above sports arbitration body were again declared enforceable

(Piraeus Court of first instance, decision published on 28. July 2021, and Thessaloniki Court of first instance, decision published on 26. April 2022, both unreported).

A summary of the new decisions

The first decision concerned a company of sport? management located in France, who initiated CAS proceedings against a football team in Greece due to non-payment of agreed fees for the transfer of a football player. The CAS granted the

application and ordered the payment of 45.000 Euros and 16.391 CHF for the costs of the arbitral proceedings (case number 2018/O/5850).

The second decision concerned two accredited sports managers from Argentina against an Argentinian football player who terminated unilaterally the agreement, hence, he failed to abide by the conditions of the contract signed with the managers. They initiated arbitration proceedings before the CAS, which ordered the payment of 1 million Euros and 49.585,80 CHF for the costs of the arbitral proceedings (case number 2014/O/3726). The player appealed unsuccessfully before the Swiss Supreme Court (no reference available in the text of the decision).

Main findings

From the assessment of the aforementioned decisions, it is possible to draw the following conclusions:

- **NYC: The ruler of the game**. The application of the New York Convention regarding requests to recognize CAS awards is undisputable and common to all Greek decisions.

- **National rules of Civil procedure.** From the combination of Articles 3 and 4 NYC, and those of the Greek Code of Civil Procedure (Book on voluntary jurisdiction), it is clearly concluded that the true meaning of Articles 3 and 4 of the above convention is that, the one who requests the declaration of enforceability of a foreign arbitral award, is required to present the relevant decision and the arbitration agreement, either in original or in an official copy, as well as an official translation into the Greek language, *during the hearing* of his application, and without being obliged to file these documents at the court, when submitting the relevant application.

This because, to the eyes of Greek judges, Article 4 NYC, referring to a presentation “at the time of the application”, does not determine the procedural

'moment' (stage) when the documents of the arbitration agreement and the arbitral decision must be submitted to the court. It simply determines the burden of proof and the party borne with it. The procedural method and the time of presentation of the documents referred to in Article 4 § 1 NYC are still regulated by the procedural law of the trial judge, in the case at hand the Greek Code of Civil Procedure.

- **Field of application of CAS.** On the grounds of the decisions rendered by Greek courts, it has been confirmed that the CAS has jurisdiction over the following disputes:
- Application for arbitration by an athlete against the team in which he plays;
- Application for arbitration by the sports manager of athletes and/or coaches against the sports club.
- Application for arbitration by the sports manager against the athlete.

- **Enforceability in the country of origin not a pre-requisite.** Contrary to finality, it is not necessary to meet the condition of enforceability of the arbitral award in the state of origin, i.e., Switzerland.

- **Enforceability of CAS Costs.** The 'order' awarding arbitration costs, following the CAS award, must also be declared enforceable, according to Rule R.64.4 CAS Procedural Rules. The matter is noteworthy, as the above 'order' is issued after the award by the CAS Secretariat, not by the arbitration Panel that ruled on the dispute, and without the participation of the parties. However, it should be underlined that the letter from the CAS Secretariat merely specifies the amount of the arbitration costs awarded by the Panel; hence, it is considered as belonging to the award's operative part. In addition, the act of awarding costs is notified to the parties in accordance with CAS rules.

- **Irreconcilable judgments.** It is not necessary to furnish a certificate of non-irreconcilability with a decision, by following the domestic model of

article 903 § 5 and 323 nr. 4 Greek Code of Civil Procedure. According to the judgment of the Greek court, it is not permissible to transfuse a condition regulated by domestic arbitration law into the context of the New York Convention.

- **No revision on the merits.** Finally, although not directly stated in the text of the NYC, a revision of the foreign arbitral award by the Greek court is prohibited, the latter being unanimously accepted and labelled as the principle of non-examination on the merits.

Case C-572/21: The Court of Justice of the EU on the interrelationship between the Brussels II bis Regulation and the 1996 Child Protection Convention – The perpetuatio fori principle

Written by Mayela Celis, UNED

On 14 July 2022 the Court of Justice of the European Union (CJEU) ruled on the interrelationship between the *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* (Brussels II bis Regulation) and the HCCH 1996 Child Protection Convention. This case concerns proceedings in Sweden and the Russian Federation and deals in particular with the applicability of the *perpetuatio fori* principle contemplated in Article 8(1) of the Brussels II bis

Regulation. The judgment is available here.

Facts

Mother (CC) gave birth to child (M) in Sweden. CC was granted sole custody of the child from birth.

Until October 2019 child resided in Sweden.

From October 2019 child began to attend a boarding school on the territory of the Russian Federation.

Father (VO) brought an application before the District Court of Sweden and several proceedings ensued in Sweden, holding *inter alia* that Swedish courts have jurisdiction under Article 8(1) of the Brussels II bis Regulation. CC brought an application before the Supreme Court of Sweden asking the court to grant leave to appeal and to refer a question to the CJEU for a preliminary ruling.

Question referred for preliminary ruling

'Does the court of a Member State retain jurisdiction under Article 8(1) of [Regulation No 2201/2003] if the child concerned by the case changes his or her habitual residence during the proceedings from a Member State to a third country which is a party to the 1996 Hague Convention (see Article 61 of the regulation)?'

Main ruling

Article 8(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, read in conjunction with Article 61(a) of that regulation, must be interpreted as meaning that ***a court of a Member State that is hearing a dispute relating to parental responsibility does not retain jurisdiction to rule on that dispute under Article 8(1) of that regulation where the habitual residence of the child in question has been lawfully transferred, during the proceedings, to the territory of a third State that is a party to the Convention*** on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996

(our emphasis).

Analysis

This is a very welcome judgment as it allows for the proper application of the 1996 Child Protection Convention to a case involving an EU Member State (Sweden) and a Contracting Party to the 1996 Child Protection Convention (the Russian Federation).

At the outset, it should be emphasised that this case deals with the *lawful* transfer of habitual residence and not with the *unlawful* transfer (removal or retention) such as in the case of international child abduction. In the latter case both the Brussels II bis Regulation and the 1996 Child Protection Convention provide for the retention of the jurisdiction in the EU Member State / Contracting State in which the child was habitually resident immediately before the removal or retention.

It is also important to clarify that contrary to the Brussels II bis Regulation, the 1996 Child Protection Convention does not adopt the principle of *perpetuatio fori* when dealing with general basis of jurisdiction (Article 5 of the Convention; see also para. 40 of the judgment). The 1996 Child Protection Convention reflects the view that the concept of habitual residence is predominantly factual and as such, it can change even during the proceedings.

As to the principle of *perpetuatio fori*, the CJEU indicates:

> *"By referring to the time **when the court of the Member State is seised**, Article 8(1) of Regulation No 2201/2003 is an expression of the principle of perpetuatio fori, according to which that court does not lose jurisdiction even if there is a change in the place of habitual residence of the child concerned during the proceedings" (para. 28, our emphasis).*

With regard to the interrelationship between these two instruments, the CJEU says:

> *"In that regard, it should be noted that Article 61(a) of Regulation No 2201/2003 provides that, as concerns the relation with the 1996 Hague Convention, Regulation No 2201/2003 is to apply 'where the child concerned has his or her habitual residence on the territory of a Member State'" (para.*

32).

"It follows from the wording of that provision that it governs relations between the Member States, which have all ratified or acceded to the 1996 Hague Convention, and third States which are also parties to that convention, in the sense that the general rule of jurisdiction laid down in Article 8(1) of Regulation No 2201/2003 ***ceases to apply where the habitual residence of a child has been transferred, during the proceedings, from the territory of a Member State to that of a third State which is a party to that convention****" (para. 33, our emphasis).*

In my view, this judgment interprets correctly Article 52 of the 1996 Child Protection Convention, which was heatedly debated during the negotiations, as well as the relevant provisions of the Brussels II bis Regulation. In particular, the formulation in both Article 61(a) of the Brussels II bis Regulation "where the child concerned has his or her habitual residence on the territory of a Member State" and Article 52(2) of the 1996 Child Protection Convention "[This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain] in respect of children habitually resident in any of the States Parties to such agreements [provisions on matters governed by this Convention]" has been properly considered by the CJEU as the habitual residence of the child is the Russian Federation.

To rule otherwise would have reduced significantly the applicability of the 1996 Child Protection Convention and would have run counter Articles 5(2) and 52(3) of the referred Convention (see para. 42 of the judgment).

As this judgment only deals with Contracting Parties to the 1996 Child Protection Convention, it only makes us wonder what would happen in the case of bilateral treaties or in the absence of any applicable treaty (but see para. 29 of the judgment).

For background information regarding the negotiations of Article 52 of the 1996 Child Protection Convention see:

– Explanatory Report of Paul Lagarde (pp. 601-603)

– Article by Hans van Loon, "*Allegro sostenuto con Brio*, or: Alegría Borrás'

Twenty-five Years of Dedicated Work at the Hague Conference." In J. Forner Delaygua, C. González Beilfuss & R. Viñas Farré (Eds.), Entre Bruselas y La Haya: Estudios sobre la unificación internacional y regional del derecho internacional privado: *Liber amicorum* Alegría Borrás (pp. 575-586). Madrid: Marcial Pons, pp. 582-583.

Just released: EFFORTS Report on Practices in Comparative and Cross-Border Perspective

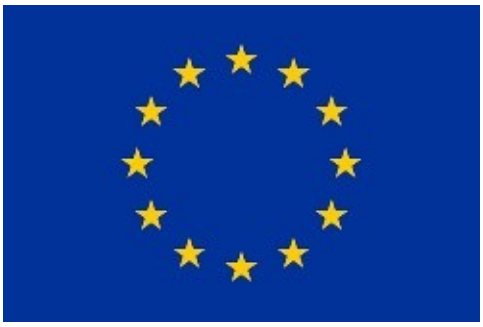
On 19 July 2022, a new Report on practices in Comparative and Cross-Border Perspective was posted on the website of **EFFORTS (Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU)**, an EU-funded Project conducted by the University of Milan (coord.), the Max Planck Institute Luxembourg for Procedural Law, the University of Heidelberg, the Free University of Brussels, the University of Zagreb, and the University of Vilnius.

The Report was authored by Marco Buzzoni and Carlos Santaló Goris (both Max Planck Institute Luxembourg for Procedural Law).

By building upon the deliverables previously published by the Project Partners (available here), the Report casts light on the implementation of five EU Regulations on cross-border enforcement of titles (namely: the Brussels I-bis, EEO, EPO, ESCP, and EAPO Regulations) in the seven EU Member States covered by the Project (Belgium, Croatia, France, Germany, Italy, Lithuania, and Luxembourg). Against this background, the Report notably provides an in-depth analysis of national legislation and case law in an effort to identify general trends

and outstanding issues regarding the cross-border recovery of claims within the European Union.

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



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Is Chinese Judicial Mediation Settlement 'Judgment' in Private International Law?

Judicial mediation is a unique dispute resolution mechanism in Chinese civil procedure. Wherever civil disputes are brought to the court, the judge should, based on parties' consent, mediate before adjudicating. Judicial mediation, therefore, is an 'official' mediation process led by the judge and if successful, the judge will make a document to record the plea, the fact and the settlement agreement. This document is called 'judicial mediation settlement' in this note.

On 7 June 2022, the Supreme Court of New South Wales recognized and enforced

two Chinese judicial mediation settlement issued by the People's Court of Qingdao, Shandong Province China in Bank of China Limited v Chen. It raises an interesting question: is Chinese judicial mediation settlement recognisable as a foreign 'judgment' and enforceable in the other country? Two commentors provide different views on this matter.

Judicial Mediation Settlement can be classified as 'Judgment'

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In Chinese civil trial practice, there are two types of legal document to merits issued by courts that has the res judicata effect, namely Minshi Panjue Shu ("MPS") (civil judgment) and Minshi Tiaojie Shu ("MTS"). The MTS refers to the mediation settlement reached by the parties when a judge acts as a mediator and as part of the judicial process. It has been translated in various ways: civil mediation judgment, civil mediation statement, civil mediation, mediation certificate, mediation agreement, written mediation agreement, written mediation statement, conciliation statement and consent judgment, civil mediation statement, mediation agreement and paper of civil mediation. In order to distinguish it from private mediation settlement, the mediation settlement reached during the court mediation process is translated into the 'judicial mediation settlement'.

No matter how the translation of MTS is manifested, the intrinsic nature of a judicial mediation settlement should be compared with the civil judgment, and analysed independently in the context of recognition and enforcement of judgments ("REJ"). Take the HCCH 2019 Judgments Convention as an example in an international dimension, Article 4 Paragraph 3 of the Convention provides that "A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin." In terms of REJ, a foreign judgment shall be effective and enforceable. While the validity of a foreign judgment specifically means when the judgment is made by a court has competent jurisdiction, the parties' rights in proceedings are not neglected or violated, and the judgment is conclusive and final; the enforceability is more associated with types of judgments, such as fixed sum required in monetary judgments.

1. What is a judicial mediation settlement

Firstly, judicial mediation settlement is granted effectiveness by Chinese court in accordance with Article 100 of Civil Procedure Law of China (revised in 2021), which stipulates that "When a mediation agreement is reached, the people's court shall prepare a written mediation statement, stating the claims, the facts of the case and the result of the mediation. The written mediation statement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court and shall be served on both parties. A written mediation statement shall come into force immediately upon signatures after receiving by both parties." In the civil trial proceedings of China, judges are encouraged to carry out mediation on a voluntary and lawful basis, failing which, a judgment shall be rendered forthwith. Article 125 also affirms that for a civil dispute brought by the parties to the people's court, if it is suitable for mediation, mediation shall be conducted first, unless the parties refuse mediation. According to Article 96 of Civil Procedure Law of China, in trying civil cases, a people's court shall conduct mediation to the merits of case under the principle of voluntary participation of the parties and based on clear facts. Article 97 Paragraph 1 states that mediation conducted by a people's court may be presided over by a single judge or by a collegiate bench. Thus, with the consent of parties, judges are entitled to make a judicial mediation settlement. Once a written mediation statement based on the mediation agreement reached by parties is made by the judges and served to litigant parties, the judicial mediation settlement shall come into effect.

Secondly, the effective judicial mediation settlement has the enforceability. As paragraph 3 of Article 52 of Civil Procedure Law represented, the parties must exercise their litigation rights in accordance with the law, abide by the litigation order, and perform legally effective judgments, rulings and mediation decisions. Therefore, assumed China is the state of origin to make a judicial mediation settlement, which has effect, and it is enforceable in the state of origin.

2. Similarity between judicial mediation settlement and judgment

Although the mediation and judgment exist under different articles of the Chinese Civil Procedure Law (an MTS under art 97, an MPS under art 155), the judicial mediation settlement has more common points than difference compared with a civil judgment. First of all, in terms of adjudicative power, the judicial mediation settlement is not only a verification of the parties' agreement as the judges are involved in the whole of mediatory process and they exercise the power of adjudication. The consent of parties to mediation is a premise, but the judicial

mediation settlement is not only to do with the parties' consent. For example, according to Article 201 of the Civil Procedure Law of China, where a mediation agreement is reached through mediation by a legally established mediation organization and an application for judicial confirmation is to be filed, both parties shall jointly submit the application to the prescribed court within 30 days from the date when the mediation agreement takes effect. After the people's court accepts the application and review it, if the application complies with the legal provisions, the mediation agreement will be ruled as valid, and if one party refuses to perform or fails to perform in full, the other party may apply to the people's court for enforcement; if the application does not comply with the legal provisions, the court will make a ruling to reject the application. Moreover, the written mediation statement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court, which also means the judges or courts are responsible for the mediation decision they have made.

Secondly, the judicial mediation settlement has the almost same enforceability with the civil judgment. On the one hand, the judicial mediation settlement and other legal documents that should be enforced by the people's court must be fulfilled by the parties. If one party refuses to perform, the other party may apply to the people's court for enforcement. On the other hand, a legally effective civil judgment or ruling must be performed by the parties. If one party refuses to perform, the other party may apply to the people's court for enforcement, or the judge may transfer the execution to the executioner.

Thirdly, the judicial mediation settlement has the legal effect of finality similar with a final civil judgment. According to article 102, if no agreement is reached through mediation or if one party repudiates the agreement prior to service of the mediation settlement, the people's court shall promptly make a judgment. Therefore, once a written mediation statement (MTS) served and signed by both parties, it has the same binding force as a legally effective judgment.

It is worth noting that mediation can take place in several different stages: if mediation is possible before the court session, the dispute shall be resolved in a timely manner by means of mediation; after the oral argument is over, a judgment shall be made in accordance with the law. If mediation is possible before the judgment, mediation may still be conducted; if mediation fails, a judgment shall be made in a timely manner. The people's court of second instance may conduct mediation in hearing appeal cases. When an agreement is reached through

mediation, a mediation statement shall be prepared, signed by the judges and the clerk, and affixed with the seal of the people's court. After the judicial mediation settlement is served, the judgment of the first instance and original people's court shall be deemed to be revoked. Therefore, the mediation is a vital part of adjudication power of people's court has in China.

Additionally, under the common law, a "judgment" is an order of court which gives rise to res judicata. According to Article 127 (5) of Civil Procedure Law of China (2021): "if a party to a case in which the judgment, ruling or civil mediation has become legally effective files a new action for the same case, the plaintiff shall be notified that the case will be handled as a petition for a review…" , which represents that a legally effective civil mediation by the court establishes res judicata and embodies a judgment.

3. Conclusion

To conclude, Chinese civil mediation could be recognized and enforced by foreign countries as a judgment. For now, China and Australia have neither signed a bilateral judicial assistance treaty, nor have they jointly concluded any convention on the recognition and enforcement of foreign court judgments, but de facto reciprocity should have been established between China and Australia (or at least the states of Victoria and NSW). Although there was the precedent of Bao v Qu; Tian (No 2) [2020] NSWSC 588 judgment recognized and enforced by the Supreme Court of New South Wales, the civil mediation judgment marks the first time that foreign courts of common law jurisdictions may recognize and enforce Chinese mediation judgments, which means important reference for other common law jurisdictions. Also, it has broadened the path for many domestic creditors who have obtained judicial claims through civil mediation, especially financial institutions, to recover and enforce the assets transferred by the debtor and hidden overseas.

Chinese Judicial Mediation Settlement should not be treated as 'judgment'

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1. Applicable Law

Whether a foreign document that seeks recognition and enforcement is a

‘judgment’ is a question of law. Therefore, the first question one needs to consider is which law applies to decide the nature of the foreign document. In Bank of China Limited v Chen, Harrison AsJ held that this matter should be determined under the law of Australia, which is the country where recognition is sought.

Interestingly, the Singapore High Court gave a different answer to the same question. In Shi Wen Yue v Shi Minjiu and another, the Assistant Registrar held that it was indeed the law of the foreign country where an official act occurs that determines whether that official act constitutes a final and conclusive judgment. Therefore, he applied Chinese law to determine the nature of the judicial mediation settlement.

It is argued applying the law of the state of origin is more appropriate. When the parties seek recognition of a foreign judgment, they anticipate that the foreign judgment is viewed as having the effect it has in its state of origin. But by applying the law of the state of recognition, a document may have greater or less effect in the state of recognition than in the state of origin. In Bank of China Limited v Chen, the plaintiff advocated for applying the Australian Law, stating that applying the law of the state of origin may lead to absurd mistakes. For example, if a ticket were regarded as a judgment by a foreign state, the Australian would have to treat it as a judgment and enforce it. The argument can hardly be the case in reality. Firstly, it is suspicious that a civilized country in modern society may randomly entitle any document as “judgment”. Secondly, even if the state of origin and the state of recognition have different understandings of the notion of judgment, a state usually will not deny the effect of a foreign state’s act in order to preserve international comity, unless such classification fundamentally infringes the public order of the state of recognition in some extreme occasions. Therefore, out of respect for the state of origin, the nature of the judicial mediation settlement shall be determined by Chinese law as a question of fact.

2. The Nature of Judicial mediation settlement

In Bank of China Limited v Chen, Harrison AsJ made an analogy to a consent judgment in common law jurisdiction when determining the nature of judicial mediation settlement. It was held that both were created by the parties’ consent but nevertheless are judgments being mandatorily enforceable and having

coercive authority. On the contrary, the Assistant Registrar in Shi Wen Yue v Shi Minjiu and another specifically pointed out that "a common law court must be conscious of the unexamined assumptions and biases of the common law". The common law and civil law view the notion of judicial power differently. The common law embodies an adversarial system of justice. Thus, the common law courts do not take issue with settlement agreements being given the imprimatur of consent judgments. However, in civil law countries, judges play an active inquisitorial role. They are "responsible for eliciting relevant evidence" while party-led discovery is anathema and seen as a usurpation of judicial power. Therefore, it is the proper and exclusive province of judges to judge and issue judgments. It would almost be a contradiction in terms for a party-negotiated settlement to be given the moniker of a consent judgment. For these reasons, judicial mediation settlements are not labelled as judgments.

Chinese law explicitly differentiates the judicial mediation settlement from judgment. Primarily, court judgments and judicial mediation settlements fall under different chapters in the Chinese Civil Procedure Law, while the former belongs to Part II "Adjudication Process". It is further evidenced by the principle that the parties reaching an agreement during judicial mediation cannot request the court to make a judgment based on such an agreement.

A judgment reflects the court's determination on the merits issue after adjudication. The judicial mediation settlement is a document issued by the court which records the settlement agreement reached between the parties during the judicial mediation. The differences between them are as follows. Firstly, the judicial mediation settlement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court and shall be served on both parties. It comes into force once the parties sign after receiving. The parties are entitled to repudiate the agreement prior to service of the mediation agreement. Namely, the court's confirmation per se is insufficient to validate a judicial mediation settlement. The effectiveness of judicial mediation settlement depends on the parties' consent. Conversely, a judgment does not require the parties' approval to become effective.

Secondly, a judicial mediation settlement could be set aside if it violates the law or party autonomy, which are typical grounds for invalidating a contract. The grounds for nullifying a judgment include erroneous factual findings or application of law and procedural irregularities, which put more weight on the

manner of judges.

Thirdly,the content of the judicial mediation settlement shall not be disclosed unless the court deems it necessary for protecting the national, social or third parties' interests. However, as required by the principle of "Public Trial" and protection for people's right to know, a judgment shall be pronounced publicly. Disclosing the judgment is important for the public to supervise the judicial process. Compared to court judgments, since a judicial mediation settlement is reached internally between the parties for disposing of their private rights and obligations, naturally, it is not subject to disclosure.

Fourthly, while the judicial mediation settlement is a document parallel to judgment in the sense of putting an end to the judicial proceedings, the effect of the judicial mediation settlement is more limited. An effective judicial mediation settlement settles the parties' rights and obligations on the merits and refrains them from filing another lawsuit based on the same facts and reasons. A judicial mediation settlement is enforceable against the debtor immediately without requiring further order or judgment from the Chinese court. However, unlike judgments, judicial mediation settlements lack the positive effect of res judicata. In other words, matters confirmed by judicial mediation settlements cannot be the basis of the lawsuits dealing with different claims afterwards.

It is fair to say that the judicial mediation settlement combines party autonomy and the court's confirmation. But it would be far-reaching to equate the court's confirmation with exercising judicial power. Judges act as mediators to assist the parties in resolving the dispute instead of making decisions for them. The judicial mediation settlement is intrinsically an agreement but not barely a private agreement since it has undertaken the court's supervision.

3. Conclusion

It is understandable that the plaintiff sought to define judicial mediation settlements as judgments. The judgment enforcement channel is indeed more efficient than seeking enforcement of a private agreement. However, considering the nature of the judicial mediation settlement, it is doubtful to define it as court judgment. In the author's opinion, since the original court has confirmed the justification of the judicial mediation settlement, it shall be recognized by foreign states. At the same time, a different approach to recognition is worth exploring.

Adoption of the ‘Lisbon Guidelines on Privacy’ at the 80th Biennial Conference of the International Law Association

On 23 June 2022, the *Lisbon Guidelines on Privacy*, drawn up by the *ILA Committee on the Protection of Privacy in Private International and Procedural Law*, were formally endorsed by the International Law Association at the 80th ILA Biennial Conference, hosted in Lisbon (Portugal).

The Committee was established in 2013 further to the proposal of Prof. Dr. Dres. h.c. Burkhard Hess (Director at the Max Planck Institute Luxembourg) to create a forum on the protection of privacy in the context of private international and procedural law. Prof. Dr. Dres. h.c. Burkhard Hess chaired the Committee, and Prof. Dr. Jan von Hein (Albert-Ludwigs-Universität Freiburg) and Dr. Cristina M. Mariottini (Max Planck Institute Luxembourg) were the co-rapporteurs.

In accordance with the mandate conferred by the International Law Association, the Committee – which comprised experts from Australia, Austria, Belgium, Brazil, Croatia, France, Germany, Italy, Japan, the Republic of Korea, Luxembourg, Portugal, Spain, the United Kingdom, and the United States of America – focussed on the promotion of international co-operation and the contribution to predictability on issues of jurisdiction, applicable law, and circulation of judgments in privacy (including defamation) matters, taking into account, i.a., questions of fundamental rights. In this framework, the Committee expanded its analysis also to the questions arising from the interface of privacy with personal data protection.

The Guidelines are premised on two fundamental principles: notably, (i) foreseeability of jurisdiction, and (ii) parallelism between jurisdiction and applicable law. They are accompanied by a detailed Article-by-Article

Commentary, which provides a comprehensive analysis of the Guidelines, complemented by examples, including illustrations taken from copious national, regional and supranational jurisprudence.

Overall, the Committee took note of the fact that, in spite of the differences between legal systems, constitutional values play a major role in the legal treatment of privacy. In particular, substantial layers of public law enter into the equation of private enforcement of privacy. This notion and the limits that stem from the impact that such layers of public law forcibly have on claims must be taken into due consideration with respect to the jurisdiction as well as to the law applicable to these claims and bear a remarkable impact on the subsequent eligibility of privacy judgments for circulation.

Against this background, the Committee proceeded to design a system based, in essence and subject to substantiated exceptions, on the foreseeability of jurisdiction and a principled parallelism between jurisdiction and applicable law. The latter approach has the advantage of saving time and costs, but must be balanced against the danger of forum shopping. In so far, the approach of the Guidelines (Article 7) distinguishes between jurisdiction based on the defendant's conduct (Article 3) and jurisdiction localized at the defendant's habitual residence (Article 4). While a defendant's conduct that is significant for establishing jurisdiction will usually also indicate a sufficiently close connection for choice-of-law purposes, the general jurisdiction at the defendant's habitual residence is rather neutral in this regard and thus complemented by a specific conflicts rule. Moreover, a necessary degree of flexibility is introduced by providing for party autonomy (Article 9) and an escape clause (Article 8). In order to take into account that personality rights and privacy protection are rooted in constitutional values, Article 11 contains a provision on public policy and overriding mandatory rules.

The Committee was cognizant that, to date, the recognition and enforcement of a foreign judgment on privacy rights is a matter primarily governed by national law. In response to this status quo, the Guidelines design a system for the recognition and enforcement of foreign privacy judgments that pursues consistency and continuity (esp. Article 12) with the rules on jurisdiction while also taking into account the characteristic objections to and obstacles that in many instances preclude the circulation of judgments that fall in the scope of the Guidelines (Article 13).

The adoption of the Guidelines marks the completion of the Committee's mandate.

Traveling Judges and International Commercial Courts

Written by Alyssa S. King and Pamela K. Bookman

International commercial courts—domestic courts, chambers, and divisions dedicated to commercial or international commercial disputes such as the Netherlands Commercial Court and the never-implemented Brussels International Business Court—are the topic of much discussion these days. The NCC is a division of the Dutch courts with Dutch judges. The BIBC proposal, however, envisioned judges who were mostly "part-timers" who may include specialists from outside Belgium. While the BIBC experiment did not pass Parliament, other commercial courts around the world have proliferated, and some hire judges from outside their jurisdictions.

In a new paper forthcoming in the American Journal of International Law, we set out to determine how many members of the Standing International Forum of Commercial Courts hire such "traveling judges," who they are, why they are hired, and why they serve.

Based on new empirical data and interviews with over 25 judges and court personnel, we find that traveling judges are found on commercially focused courts around the world. We identified nine jurisdictions with such courts, in Hong Kong, Singapore, Dubai, Abu Dhabi, Qatar, Kazakhstan, and the Caribbean (the Cayman Islands and the BVI), and The Gambia. These courts are designed to accommodate foreign litigants and transnational litigation—and inevitably, conflicts of laws.

One may assume that these judges largely resemble arbitrators (as was likely

intended for the BIBC). But whereas studies show arbitrators are mostly white, male lawyers from “developed” countries that may be based in the common law or civil law tradition, traveling judges are even more likely to be white and male, vastly more likely to have prior judicial experience and common-law legal training, and are overwhelmingly from the UK and its former dominion colonies. In the subset of commercially focused courts in our study, just over half of the traveling judges were from England and Wales specifically. Nearly two-thirds had at least one law degree from a UK university.

Below is a chart showing the home jurisdiction of the judges in our study. This includes traveling judges sitting on the BVI commercial division, Hong Kong Court of Final Appeal, Dubai International Financial Centre (DIFC) Courts, Qatar International Court, Cayman Islands Financial Services Division, Singapore International Commercial Court, Abu Dhabi Global Market (ADGM) Courts, and Astana International Financial Centre (AIFC) Courts as of June 2021.

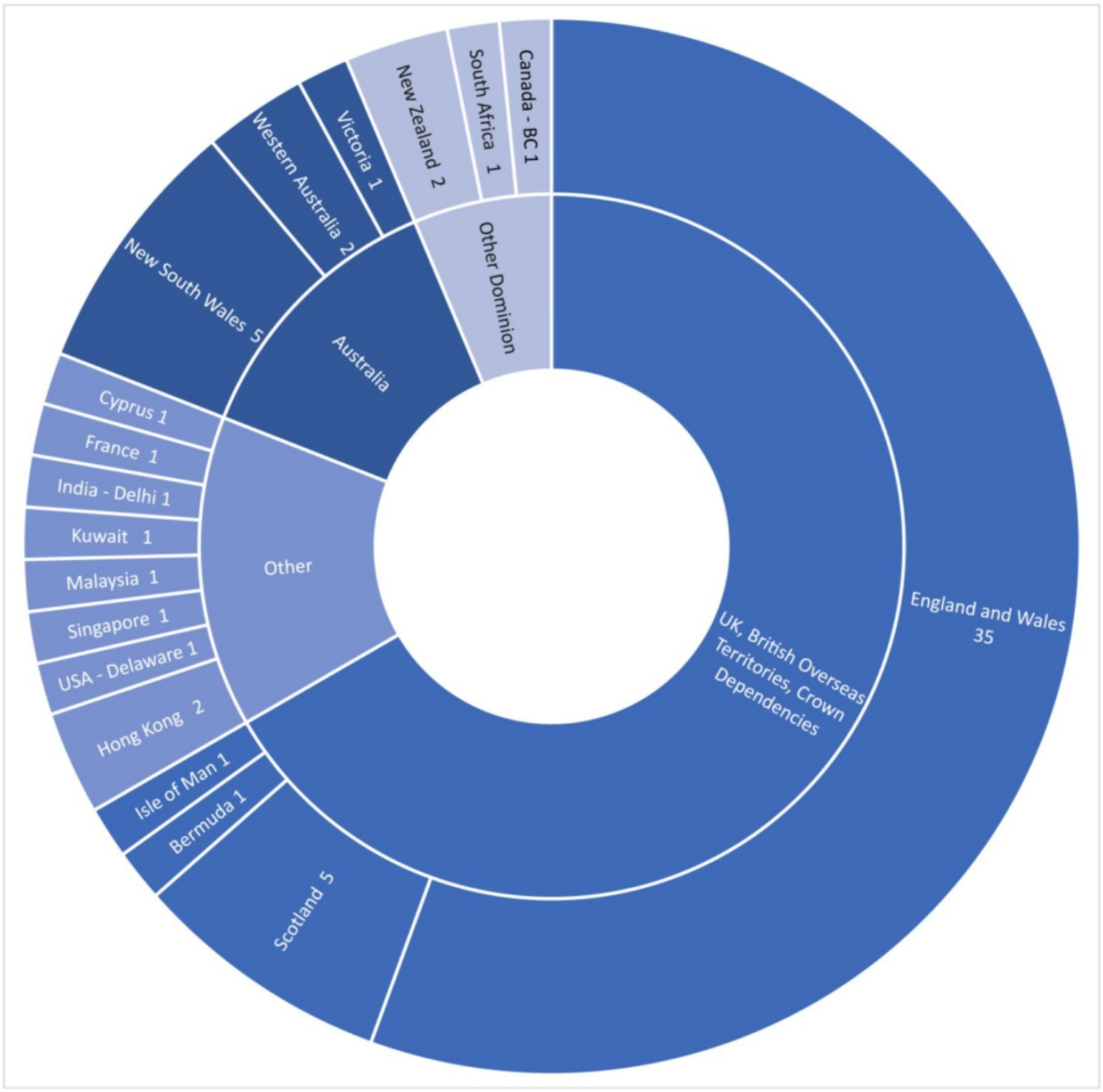

Figure 2. Traveling Judges by Home Jurisdiction Excluding Non-Commercial ECSC and The Gambia—June 2021

A look at traveling judges' backgrounds suggests that traveling judges might be a phenomenon limited to common-law countries, but only half of hiring jurisdictions are in common law states. Almost all hiring *jurisdictions*, however, are common law jurisdictions. Moreover, almost all are or aspire to be market-dominant small jurisdictions (MDSJ). For example, the DIFC Courts are located in a common law jurisdiction within a non-common-law state that has been identified as a MDSJ.

Traveling judges are a phenomenon rooted not only in the rise of international commercial arbitration, but also in the history of the British colonial judicial

service. Today, traveling judges may be said to bring their expertise and knowledge of best practices in international commercial dispute resolution. But traveling judges also offer hiring jurisdictions a method of transplanting well-respected courts, like London's commercial court, on their shores. In doing so, judges reveal these jurisdictions' efforts to harness business preferences for English common law into their domestic court systems. They also provide further opportunities for convergence on global civil procedure norms, or at least common law ones. Many courts have adopted some version of the English Civil Procedure Rules, looking for something international lawyers find familiar and reliable. Judges also report learning from each other's approaches.

Our article suggests that traveling judges are a nearly entirely common law phenomenon—only a handful of judges were from mixed jurisdictions and only one was a civil law judge. Common law courts may be especially amenable to traveling judges. In contrast to judges in continental civil law systems, common law judges are not career bureaucrats. They come to the judiciary late, usually after having built successful litigation practices. Moreover, the sociologist, and judge, Antoine Garapon observes that common law style-judging can be more personalized, with more room for individual authority rather than that of the office. All these differences are a matter of degree, with exceptions that come readily to mind. Still, as a result, common law judges are more likely have reputations independent of the office they serve. That reputation, in turn, is valuable to hiring governments eager to demonstrate their commercial law bona fides.

These efforts to harness English common law contrast with the efforts to build international commercial courts in the Netherlands or Belgium. The NCC advertises itself as an English-language court built on the foundation of the Dutch judiciary's strong reputation. As such, it has no need for foreign judges or common law experience. The BIBC likely also would not have relied as heavily on retired English judges, both because its designers envisioned more lay adjudicators (not retired judges) and likely a greater civil law influence. In that sense, its roster of judges might have more closely resembled that of the new international commercial court in Bahrain.

The Dutch, Belgian, and Bahraini examples do share something else in common with the network of courts profiled in *Traveling Judges*, however. Despite their apparent similarities to arbitration, these courts are domestic courts, and they

exist in significantly different political environments. The differences between Dutch and Belgian national politics influenced the NCC's success in being established and the BIBC's failure. In Belgium, for instance, the BIBC was maligned as a "caviar court" for foreign companies and the Belgian Parliament ultimately decided against the proposal. As one of us recounts in a related article on arbitration-court hybrids, similar arguments were raised in the Dutch Parliament, but they did not win the day. Several courts in our study, such as those established in the special economic zones in the UAE, did not face such constraints. But they may face others, such as how local courts will recognize and cooperate with a new court operating according to a different legal system and in a different language. The new court in Bahrain overcame local obstacles to its establishment, but it may face yet another set of political constraints and pressures as it proceeds to hear its first cases. Wherever traveling judges travel, local politics will affect both hiring jurisdictions' ability to achieve their goals and traveling judges' ability to judge in the way they are accustomed.