

# Publication: Hill & Chong on International Commercial Disputes

The fourth edition of J Hill & (now) A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* has just been published by Hart. Here's the blurb: 

*This is the fourth edition of this highly regarded work on the law of international commercial litigation as practised in the English courts. As such it is primarily concerned with how commercial disputes which have connections with more than one country are dealt with by the English courts. Much of the law which provides the framework for the resolution of such disputes is derived from international instruments, including recent Conventions and Regulations which have significantly re-shaped the law in the European Union. The scope and impact of these European instruments is fully explained and assessed in this new edition.*

*The work is organised in four parts. The first part considers the jurisdiction of the English courts and the recognition and enforcement in England of judgments granted by the courts of other countries. This part of the work, which involves analysis of both the Brussels I Regulation and the so-called traditional rules, includes chapters dealing with jurisdiction in personam and in rem, anti-suit injunctions and provisional measures. The work's second part focuses on the rules which determine whether English law or the law of another country is applicable to a given situation. The part includes a discussion of choice of law in contract and tort, with particular attention being devoted to the recent Rome I and Rome II Regulations. The third part of the work includes three new chapters on international aspects of insolvency (in particular, under the EC Insolvency Regulation) and the final part focuses on an analysis of legal aspects of international commercial arbitration. In particular, this part examines: the powers of the English courts to support or supervise an arbitration; the effect of an arbitration agreement on the jurisdiction of the English courts; the law which governs an arbitration agreement and the parties' dispute; and the recognition and enforcement of foreign arbitration awards.*

This is a book I have eagerly been waiting for (the 2005 edition is excellent), and it's highly recommended. Get it for **£50 from Hart Publishing**, or **£47.50 from Amazon UK**.

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# Jurisdiction of the Amsterdam Court of Appeal in the Converium Settlement Case

*[Guest post written by Thijs Bosters LL.M., a PhD Researcher (Private International Law and Collective redress) at Tilburg University.]*

After the *Morrison v. NAB* decision of last June, the question was raised how and where an f-cubed case should be filed in the future. It has been proposed that, for example, the Canadian class action or the Dutch collective settlement procedure could serve as alternatives in cross-border securities mass disputes. What makes the Dutch collective settlement procedure such an interesting alternative is that a settlement can be declared binding by the Amsterdam Court of Appeal on all persons to which it applies according to its terms. In this way, all plaintiffs can be covered and a mass dispute can be resolved through a single action (for more information on the Collective Settlement Act (*Wet collectieve afwikkeling massaschade*), see the The Global Class Actions Exchange report of Stanford Law School). With the 2009 Shell collective settlement, the Dutch Act proved that it can be instrumental in the resolution of cross-border securities mass disputes. The *Shell* case, however, was only a partially f-cubed case, as quite many of the investors involved were Dutch.

## *Converium*

On 12 November 2010, the Amsterdam Court of Appeal assumed preliminary jurisdiction in the “full f-cubed” *Converium* case (the Dutch text can be found here). This case revolves around the Swiss reinsurance company Converium

Holding AG (currently known as SCOR Holding AG). In late 2001, Zürich Financial Services Ltd, of which Converium was a full subsidiary, sold its shares through an initial public offering. The shares were listed on the SWX Swiss Exchange in Switzerland and as American Depositary Shares (ADSs) on the New York Stock Exchange. Between 7 January 2002 and 2 September 2004, Converium made several announcements which led people to believe that Converium had deliberately underestimated the insurance risks when floating its reinsurance unit. The existing reserve deficiency forced Converium to announce that it would take a charge of between \$ 400 and \$ 500 million to increase its reserve. This, combined with the downgrade of the company's credit rating by Standard & Poor's in response to the reserve increase, caused a massive drop of the share value.

In October 2004, the first of several securities class action complaints was filed against Converium, ZFS, and certain of Converium's officers and directors. Eventually, the filed class actions were consolidated before the United States District Court for the Southern District of New York. This court, however, excluded from the class action all non-U.S. persons who had purchased Converium shares on any non-U.S. exchange, leaving them empty-handed. Because of the positive way the Shell case was being resolved in the Netherlands, Converium and ZFS agreed that a settlement would be sought for these non-U.S. purchasers through the Dutch collective settlement system.

Converium, ZFS, the special Converium Securities Compensation Foundation (which represents the group of individual purchasers that were excluded from the U.S. class), and the Dutch Investors Association agreed on a settlement on 8 July 2010. These parties subsequently filed an application with the Amsterdam Court of Appeal to declare the settlement binding. Because there were only approximately 200 known Dutch individual purchasers (out of a total of 12,000), who formed the most important link to use the Dutch system, the Court first wanted to decide whether this link was enough to assume jurisdiction over the case.

## ***Jurisdiction Amsterdam Court of Appeal***

The Court first examined whether it could assume jurisdiction to effectuate the settlement and subsequently whether it was also competent to bind all the

purchasers named in the settlement. This would prevent plaintiffs from filing a claim for damages in the future.

As the settlement only takes effect if it is made binding, it is not possible to directly use Article 5(1) Brussels I/Lugano to determine which court has jurisdiction because the place of performance, the main requirement of this provision, is unknown. However, in *Effer v. Kantner*, the court also based its jurisdiction on Article 5(1) Brussels I/Lugano in a dispute concerning a contract which had not been concluded yet, so the place of performance was unknown as well. Because the *Converium* settlement is aimed at a certain performance that will take place in the Netherlands, namely, payment of damages by the Dutch special compensation foundation, the Dutch Court of Appeal can assume jurisdiction.

To prevent parallel and irreconcilable litigation, the Amsterdam Court of Appeal based its jurisdiction to declare the settlement binding on Article 6(1) Brussels I/Lugano. The Court stated that the claims of the various purchasers are so closely connected that it is expedient to hear and decide on them together. As the Court already had jurisdiction over the Dutch purchasers, Article 6(1) Brussels I/Lugano makes it possible to assume jurisdiction in the combined case.

Although the majority of the purchasers are domiciled in one of the Brussels I Regulation/Lugano Convention member states, there are also purchasers that are not. In these cases, the Dutch Code of Civil Procedure decides whether a Dutch court has jurisdiction. According to this Code, a court can assume jurisdiction over cases in which one or more purchasers are domiciled in the Netherlands. In the *Converium* case, the Compensation Foundation and the Investors Association are domiciled in the Netherlands. Moreover, because the settlement will be executed in the Netherlands, there is a sufficient connection with the Dutch jurisdiction for the Amsterdam Court of Appeal to also assume jurisdiction for those cases which involve non-Brussels I/Lugano purchasers.

Based on the above-mentioned provisions, the Amsterdam Court of Appeal may assume jurisdiction in the *Converium* case. Article 6 ECHR and the principle of *audi alteram partem*, however, prevent the Court from making a final decision on its competence. As not all the purchasers have been summoned yet, the Court will be forced to stay the proceedings (Article 26(2) Brussels I/Lugano) till they have been given proper notice. Until then, the ruling will be provisional. During the

fairness hearing, which still has to be scheduled but will probably take place in the second half of 2011, the purchasers may still advance a different view on the jurisdiction issue.

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# **Postgraduate Studentships in Private International Law of the EU at Aberdeen**

The University of Aberdeen has one of the most significant groups of private international law (PIL) researchers in the world, an excellent dedicated Law Library and a proven track record in research supervision. The EU has embraced harmonised PIL as the means of preserving the cultural and legal diversity that makes Europe so interesting while giving sufficient unity and coherence to the EU to make it strong.

The research topics that could be selected are from across all areas of private international law that have been or could be legislated for within the EU. Successful applicants will be given a significant financial award designed to cover their fees and in some cases to help with maintenance. We hope that there will be opportunities for successful applicants to supplement their income by working as tutors and/or research assistants in the Law School.

The awards are tenable from September 2011 (but the start date is flexible) and can last for up to 3 years for a PhD (depending on good progress) and one year for a research LLM.

Further particulars can be obtained from the Law School by contacting the postgraduate secretary, Mrs Claire Thomson, [law438@abdn.ac.uk](mailto:law438@abdn.ac.uk)

## ***How to apply?***

Please send a copy of your cv, your research proposal and two academic

references (in signed and sealed envelopes) to Professor Paul Beaumont, School of Law, University of Aberdeen, Aberdeen AB24 3UB, Scotland, UK by 1 February 2011.

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# Rome III: Agreement in Council on the Text of the New Rules on Divorce and Legal Separation

**The JHA Council**, in its meeting held on 3 December 2010 in Brussels, **agreed on the text** (doc. n. 17045/10) **of the Rome III regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation** (see our previous post [here](#)).

As stated in the Council's press release (doc. n. 17151/10),

*The new rules will apply to all participating member states as of mid-2012. Other EU member states which are not yet ready but wish to join this pioneer group at a later stage will be able to do so. The agreement also constitutes the implementation of the first enhanced cooperation in the history of the EU.*

*For its adoption two more procedural steps are necessary: The European Parliament is expected to adopt an opinion on the file in its December plenary session. The Council will then adopt the new rules without discussion, most likely at the Environment Council on 20 December 2010.*

Upon the adoption, the regulation will be accompanied by declarations by the Council (on *forum necessitatis*), and by the Commission, Malta and Finland on a new controversial art. 7a ("Differences in national law"): see Annexes I, II, III and IV to doc. n. 17046/10.

The position of the European Parliament, under examination in the JURI Committee, can be found in the Draft report prepared by rapporteur *Tadeusz*

Zwiefka (see, in particular, the Explanatory Statement) and additional amendments.

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# EU Consultation on Harmonisation of Securities Law

The European Commission has launched a month ago a Consultation on the Harmonisation of Securities Law.

The objective of the consultation is to obtain

*advice from Member States, market participants and other stakeholders, in particular investors, on a certain number of principles, on which the Commission could base its future legislative proposals in order to improve the EU-wide legal framework for cross-border transfers of securities*

Contributions are welcome until January 1st, 2011.

The consultation raises an interesting issue of choice of law:

## ***14 - Determination of the applicable law***

### *14.1 Principle*

*1. The national law should provide that any question with respect to any of the matters specified in paragraph 3 arising in relation to account-held securities should be governed by the national law of the country where the relevant securities account is maintained by the account provider. Where an account provider has branches located in jurisdictions different from the head offices' jurisdiction, the account is maintained by the branch which handles the relationship with the account holder in relation to the securities account, otherwise by the head office.*

*2. An account provider is responsible for communicating in writing to the*

*account holder whether the head office or a branch and, if applicable, which branch, handles the relationship with the account holder. The communication itself does not alter the determination of the applicable law under paragraph 1. The communication should be standardised.*

*3. The matters referred to in paragraph 1 are:*

*(a) the legal nature of account-held securities;*

*(b) the legal nature and the requirements of an acquisition or disposition of account-held securities as well as its effects between the parties and against third parties;*

*(c) whether a disposition of account-held securities extends to entitlements to dividends or other distributions, or redemption, sale or other proceeds;*

*(d) the effectiveness of an acquisition or disposition and whether it can be invalidated, reversed or otherwise be undone;*

*(e) whether a person's interest in account-held securities extinguishes or has priority over another person's interest;*

*(f) the duties, if any, of an account provider to a person other than the account holder who asserts in competition with the account holder or another person an interest in account-held securities;*

*(f) the requirements, if any, for the realisation of an interest in account-held securities.*

*4. Paragraph 1 determines the applicable law regardless of the legal nature of the rights conferred upon the account holder upon crediting of account-held securities to his securities account.*

## *14.2 Background*

*Many dispositions in securities involve a cross-border element. Therefore, more than one jurisdiction may be relevant to these dispositions. As already mentioned, not only the legal concepts applying to securities held through account providers vary considerably, but similarly the conflict-of-laws rules do not conform to each other. Three directives address the issue, amongst other questions, notably Article 9(1) of the Financial Collateral Directive, Article 9(2)*

*of the Settlement Finality Directive, and Article 24 of the Winding-Up Directive.*

*The status quo raises three questions: First, the conflict-of-laws rules as contained in the three directives are based on slightly different criteria. The envisaged legislation should bring the three rules in line with each other so as to ensure consistency and predictability.*

*Second, these rules exclusively apply to the relatively limited scope of the directives, notably to those organisations covered by their personal scope. The envisaged legislation should apply to all account holders and account providers. Consequently, a uniform conflict-of-laws rule for all market participants would be useful.*

*Third, taking Article 9(1) of the Financial Collateral Directive, which is the most recent one, as a conceptual starting point, it becomes clear that that in some (admittedly rare) cases the interpretation of where securities accounts are “located” could diverge. That means, before settling on a uniform conflict-of-laws rule for the entire environment, the rule itself needed to be clarified as regards the so called “connecting factor.*

*The connecting factor of the conflict-of-laws rule should be based on the factual criterion similar to the criterion used in the three directives, i.e. where a securities account is ‘maintained’. However, more guidance is needed for proper interpretation of this criterion, in particular as regards multi-branch entities. In this respect, regard has to be given to the reasonable perspective of the account holder, which expects that the national law of the country is applicable where the branch is located which handles the relationship with the account holder in relation to the securities account. In deciding which branch is servicing the client, the question of through which branch the account was opened, which branch handles the commercial relationship with the account holder, and which branch administers payments or corporate actions relating to the securities credited to the securities account, and similar aspects, will have to be taken into account, whereas the place of the location of supporting technology or of call or mailing centres should be disregarded. However, these additional guidelines as to which branch handles the relationship should not figure as cumulative elements of the connecting factor but rather as clarifying elements of interpretation figuring in the recitals of the instrument (cf. paragraph 1 of the envisaged Principle).*

*In addition to clarifying the connecting factor itself improvement of ex-ante legal certainty is necessary. As the connecting factor is fact-based and subject to legal interpretation, ultimately confined to the judge, it is basically a criterion delivering an ex post view. However, increased legal certainty requires active reliable ex ante knowledge of the applicable law. Paragraph 2 of the envisaged Principle cuts the Gordian knot by prescribing a practical solution, allowing for a fact based connecting factor while at the same time increasing ex ante predictability: account provider should always be in a position to tell where an account is maintained, i.e. which branch handles the client relationship. This certainty should be transferred to the account holder by communicating the relevant location. The account provider should be responsible for the correct fulfilment of this duty and the competent authority should be in a position to intervene where the communication does not reflect the location where the account is actually serviced. However, there needs to be a clarification that the approach remains entirely fact based and that the communication must not be able to alter the underlying analysis of where the account is actually maintained. A judge will have to look at the facts, not at the communication, in order to determine the applicable law. In case the factual analysis and the communication differ, the factual analysis prevails and the account provider will be responsible for any incorrect communication in this regard (cf. Paragraph 2 of the envisaged Principle).*

*There is agreement that a conflict-of-laws rule should roughly cover what is dealt with in the substantive law part regarding holding and disposition of account-held securities. However, there are additional elements which need to be covered by the conflict of laws rule, notably those that are closely connected to the matter but are, in the substantive law part, left to autonomous national legislation. For instance, the characterisation of the legal nature of the rights arising from crediting securities accounts would need to be included. Furthermore, there are aspects addressed in the substantive part which should not be governed by the conflict-of-laws rule, for instance the loss sharing mechanism in case of insolvency. Consequently, a detailed list of issues setting out the scope of the conflict-of-laws rule needs to be included in a separate paragraph, (cf. paragraph 4 of the envisaged Principle).*

*There needs to be a clarification that all securities credited to a securities account are covered by the conflict-of-laws rule, regardless the legal nature*

*that national law attributes to them. This aspect is particularly important where national law characterises certain account-held securities in a cross-border context as being of contractual or similar nature ( cf. paragraph 5 of the envisaged Principle).*

*There might be additional benefit in harmonising the way by which the location is communicated to the account holder, for example in a separate document, on the account statement, or even as part of the account number. This rather technical issue would benefit from some degree of standardisation.*

### *14.3 Questions*

*Q27: Would a Principle along the lines described above allow for a consistent conflict-of-laws regime? If not: Which part of the proposal causes practical difficulties that could be addressed better?*

*Q28: Would the mechanism of communicating to the client, whether the head offices or a branch (and if a branch, which one) is handling the relationship with the client, add to ex ante clarity? Is it reasonable to hold the account provider responsible for the correctness of this information? If applicable, would any negative repercussions on your business model occur?*

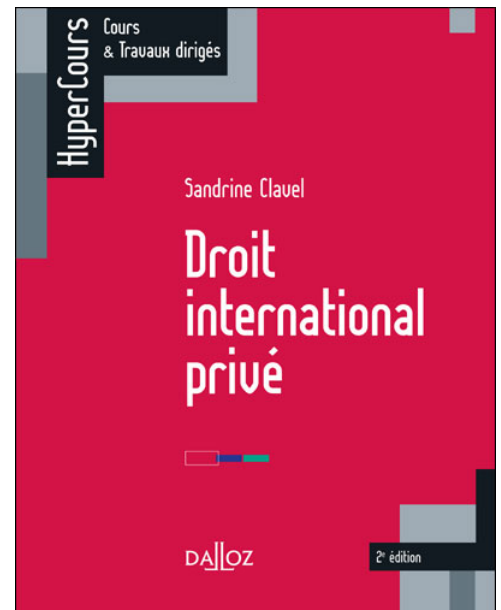
*Q29: The **Hague Securities Convention** provides for a global harmonised instrument regarding the conflict-of-law rule of holding and disposition of securities, covering the same scope as the proposal outlined above and the three EU Directives. Most EU Member States and the EU itself have participated in the negotiations of this Convention. The proposed principle 14 differ from the Convention as regards the basic legal mechanism for the identification of the applicable law. However, the scope of principle 14 is the same than the scope of the Convention: property law, collateral, effectiveness, priority. Do you agree that this will facilitate the resolution of conflicts with third country jurisdictions ? If not, please explain why.*

*Many thanks to Bram van der Eem for the tip-off.*

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# New Edition of Clavel's Droit International Privé

Sandrine Clavel, who is a professor of law at the University of Versailles-Saint-Quentin and the co-director of the Master Arbitrage et Commerce International, has published the second edition of her manual.



The book offers an account of the entirety of French private international law. But it is also a teaching book, as it includes a variety of exercises, many summaries of cases and tests that students may use to verify their correct understanding of the field.

More details can be found [here](#).

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## China's First Statute on Choice of Law - German Translation

Following Gilles' post of 3 November, *Christian Heinze* (Hamburg) kindly brought to my attention the German translation of the Chinese Statute on Choice of Law. The translation by *Knut Benjamin Pißler* (Max Planck Institute for Comparative and Private International Law, Hamburg) can be found **here**.

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# EP Workshop on Civil Justice: “How to facilitate the life of European families and citizens?”

✖ On 30 November 2010 the European Parliament’s Committee on Legal Affairs will host in Brussels an interparliamentary workshop on Civil Justice, organized in collaboration with the national parliaments of the Member States: “How to facilitate the life of European families and citizens?”. The conference is structured in 4 parts, and can be watched live in video streaming on the EP’s website:

Morning Sessions (h 9.30 – 13.00):

- Opening
- I. Family Law: Latest Developments and the Way Forward;
- II. Cross-Border Successions.

Afternoon Sessions (h 15 – 18.30):

- III. Parental Responsibility and the Protection Of Children;
- IV. Civil Status;
- Conclusions.

Each session will include speakers from the EP, national parliaments and the Commission, as well as the academic world and practitioners: a detailed draft programme is available [here](#).

Here’s a presentation of the event:

*Removing the legal and administrative barriers that citizens face when they start a family life in a Member State other than their own will be at the centre of the Workshop on Civil Justice which will take place in the European Parliament on 30 November.*

*The Workshop, which will be attended by EU and national parliamentarians, will be composed of four thematic sessions. The first two sessions will present the “state of play” in the drafting of new legal instruments in the field of European family law and the law of succession.*

*The third session will focus on child protection in cross-border situations. The topics of parental responsibility, including the controversial issue of the recognition of surrogacy agreements, as well as of international adoption will be addressed therein. Legal practitioners and academics will report on the current situation as it stands in several Member States.*

*The last session will provide an overview of the current difficulties faced by citizens in proving their civil status in cross-border situations. In this regard, a number of actions ranging from the suppression of the legalisation formalities of civil status acts to the interconnection of civil status registers will be presented. The challenging idea of creating a European “civil status” document will also be discussed.*

*Finally, the Workshop will also include speeches from Melchior Wathelet, Belgian State Secretary for Family Policy, on the achievements of the Belgian Presidency in the field of family law and Viviane Reding, European Commission (EC) Vice-President, on the actions planned by the EC in this field.*

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## **An Italian View on the Living Dead Convention**

*I am grateful to Pietro Franzina, a researcher in International law at the University of Ferrara, Italy, for sharing his thoughts on the recent case of the Cassazione on the Brussels Convention. Pietro dealt with this topic in ‘Interpretazione e destino del richiamo compiuto dalla legge di riforma del diritto internazionale privato ai criteri di giurisdizione della Convenzione di Bruxelles’, Rivista di diritto internazionale, 2010, 817 et seq.*

I agree with Gilles Cuniberti: the conclusion reached by the *Corte di Cassazione* in its order of 21 October 2009 regarding Article 3(2) of the Italian Statute on Private International Law (*see his post here*) is an unfortunate one.

Before I attempt to explain why, in my view, the Court erred in saying that the reference made by that provision to the 1968 Brussels Convention should still be interpreted as a reference to the Convention, and not to the Brussels I regulation, let me put forward a few preliminary remarks.

(a) Article 3(2) of the Italian Statute on Private International Law of 31 May 1995 (hereinafter, the Statute) determines whether Italian courts have jurisdiction in civil and commercial matters in respect of proceedings *falling outside the scope of application* of the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, *i.e.* proceedings instituted against defendants domiciled outside the territory of a contracting State (or a contracting State of the Lugano Conventions). In respect of such proceedings the Italian legislator of 1995 was virtually free to lay out any rule on jurisdiction, and still is.

(b) The drafters of the Statute decided to make use of this freedom in an almost unprecedented way. They incorporated the heads of jurisdiction set out in section 2, 3 and 4 of chapter II of the Brussels Convention within the Statute. To do so, they made an express reference to such heads of jurisdiction, as provided for by the 1968 Convention and by its subsequent modifications in force for Italy ("*e successive modificazioni in vigore per l'Italia*"). This way, the Italian legislator introduced *national* rules providing heads of jurisdiction corresponding to those employed in Articles 5-15 of the Convention.

(c) After the entry into force of the Brussels I regulation, the doubt arose as to whether the reference made in Article 3(2) of the Statute should still be construed as aiming at the Convention, and not at the regulation. While the legislator took no action to amend (or confirm) the wording of Article 3(2), opposing views were expressed by scholars as to how the provision should be interpreted within the new legal landscape.

(d) The interest of the question was not only theoretical. It is well known that while the regulation retained the structure of the Convention and left almost unchanged many of its provisions, some rules have been significantly modified. One of these is Article 5(1), on jurisdiction in contractual matters. Suppose that

an Italian company seeks to recover the price of the goods it sold to a non-European buyer. If the relevant heads of jurisdiction were to be found – via the Statute – in Article 5(1) of the Brussels Convention, the chances of bringing the case before an Italian court would presumably be rather high: the relevant obligation for jurisdictional purpose would be the obligation to pay the price (*De Bloos*), and its place of performance should be determined (under *Tessili* and *Custom Made*) pursuant to the substantial rules governing the contract, be they national rules (such as Article 1498(3) of the Italian Civil Code: at the seller's domicile) or uniform rules (such as Article 57(1)(a) of the CISG: at the seller's place of business). On the contrary, should Article 3(2) of the Statute be construed as implying a reference to Article 5(1)(b), first indent, of the Brussels I regulation, the obligation to be taken into account would be the obligation to deliver the goods (*Color Drack*), and – failing an agreement of the parties – its place of performance should be the place where the purchaser obtained, or should have obtained, actual power of disposal over the goods, at the final destination of the sales transaction (*Car Trim*). The Italian seller would thus presumably be unable to sue the buyer in Italy.

In its order of 21 October 2009, the Italian Court of Cassation held that the Brussels Convention, although superseded by the regulation as between Member States, except as regards the territories of such States which fall within the scope of that Convention but lie outside the reach of EU law, must be considered as still in force and applicable. According to the Court, the fact that the Convention remains in force, no matter how narrow its residual scope of application, implies that the reference made in Article 3(2) is still capable of working as it was originally drafted, *i.e.* as a reference to the Convention, leaving no room for a different reading of the provision.

One would be tempted to say that the rationale behind the decision is, at least partly, a 'political' one. The rule regarding jurisdiction in contractual matters is frequently relied on, in Italy, by small and medium enterprises exporting the goods they manufacture. The latest developments in the ECJ's case law regarding the operation of this rule within the Brussels I regulation (*Car Trim*) make it more and more difficult for these businesses to sue their contractual counterparts before an Italian court (it is worth noting that the *Corte di Cassazione*, up until one year ago, interpreted the expression 'place of delivery' under Article 5(1) of the Brussels I regulation as meaning – according to Article 31(a) of the CISG, and

contrary to what is now the view of the ECJ – the place in which the goods are handed over to the first carrier for transmission to the buyer, *i.e.* a place generally ‘close’ to the seller’s place of business). This conclusion may be inevitable for cases regulated by the Brussels I Regulation, but not for cases which are subject to a national provision, such as Article 3(2) of the Statute, provided the ‘old’ rule of the Convention and its pro-seller bias (as compared with the Regulation) may still be allowed to play a role.

I will leave ‘political’ considerations aside and try to examine the solution reached by the *Cassazione* from a purely legal standpoint. In this perspective, the Court’s order calls for at least two critical remarks.

(1) The Brussels Convention may still be applicable in respect of proceedings against defendants domiciled in Wallis and Futuna, Saint-Pierre and Miquelon and a few other areas around the world, but this does not imply that the Brussels I regulation is to be given no weight in the interpretation of Article 3(2) of the Statute. On the contrary, the correct view – in my opinion – is that the regulation did bring about a “modification” of the Convention for the purpose of Article 3(2) of the Statute. The fact that the two instruments bear a different legal nature is not necessarily at odds with this assumption. According to the law of treaties (as codified in the Vienna Convention of 23 May 1969), a treaty may in general be amended by an agreement between the parties (Articles 39 *et seq.*): the Brussels regulation (and the EU-Denmark Agreement of 19 October 2005, on the application of the regulation between the parties) may be seen as the ‘vehicle’ by which the contracting States agreed to alter the scope of application of the Convention, limiting it to the cases which were not concurrently regulated by the regulation (and/or the EU-Denmark Agreement). One would hardly imagine, otherwise, how the EU Member States (those who are parties, at the same time, to the Brussels Convention) might ignore in their mutual relationship, without violating it, a convention to which they are still bound.

(2) If the preceding assumption is correct, one should conclude that Article 3(2) of the Statute, according to its terms, implies – after the entry into force of the Brussels I regulation – a ‘double’ reference: a reference to the Brussels Convention (as long as it is an international treaty in force) *and* a reference to the regulation. Such double reference – a situation which the Italian legislator could not reasonably expect (until then, the modifications of the Brussels Convention were effected through conventions superseding the previously applicable texts *in*

*their entirety*) – is clearly unworkable in practice. Under the Italian rules on statutory interpretation, issues like this, concerning a national rule ambiguously worded, should be solved through the use of non-textual (*i.e.* systematic and teleological) canons of interpretations. As a matter of fact, the *Corte di Cassazione* paid little or no importance, in its order, to the goals underlying Article 3(2). Through this provisions, the Statute attempted to permanently bring the Italian system of private international law in line with the most developed experiences of international cooperation in this field. Furthermore, by enacting national rules on jurisdiction corresponding to the heads of jurisdiction set out in a frequently applicable legal instrument, such as the Brussels Convention, the drafters of Article 3(2) pursued the objective of simplifying the work of interpreters, placing almost *all* jurisdictional issues susceptible of arising before Italian judges in civil and commercial matters within *one* normative framework. Both goals suggest that the better reading of Article 3(2) is the one implying a reference to the Brussels I regulation, and not to the Convention. The opposite view, followed by the *Cassazione*, prevents the Italian system from taking advantage of the developments of the regime set up by the Convention and ‘continued’ by the regulation, and runs counter the need of simplification.

Should the ‘new’ Brussels I regulation contain *erga omnes* rules on jurisdiction, as suggested by many (including the drafters of the Green Paper on the revision of the regulation, COM (2009) 175 def.), the *raison d’être* of Article 3(2) of the Statute will disappear altogether. Till then, the Italian interpreters will need to cope with a highly complex regime arising out of a questionable case law.

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## The Living Dead Convention

Reports of the death of the 1968 Brussels Convention have been greatly exaggerated. 

In some parts of Europe, it is still possible to enjoy the application of old Article 5.1 of the Convention and to determine the place of performance of the obligation in question for a basic sale of goods.

One such example is Italy, where the Convention has risen from the dead. This happened a year ago, in Rome.

### **Italian Private International Law Act, 1995**

In 1995, Italy reformed its private international law and adopted a new statute reforming the Italian System of Private International Law. Article 2 of the 1995 Statute provides that international conventions prevail over domestic rules. Thus, jurisdiction of Italian courts over disputes falling within the scope of the Brussels I Regulation is governed by the said Regulation.

Article 3 of the Statute provides a remarkable rule for disputes in civil and commercial matters falling outside the territorial scope of European law, i.e. when the defendant is not domiciled within the jurisdiction of a Contracting state. Instead of laying down its own rules of jurisdiction, the Italian lawmaker decided to apply further the 'Brussels Convention'. Article 3 provides that the heads of jurisdiction provided by the Convention remain applicable. In other words, Italy extended the territorial scope of the Convention to civil and commercial disputes where the defendant is domiciled outside of a contracting state.

#### ***Art. 3 Ambito della giurisdizione.***

*2. La giurisdizione sussiste inoltre in base ai criteri stabiliti dalle Sezioni 2, 3 e 4 del Titolo II della Convenzione concernente la competenza giurisdizionale e l'esecuzione delle decisioni in materia civile e commerciale e protocollo, firmati a Bruxelles il 27 settembre 1968, resi esecutivi con la L. 21 giugno 1971, n. 804, e successive modificazioni in vigore per l'Italia, anche allorché il convenuto non sia domiciliato nel territorio di uno Stato contraente, quando si tratti di una delle materie comprese nel campo di applicazione della Convenzione.*

That was all fine in 1995, when the Brussels Convention was alive and kicking. But when the Convention was replaced by the Brussels I Regulation, an issue arose. Was the reference to the '1968 Brussels Convention and its successive modifications in force in Italy' to be interpreted as a reference to the new Regulation? Did it matter that Denmark kept on for a while applying the Brussels Convention? and that it has now stopped?

## Legal Miracle

The question was put forward the Italian supreme court for private matters (*Corte di Cassazione*) last year. An Italian firm was suing a company incorporated in Monaco in a dispute involving a sale of goods. Monaco is neither a member of the European Union, nor a party to any Lugano Convention. Would jurisdiction be determined by establishing where the obligation in question had been performed, or by reference to the place of delivery of the goods?

In October 2009, the *Corte di Cassazione* held that the reference to the Brussels Convention could not be interpreted as designating the Brussels I Regulation. It thus applied old article 5.1 of the Brussels Convention.

Any comment from Italian readers wishing to explain how international conventions can be resurrected is most welcome!