First edition of The Hague Academy of International Law's Advanced Course in Hong Kong on "Current Trends on International Commercial and Investment Dispute Settlement"

From 11 to 16 December 2023, the first edition of **The Hague Academy of International Law's Advanced Course in Hong Kong** was held, co-organised by the Asian Academy of International Law and the Department of Justice of the Government of the Hong Kong Special Administration Region. For this programme, the Hague Academy of International Law convened distinguished speakers to deliver lectures on "Current Trends on International Commercial and

Investment Dispute Settlement".

After welcome notes (Adrian Lai, Deputy Secretary General and Co-Convenor of the Advisory Board of the Asian Academy of International Law; Teresa Cheng, Founding Member and Co-Chairman of the Asian Academy of International Law, also on behalf of Christophe Bernasconi, Secretary General of the HCCH; Jean-Marc Thouvenin, Secretary-General of The Hague Academy of International Law; and Lam Ting-kwok Paul, Secretary for Justice of the Government of the Hong Kong SAR) a welcome lunch was offered where a "beggar's chicken" was offered, to be hammered out of the bread casing…

In the afternoon the first class, delivered by **Natalie Morris-Sharma**, Singapore, focused on the **UN 2018 Convention on Settlement Agreements Resulting from Mediation (Singapore Convention)**. Structuring her lecture around the drafting procedure of the new instrument, the former Chairperson provided valuable insights into the deliberations within the Working Group. For instance, the question what form (international treaty, model law, or mere guidelines) the future instrument should take was literally up for debate until the very last session, as some delegations felt that national approaches to enforcing settlement agreements were far too different to justify the adoption of a uniform "hard law" solution. This uncertainty during the discussions is the main reason why the Working Group has taken the unusual course of action to produce not only the Convention but also the amended UNCITRAL 2018 Model Law on International Commercial Mediation. Further in the lecture, it was emphasised that the Singapore Convention has taken a stance on at least one of these differences, the legal nature of the mediated settlement agreement. By providing for the

“enforcement” (“relief”) in Articles 3 and 4 which can only be refused on the limited, discretionary grounds contained in Art. 5, the Singapore Convention rejects the traditional view that mediation results in nothing more than a contractual obligation. Finally, the future of the instrument has been discussed, in particular the reasons why the major economic powers (China, EU, USA) have not yet ratified the Convention.

The next morning, **Diego Fernández Arroyo** started his lecture on **investor-state dispute resolution**. Using the Euro Disneyland negotiations as an example, in which corporate counsel Joe Shapiro, envisaging the possibility of legal disputes with the French government, pushed relentlessly for the inclusion of an arbitration clause, he first illustrated the practical importance of ISDS. Subsequently, the historical development of this area of law from diplomatic protection to international arbitration was summarised, with particular reference to the highly specialised International Centre for Settlement of Investment Disputes (ICSID) established under the auspices of the World Bank Group. He stressed that the submission of investment disputes, that involve a public law (global) governance dimension, to essentially the same resolution mechanism as private law commercial disputes is by no means self-evident. On this foundation, Fernández Arroyo finally turned to the contemporary criticism towards the current ISDS practice. He stated, *inter alia*, that the concerns regarding transparency have been adequately addressed through the adoption of new standards (e.g. Mauritius Convention, UNCITRAL 2014 Rules) and elaborated on the prospects of the Multilateral Investment Court project advocated by the EU.

Then, **Franco Ferrari** made use of his part of the course on **international commercial arbitration** to powerfully challenge an overly idealistic understanding of international arbitration. Appealing in particular to the Hong Kong barristers in the room, he initially demonstrated how the loopholes between arbitration and litigation may be strategically utilised in legal practice. While the existence of an arbitration agreement obliges the court to dismiss a claim, it does not prevent filing a lawsuit in the first place. Hence, the resulting fear of publicity or discovery can be used effectively as leverage in settlement negotiations. Thereafter, quite in contrast to the idea of global governance underlying the ISDS frameworks, he reminded the audience of F. A. Mann’s statement: “every arbitration is a national arbitration, that is to say, subject to a specific system of national law”. Along the lines of this famous *bon mot*, Ferrari highlighted the

persistent relevance of the *lex loci arbitri* by examining, among others, whether the provisions of the UN 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) require an "international" or rather a "domestic" reading. In this context, he discussed with the audience the doctrine of delocalisation as promoted in French jurisprudence (e.g. Cass. Civ., 23 mars 1994, *Hilmarton*, Bull. 1994 I N° 104 p. 79). From the perspective of legal positivism, those approaches, even if striving for a truly transnational understanding, are nevertheless dependent on the applicable domestic legal framework, which is determined by the seat of the respective arbitration.

In the following, the author of these lines focused on the **settlement of international disputes before domestic courts**. After laying out a foundational theory for designing judicial cooperation in civil matters within a field of "trust" and "control" ("trust management") in regard to foreign sovereign judicial acts, in particular foreign judgments, to be integrated (or not) into a state's s own administration of justice, this theory was then applied to the "Hague Package" (Christophe Bernasconi) of instruments on judicial cooperation in civil matters, starting with the HCCH 2019 Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (e.g. when and why and to what extent foreign courts are "courts" in the sense of, inter alia, Art. 4 of the Convention?), touching further upon the ongoing HCCH Jurisdiction Project (currently mainly focusing on parallel proceedings), the HCCH 2005 Choice of Court Agreement Convention, as well as the HCCH Conventions on Service, Taking of Evidence, and the Apostille. This emerging "Hague System" – that is evidently emerging under fundamentally different conditions than the well-established "Brussels System" within the EU's supranational Area of Freedom, Security and Justice – was contrasted with current escalations of "distrust", such as e.g. the current trend of antisuit injunctions (ASIs), anti-antisuit injunctions (AASIs) and even anti-anti-antisuit injunctions (AAASIs) in international Standard Essential Patent (SEP) ligitation in respect to setting global FRAND licences, involving domestic courts from all over the world (e.g. China, Germany, India, UK, USA etc.) – an area of law which is – unfortunately – excluded to a large extent from the material scopes of the younger HCCH Conventions.

Jean-Marc Thouvenin added with a fascinating lecture on **dispute settlements before the International Court of Justice**, and **Judge Gao Xiaoli** explained the latest developments of dispute resolution in (Mainland) China, in particular the setting and functions of China's **Supreme People's Court's International Commercial Court (CICC)**.

In the **afternoon of the last day**, the participants, coming from more than 20 nations, received their certificates, and the week concluded with a **closing reception in celebration of the Centenary of the Hague Academy** against the background of Hong Kong's skyline.

The Course took place in the chapel of the **historic Former French Mission Building**, later the seat of Hong Kong's Court of Final Appeal. Lectures and participants convened in the former hearing hall of the building which added further inspiration to the vivid and intense discussions about the settlement of international commercial disputes on all avenues and levels, a holistic perspective that some liked to call an "integrated approach" (M. Weller, Festschrift für

Herbert Kronke 2020), others a “pluralistic dispute resolution” (“PDR”, see e.g. Wang/Chen, Dispute Res. in the PRC, 2019).

New Proposed Rules on International Jurisdiction and Foreign Judgments in Morocco

Last Thursday, November 9, Draft No. 02.23 proposing the adoption of a new Code of Civil Procedure (*al-musattara al-madaniyya*) was submitted to the Moroccan House of Representatives. One of the main innovations of this draft is the introduction, for the first time in Moroccan history, of a catalogue of rules on international jurisdiction. It also amends the existing rules on the enforcement of foreign judgments.

Despite the importance of this legislative initiative for the development of private international law in Morocco, the proposed provisions are unfortunately disappointing in many respects.

First, with regard to the rules of international jurisdiction, it is surprising that the drafters of the 2023 proposed Code have relied heavily on the rules of the Egyptian Code of Civil Procedure, which date back to the fifties of the last century. These rules are in many respects completely parochial and outdated. Other codifications from the MENA region (e.g., the Tunisian codification of PIL) or elsewhere (e.g., recent codifications of PIL in Europe and Asia) could have served as better models. Furthermore, the proposed rules seem to have overlooked developments at the regional or international level, in particular those in the European Union and the Hague Conference on Private International Law over the last two decades. The fact that the new proposed rules do not even take into account the solutions of the 1991 Ras Lanouf Convention, a double convention concluded between the Maghreb countries (but not yet ratified by Morocco), is difficult to explain.

Examples of questionable aspects of the new proposed rules include, among others:

- Adopting the nationality of the defendant as the basis for jurisdiction in all matters, including civil and commercial matters, even if the dispute has no other connection with Morocco.
- Failure to distinguish between concurrent and exclusive jurisdiction. This is problematic because the new proposed provision on the requirements for the enforcement of foreign judgments allows Moroccan courts to refuse enforcement if the judgments were rendered in matters within the exclusive jurisdiction of Moroccan courts, without providing a list of such matters.
- The adoption of questionable and outdated grounds of jurisdiction, such as the location of property without limitation and the place of the conclusion of the contract.
- Failure to introduce new rules that take into account the protection of weaker parties, especially employees and consumers.
- Failure to include a clear and coherent rule on choice of court agreements.
- Failure to include a rule on lis pendens.

Second, with regard to the enforcement of foreign judgments, the main surprise is the introduction of the reciprocity rule, which was not part of the law on foreign judgments in Morocco. Moreover, Moroccan courts have never invoked the principle of reciprocity when dealing with the enforcement of foreign judgments, either as a possible requirement or as ground for refusing to give effect to foreign judgments. It is not clear why the drafters felt the need to introduce reciprocity when there does not seem to be any particular problem with the enforcement of Moroccan judgments abroad.

The following is a loose translation of the relevant provisions. The text in brackets has been added by the author.

Part II – The Jurisdiction of the Courts

Chapter IV – International Judicial Jurisdiction

Article 72 [(General) Jurisdiction over Moroccans]
The courts of the Kingdom shall have jurisdiction to hear actions brought against Moroccans even if they are not domiciled or resident in Morocco, except when the action concerns immovables located abroad.

Article 73 [(General) Jurisdiction over Foreigners Domiciled or Resident in Morocco]
The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are domiciled or resident in Morocco, except where the dispute concerns immovables located abroad.

Article 74 [(Special) Jurisdiction over Foreigners not domiciled or resident in Morocco]
[1] The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are not domiciled or resident in Morocco [in the following cases]:

1. **[Property and Obligations]** [if the action] concerns property located in Morocco, or an obligation formed, performed, or should have been performed in Morocco;

2. **[Tortious Liability]** [if the action] concerns tortious liability when the act

giving rise to liability or the damage takes place in Morocco;

3. **[Intellectual Property]** [if the action] concerns the protection of intellectual property rights in Morocco;

4. **[Judicial Restructuring]** [if the action] concerns procedures for businesses in difficulty instituted in Morocco;

5. **[Joint Defendants]** [if the action] is brought against joint defendants, and one of them is domiciled in Morocco;

6. **[Maintenance]** [if the action] concerns a maintenance obligation and the maintenance creditor is resident in Morocco;

7. **[Filiation and Guardianship]** [if the action] concerns the filiation of a minor resident in Morocco or a matter of guardianship over a person or property;

8. **[Personal status]** [if the action] concerns other matters of personal status:

a) if the plaintiff is Moroccan;
b) if the plaintiff is a foreigner who has resident in Morocco and the defendant does not have a known domicile abroad,

9. **[Dissolution of marriage]** [if the action] concerns the dissolution of the marital bond:
a) if the marriage contract was concluded in Morocco;
b) if the action is brought by a husband or a wife of Moroccan citizenship;
c) if one of the spouses abandons the other spouse and fixes his/her domicile abroad or has been deported from Morocco

[2] **[Counterclaims and related claims]** The courts of the Kingdom that have jurisdiction over an original action shall also have jurisdiction to hear counterclaims and any related claims.

[3] **[Conservative and Provisional measures]** The courts of the Kingdom shall also have jurisdiction to take conservative and provisional measures to be executed in the Kingdom even if they do not have jurisdiction over the original action.

Article 75

[1. **Consent and Submission]** The courts of the Kingdom shall also have jurisdiction to hear actions even if they do not fall within the jurisdiction of the defendant explicitly or implicitly accepting their jurisdiction unless the action concerns an immovable located abroad.

[2. **Declining jurisdiction]** If the defendant in question does not appear, the court shall [in its motion] rule that it has no jurisdiction.

Part IX – Methods of Execution
Chapter III – General Provisions relating to Compulsory Execution of Judicial Judgments

Article 451 [Necessity of an Exequatur Declaration]
Foreign judgments rendered by foreign courts shall not be enforced unless they are declared enforceable following the conditions laid down in the present Act.

Article 452 [Procedure]
[1] The request for exequatur shall be submitted to the First President of the court of the second instance with subject-matter jurisdiction.
[2] Jurisdiction shall lie with the court of the place of execution, and the executor shall have the authority to pursue the execution wherever the property of the person against whom the execution was issued is found.
[3] The first president or the person replacing him/her shall summon the defendant when necessary.

Article 453 [Requirements]
The foreign judgment shall not be declared enforceable except after verifying that the following requirements are satisfied:
[a] The foreign court did not render a judgment that falls within the exclusive jurisdiction of Moroccan courts;
[b] There exists a substantial connection between the dispute and the court of the state where the judgment was rendered;
[c] There was no fraud in choosing the rendering court;
[d] The parties to the dispute were duly summoned and properly represented;
[e] The judgment became final and conclusive following the law of the rendering court;
[f] The judgment does not contradict with a judgment already rendered by Moroccan courts;

[g] The judgment does not violate Moroccan public policy.

Article 454 [Documents and Appeal]
[1] Except otherwise stipulated in the international conventions ratified by Morocco and published in the Official Gazette, the request [for declarations of enforceability] shall be submitted by way of application accompanied by the following:
[a] an official copy of the judicial judgment
[b] a certificate of non-opposition, appeal, or cassation
[c] a full translation into Arabic of the documents referred to above and certified as authentic by a sworn translator.
[2] The judgment of granting exequatur can be subject to appeal before the Supreme Court.
[3] The Supreme Court shall decide on the appeal within one month.
[4] Judgments granting exequatur in cases relating to the dissolution of marriage shall not be subject to any appeal except by the public prosecutor.

Article 455 [Titles and Authentic Instruments]
Titles and authentic instruments established abroad before competent public officers and public servants can be enforced in Morocco after being declared enforceable, and that after showing that the title or the authentic instrument has the quality of an enforceable title and that it is enforceable following the law of the State where it was drawn up and does not violate the Moroccan public policy.

Article 456 [International Conventions and Reciprocity]
The rules laid down in the previous articles shall be applied, without prejudice to the provisions of the international conventions and treaties ratified by the Kingdom of Morocco and published in the Official Gazette. The rule of reciprocity shall also be considered.

Certificat de coutume: New

volume in French

Gustavo Cerqueira, Nicolas Nord, and Cyril Nourissat have recently edited a new volume on the "Certificat de coutume – Pratiques en droit des affaires internationales" (in French). The editors have kindly provided us with an English translation of the blurb available on the publisher's website:

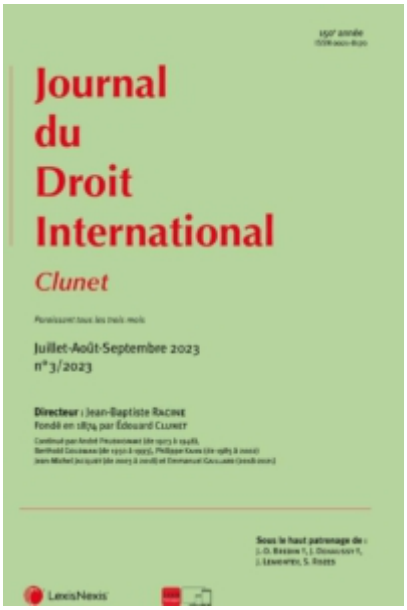
> *Statement or written certificate on the content of a foreign law rule, the Certificat de coutume is subject to a heterogeneous practice both in terms of its establishment and its processing Ignored by many jurists, its reliability is often called into question due to a double insufficiency that it may conceal: about the law attested when it is issued by a public authority, about the impartiality when a private person issues it.*
>
> *However, these criticisms are not insurmountable. In addition to the combination with other means of establishing the content of the foreign law rule in question, the Certificat de coutume does not avoid obliterating any contradictory discussion and the freedom of interpretation of the authority before which it is produced. The liabilities associated with the Certificat de coutume, whether that of the drafter, the counsel of the parties or the notary using such a certificate, constitute a formidable safeguard against tendentious approaches. Above all, we must not ignore the virtues of empiricism, which could – in these times of debates regarding a future codification of French private international law – reveal important and good practices to be considered de lege ferenda.*
>
> *The book contains the reflections of several experts on the practice – little known to the public – of the Certificat de costume in international affairs at a symposium held on 12 April 2022 at the Conseil supérieur du notariat français. The real added value of this book therefore lies in the desire to lift the veil on the Certificat de coutume, which currently constitutes a blind spot in private international law. Its name is certainly known to all, but its legal system still appears to be embryonic.*
>
> *This book aims to be constructive and to come up with concrete proposals, the fruit of collective reflection, bringing together the key players in the field.*

Authors: Bertrand Ancel, Oliver Berg, Marc Cagniart, Gustavo Cerqueira, Louis Degos, Karlo Fonseca Tinoco, Jacques-Alexandre Genet, Giulio-Cesare Giorgini, Kevin Magnier-Merran, Daniel Mainguy, Pierre Jean Meyssan, Pierre Mousseron, Nicolas Nord, Cyril Nourissat, Sylvaine Poillot-Peruzzetto, Pierre Tarrade, Jean-Luc Vallens, Pascal de Vareilles-Sommières.

Journal du Droit International Clunet – issue 2023/3

The third issue of the *Journal du Droit international-Clunet* of 2023 was released in July. It contains three articles and many case notes.

The first article Regard québécois sur le projet de Code de droit international privé français (A view from Quebec on the project of a french private international law Code) is authored by Prof. Sylvette Guillemard (Université Laval). The abstract reads as follows:



> *A draft of a French private international law code project was presented to the Minister of Justice in March 2022. As soon as it was submitted, it was immediately commented on by various parties ; its qualities are admired as much as its shortcomings are pointed out. In 1994, the Quebec legislator adopted a book dedicated to private international law in its new Civil Code. After nearly 30 years, it was able to reveal its flaws and demonstrate its*

advantages. Therefore, neither too old nor too young, it appeared to us as an excellent object of comparison with the French project. At the end of the exercise, we may conclude that French law can only emerge as the winner of this "operation of shaping the rules [of private international law] into a whole", to borrow the words of Rémy Cabrillac.

Dr Djoleen Moya (Université catholique de Lyon) is the author of the second article Vers une redéfinition de l'office du juge en matière de règles de conflit de lois ? (Towards a redefinition of the obligation for a judge to apply choice-of-law rules?). Dr Moya is continuing the reflection of her doctoral work *L'autorité des règles de conflit de loi – Réflexion sur l'incidence des considérations substantielles*, recently published. The abstract reads as follows:

The latest developments in matters of divorce, both in domestic law and in private international law, have largely renewed the question of the obligation for a judge to apply choice-of-law rules. Traditionally, the Cour de cassation considers that in matters of divorce, judges must apply, if necessary ex officio, the applicable conflict rule, because unwaivable rights are concerned. However, this solution is under discussion. First, the qualification of divorce as an unwaivable right is questionable, especially since the admission of a purely private divorce by mutual consent in French law. But above all, the Europeanisation of the applicable choice-of-law rules seems likely to call for a new definition the judges' procedural obligations. If we add to this the recent reorientation of the Cour de cassation's position and the solutions stated in the draft Code of Private of International Law, the question undoubtedly calls for a reassessment.

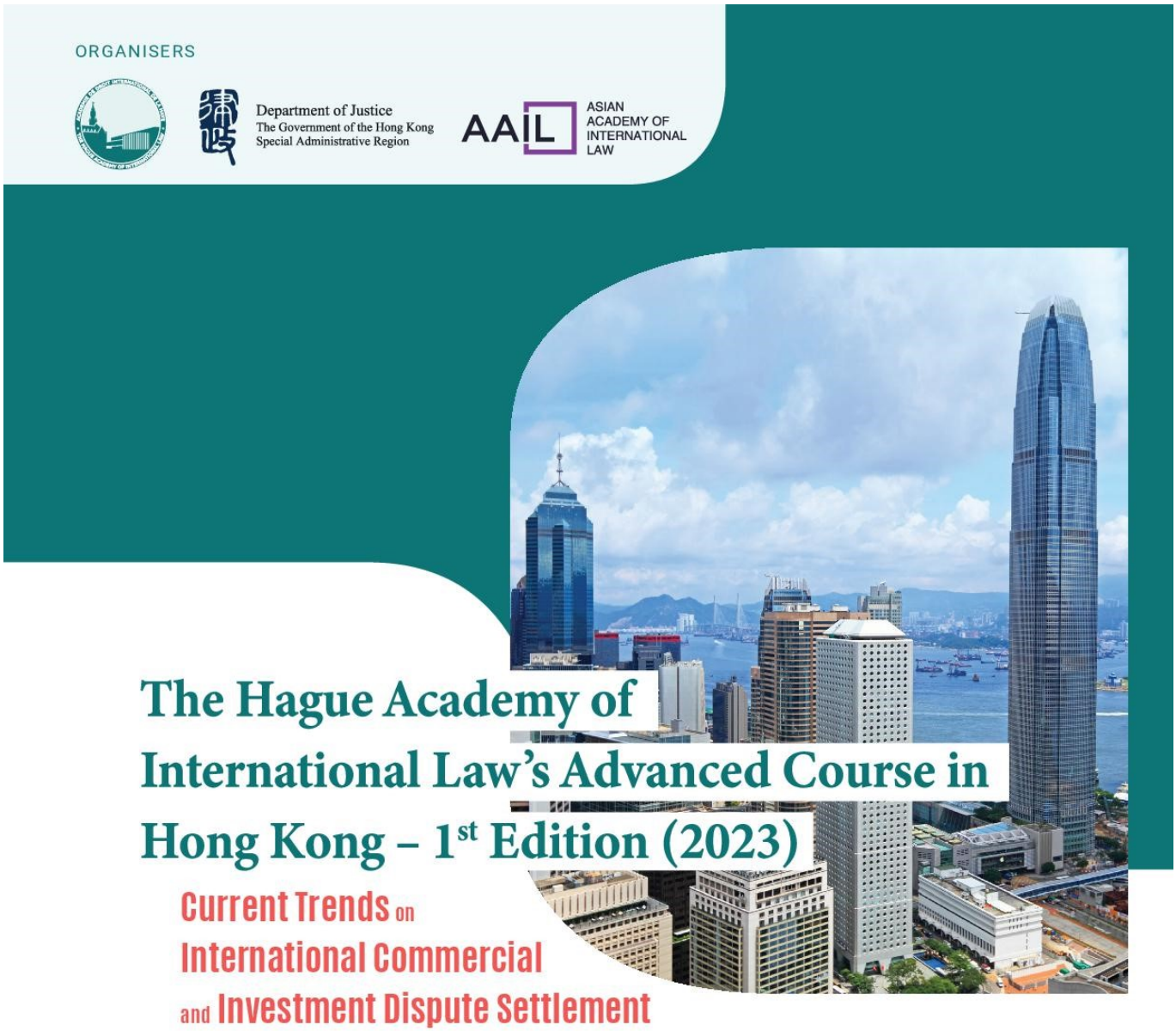
The third article is authored by Prof. Sara Tonolo (Università degli Studi di Padova) and deals with Les actes de naissance étrangers devant la Cour européenne des droits de l'homme – à propos de l'affaire *Valdís Fjölnisdóttir et autres c/ Islande* (Foreign birth certificates before the European Court of Human Rights – about the *Valdís Fjölnisdóttir and others v/ Iceland* case). The abstract reads as follows:

The European Court of Human Rights ruled on the recognition of the filiation status within surrogacy in the Valdís Fjölnisdóttir and others v. Iceland case.

This perspective leaves many questions unanswered and prompts further reflection, particularly with regard to the role that private international law can play in the protection of human rights, in the context of the difficult balance between the protection of the right to private and family life and the margin of appreciation reserved to member states.

The full table of contents is available here.

Application Now Open: The Hague Academy of International Law's Advanced Course in Hong Kong – 1st Edition (2023)



The first edition of the **HAIL Advanced Courses in Hong Kong,** organised in cooperation with with the Asian Academy of International Law and (AAIL) and the Hong Kong Department of Justice, will take place on **11-15 December 2023** with a focus on "**Current Trends on International Commercial and Investment Dispute Settlement**".

For this special programme, the Secretary-General of The Hague Academy of International Law (Professor Jean-Marc Thouvenin) has invited **leading academics and practitioners** from around the world to Hong Kong, including **Diego P. Fernández Arroyo** (Science Po, Paris), **Franco Ferrari** (New York University), **Natalie Morris-Sharma** (Attorney-General's Chambers, Singapore), **Matthias Weller** (University of Bonn) and **Judge Gao Xiaoli** (Supreme People's Court, China), who will deliver **five expert lectures** on:

Lecture 1: ‘The United Nations Convention on International Settlement Agreements Resulting from Mediation’ (Natalie Morris-Sharma)
Lecture 2: ‘Investor-State Dispute Settlement’ (Diego P. Fernández Arroyo)
Lecture 3: ‘International Commercial Arbitration’ (Franco Ferrari)
Lecture 4: , ‘Settlement of International Disputes before Domestic Courts’ (Matthias Weller)
Lecture 5: ‘Latest Developments of Dispute Resolution in China’ (Judge Gao Xiaoli)

This course is **free of charge**. However, full attendance is mandatory. Interested candidates are invited to send the completed application form to events@aail.org **by 13 October 2023**. All applications are subject to review. Succesful applicants will receive email confirmation by October 31. Registered participants will have **pre-course access** to the **HAIL e-learning platform** that provides reading materials prepared by the lecturers. A **certificate of attendanc**e will be awarded to participant with a perfect attendance record.

For **further information** provided by the organisers, please refer to the attached HAIL eFlyer and application form.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2023: Abstracts

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

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

C. Budzikiewicz/K. Duden/A. Dutta/T. Helms/C. Mayer: **The European Commission's Parenthood Proposal – Comments of the Marburg Group**

The Marburg Group – a group of German private international law scholars – reviewed the European Commission's Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. The Group welcomes the initiative of the Commission and embraces the overall structure of the Parenthood Proposal. Nevertheless, it suggests some fundamental changes, apart from technical amendments. The full article-by-article comments of the Group with redrafting suggestions for the Commission Proposal are available at www.marburg-group.de. Building on the comments, the present article authored by the members of the Marburg Group focuses on the main points of critique and considers the present state of discussion on the proposed Regulation.

U.P. Gruber: **A plea against ex post-adaptation of spousal inheritance rights**

Adaptation is recognized as a tool to eliminate the lack of coordination between the provisions of substantive law derived from different legal systems. According to a widespread view, adaption is very often necessary with regard to the spouse's share in the deceased's estate, namely if the matrimonial property regime and questions relating to succession are governed by different laws. However, in this article, the author takes the opposite view. Especially in light of the ECJ's classification of paragraph 1371(1) BGB as a provision dealing with succession, there are new solutions which render ex post adaptations superfluous.

M. Mandl: **Apparent and virtual establishments reflected through Art. 7 No. 5 Brussels Ia Regulation and Art. 19 (2) Rome I Regulation**

The Federal Court of Justice (Bundesgerichtshof – BGH) has ruled that a dispute has the required connection to the operation of an (existing) establishment pursuant to Article 7 (5) Brussels Ia Regulation if the business owner operates an internet presence that gives the appearance of being controlled by this

establishment instead of the company's central administration and the contract in dispute was concluded via this internet presence. This decision provides an opportunity to examine the prerequisites and legal consequences of apparent establishments and so-called virtual establishments (internet presences) from a general perspective, both in the context of Article 7 (5) Brussels Ia Regulation and in connection with Article 19 (2) Rome I Regulation.

D. Nitschmann: **The consequences of Brexit on Civil Judicial Cooperation between Germany and the United Kingdom**

The United Kingdom's withdrawal from the European Union has far-reaching consequences for international civil procedure law. This is exemplified by the decisions of the Higher Regional Court of Cologne for the international service of process. Since the European Regulation on the Service of Documents no longer applies to new cases, the Brexit leads to a reversion to the Hague Service Convention and the German-British Convention regarding Legal Proceedings in Civil and Commercial Matters. Of practical relevance here is, among other things, the question of whether and under what conditions direct postal service remains permissible.

R.A. Schütze: **Security for costs of english plaintiffs in Austrian litigation**

The judgment of the Austrian Supreme Court (Oberster Gerichtshof – OGH) of 29 March 2022 deals with the obligation of English plaintiffs to provide security for costs according to sect. 57 Austrian Code of Civil Procedure. The principle stated in para. 1 of this section is that plaintiffs of foreign nationality have to provide security for costs. But an exception is made in cases where an Austrian decision for costs can be executed in the country of residence of the plaintiff.

The OGH has found such exception in the Hague Convention 2005 on Choice of Court Agreements. As the United Kingdom has, on 28 September 2020, declared the application of the Hague Convention 2005 for the United Kingdom, the Convention is applicable between Austria and the United Kingdom despite the Brexit. The Hague Convention opens the possibility to recognition and execution of judgments rendered under a choice of court agreement including decisions on

costs.

Th. Garber/C. Rudolf: **Guardianship court authorisation of a claim before Austrian courts ¬– On international jurisdiction and applicable law for the grant of a guardianship court authorization**

The Austrian court has requested court approval for the filing of an action by a minor represented by the parents. The international jurisdiction for the granting of a guardianship court authorisation is determined according to the Brussels II-bis Regulation or, since 1.8.2022, according to the Brussels II-ter Regulation. In principle, the court competent to decide on the action for which authorization by the guardianship court is sought has no corresponding annex competence for the granting of the authorization by the guardianship court: in the present case, the Austrian courts cannot therefore authorize the filing of the action due to the lack of international jurisdiction. If an Austrian court orders the legal representative to obtain the authorization of the guardianship court, the courts of the Member State in which the child has his or her habitual residence at the time of the application have jurisdiction. In the present case, there is no requirement for approval on the basis of the German law applicable under Article 17 of the Hague Convention 1996 (§ 1629 para 1 of the German Civil Code). The Cologne Higher Regional Court nevertheless granted approval on the basis of the escape clause under Article 15 para 2 of the Hague Convention 1996. In conclusion, the Cologne Higher Regional Court must be agreed, since the escape clause can be invoked to protect the best interests of the child even if the law is applied incorrectly in order to solve the problem of adaptation.

M. Fornasier: **The German Certificate of Inheritance and its Legal Effects in Foreign Jurisdictions: Still Many Unsettled Issues**

What legal effects does the German certificate of inheritance („Erbschein“) produce in other Member States of the EU? Is it a reliable document to prove succession rights in foreign jurisdictions? More than one decade after the entry into force of the European Succession Regulation (ESR), these questions remain, for the most part, unsettled. In particular, commentators take differing views as to whether the Erbschein, being issued by the probate courts regardless of

whether the succession is contentious or non-contentious, constitutes a judicial decision within the meaning of Article 3(1)(g) ESR and may therefore circulate in other Member States in accordance with the rules on recognition under Articles 39 ESR. This article deals with a recent ruling by the Higher Regional Court of Cologne, which marks yet another missed opportunity to clarify whether the Erbschein qualifies as a court decision capable of recognition in foreign jurisdictions. Moreover, the paper addresses two judgments of the CJEU (C-658/17 and C-80/19) relating to national certificates of inheritance which, unlike the German Erbschein, are issued by notaries, and explores which lessons can be learned from that case-law with regard to certificates of inheritance issued by probate courts. In conclusion, it is submitted that, given the persisting uncertainties affecting the use of the Erbschein in foreign jurisdictions, the European Certificate of Succession provided for by the ESR is better suited for the settlement of cross-border successions.

E. Vassilakakis/A. Vezyrtzi: **Innovations in International Commercial Arbitration – A New Arbitration Act in Greece**

On 4.2.2023 a new Arbitration Act came into effect in Greece. It was approved by means of Law No. 5016/2023 on international commercial arbitration, and was enacted in order to align the regime of international commercial arbitration with the revision of the UNCITRAL Model Law on International Commercial Arbitration adopted in 2006 (hereinafter the revised Model Law). The new law contains 49 arbitration-related provisions and replaces the Law No. 2735/1999 on international commercial arbitration, while domestic arbitration continues to be regulated by Art. 867–903 of the Greek Code of Civil Procedure (hereinafter grCCP). A reshaping of Art. 867 ff. grCCP was beyond the "mission statement" of the drafting Committee.1 Besides, it should also be associated with a more extensive and, in consequence, time-consuming reform of procedural law. Hence, the dualist regime in matters of arbitration was preserved.

Pursuant to Art. 2, the new law incorporates on the one hand the provisions of the revised Model Law and on the other hand the latest trends in international arbitration theory and practice. Therefore, it is not confined to a mere adjustment to the revised Model Law, but also includes several innovative provisions that merit a brief presentation.

Notifications:

C. Rüsing: Dialogue International Family Law, 28th – 29th April, Münster, Germany.

Seminar Report on Personal identity and status continuity – a focus on name and gender in the conflict of laws

Written by Thalia Kruger (University of Antwerp) and Laura Carpaneto (University of Genoa)

On 1 June 2023 the European Law Institute (ELI) and the Swiss Institute of Comparative Law (SICL) held the third session of a conference on personal identity and status continuity. The focus of this third session was on names and gender in the conflict of laws. The programme included recent amendments to Swiss legislation, the portability and recognition of names, and new gender statuses in private international law.

The conference, including a screening of the film 'The Danish Girl' (Tom Hooper, 2015), illustrated the importance of gender and names as part of people's identity, beyond the law. Names can be essential for people to identify with their religious group. In central and southern Africa, the use of names taken from people's own language instead of English names has been part of the black consciousness movement. The film showed the struggle of a person to change her sex despite the absence of any legal framework. And yet, Lukas Heckendorn Urscheler (director of the SICL) and Martin Föhse (University of St Gallen) showed that the societal issues turn into legal ones. Sharon Shakargy (University

of Jerusalem) explained that the law is important when individuals have to use identity cards, credit cards, licences, certificates and the like. The law struggles to provide the most appropriate solutions, respecting the rights of all involved and ensuring portability of gender and names.

When talking about **rights**, there is a blurring, or at least a lack of terminological clarity, between human rights and fundamental rights. The free movement of persons in the EU is also classified as a fundamental right. Giulia Rossolillo (University of Pavia) compared the approaches of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) with respect to the recognition and continuation of names. She showed that the solutions reached by the two courts can be quite different, as a result of their different approaches. The ECtHR uses the (human) right to the respect of private and family life protected by Article 8 of the European Convention of Human Rights (ECHR) while the CJEU uses the (fundamental) right to free movement of EU citizens. Moreover, the ECtHR is not so much concerned with the cross-border aspect, but focuses on the right to a person's identity. The CJEU emphasises continuity of name in cross-border contexts. For instance, the facts in the ECtHR case Künsberg Sarre v. Austria and the CJEU case Sayn-Wittgenstein were quite similar, dealing with the Austrian prohibition on the use of noble titles. The ECtHR found that Austria, but allowing for a long time the use of the noble 'von' and then disallowing it, violated the applicant's rights under Article 8 of the ECHR. The CJEU, on the other hand, found the obstacle to the right to free movement in the EU to be justified.

Different approaches to rights can also result in conflicting rights, i.e. the society's right to equality (no noble titles) versus the individuals' rights to continuity of name. Other rights that come into play, include the LGBTIQ+ rights and rights of women (a gender logic, Ilaria Pretelli SICL), and the rights linked to the free market (economic logic), societal rights, and the right to self-determination and autonomy, such as the right to freely choose and change a name.

Johan Meeusen (University of Antwerp) considered the **specific approach** of the European Commission to matters of gender, drawing lessons from the Commission's Parenthood Proposal, Com(2022) 695. The lessons are that the Commission uses PIL to pursue its political ambition to advance non discrimination and LGBTIQ rights in particular; is on a mission to achieve status

continuity; invests in legal certainty and predictability; approaches status continuity first and foremost from a fundamental rights perspective; acts within the limits of the Union's competence but tries to maximize its powers; ambitious with an eye for innovation…but within limits.

Anatol Dutta (Ludwig Maximilians University of Munich) explained the different waves of changes in gender legislation nationally. He indicated that private international law influences people's status differently depending on whether it considers sex registration and sex change as substantive or procedural. This would determine whether the lex fori or lax causae is used. Even when agreeing on a classification as substantive law, different legal systems use different connecting factors. Nationality is often used, but sometimes the individual is given a choice between the law of the habitual residence and nationality. Yet, public policy can still play a role (bringing back the ideas of human rights, discussed earlier).

All in all, it is becoming increasingly clear that the idea that private international law is a neutral and merely technical field of law is nothing more than a fiction. Besides the different right and approaches at play, as discussed above, feminist approaches (set out by Mirela Zupan, University of Osijek) also influence connecting factors and recognition rules.

Recognition and Public Certification of German Ipso Iure Converted Pay Paternity Into Paternity With Civil Status Effects Does Not Violate Swiss Ordre

Public

This post has been written by Anna Bleichenbacher, MLaw, University of Basel, Nievergelt & Stoehr Law and Notary Office (Switzerland).

The Swiss Federal Supreme Court (Bundesgericht) published a leading decision on recognition and public certification of foreign conversions of ancient law pay paternities (Zahlvaterschaften) into paternities with civil status effects on June 15th, 2023 (decision of Swiss Federal Supreme Court 5A_81/2022 of May 12th, 2023).

Respondent in the present case was a German citizen, living in Germany (**respondent**). She was born out of wedlock in 1967 and acknowledged by her father (**father**) in the same year, both in Germany. The acknowledgement included only a pay paternity. A pay paternity was a legal institution with an obligation to pay maintenance. The pay paternity did not include a legal child relationship recorded in the civil register.

According to the German law on the legal status of children born out of wedlock of August 19th, 1969 (**law on children born out of wedlock**), a father who has acknowledged his obligation to pay maintenance for a child in a public deed or an enforceable debt certificate, is seen as a legal father to child, recorded in the civil register, after the enforcement of the law on children born out of wedlock. In short, Germany knows the *ipso iure* conversion of the pay paternity into the paternity with civil status effects.

Switzerland also knows the legal institution of the pay paternity. However, Swiss law did not provide for *ipso iure* conversion of the pay paternity into a paternity with civil status effects.

The respondent's father was a Swiss citizen, living in Switzerland. In 2016, he died, not only leaving behind the respondent, but also his wife and a common daughter (born in wedlock; **appellants**). In 2017, the respondent appealed to the Swiss civil status authorities, claiming the registration and public certification of the birth in Germany as well as the legal child relationship to the father. After exhaustion of the intra-cantonal appeal process, the appellants reach the Swiss

Federal Supreme Court with two main arguments against the registration and public certification of the respondent's legal child relationship to the father:

(1) Applicability of the Swiss Federal Act on Private International Law (PILA) in the present case

The PILA entered into force on January 1st, 1989. The appellants claimed that recognition and enforcement in the present case are governed by the respective law in force at the time of the respondent's birth in 1967. This would be the Federal Act on Civil Law Relations of Settled Persons and Residents of June 25th, 1891. The Swiss Federal Supreme Court made clear that the date of the foreign decision or other legal act (i.e. the acknowledgment of the child) is irrelevant. The time at which the question of recognition and enforcement arises is decisive.

Therefore, the PILA is applicable for the present case.

(2) Violation of the Swiss *Ordre Public* in case of recognition and public certification

The PILA supports the recognition and enforcement of foreign decisions and other legal acts by the principle "*in favorem recognitionis*". A foreign child acknowledgment is recognized in Switzerland if it is valid in form and content in one of the jurisdictions named in Art. 73 para. 1 PILA. These include the state of the child's habitual residence, the child's state of citizenship or the state of domicile or of citizenship of the mother or the father.

As mentioned above, the legal child relationship between the respondent and the father is based on the acknowledgment of the father in 1967 and the *ipso iure* conversion of the pay paternity into a paternity with civil status effects. The validity of this conversion in Germany has been proven by German civil status documents of the respondent.

Since Germany is a jurisdiction in the sense of Art. 73 para. 1 PILA, and the child acknowledgment is valid there, Switzerland will only refuse the recognition and public certification in case of violation of Swiss *Ordre Public*.

The Swiss Federal Supreme Court stated that, just because Swiss law does not provide for *ipso iure* conversion of the pay paternity, a German legal act on paternity valorization does not violate Swiss *Ordre Public*. This is mainly because

both jurisdictions aim for a similar purpose, namely the equality of children born out of wedlock. In an *obiter dictum*, the Swiss Federal Supreme Court even doubts the conformity of Swiss regulation with fundamental rights.

In summary, the recognition and public certification of a German *ipso iure* converted pay paternity into a paternity with civil status effects does not violate the Swiss *Ordre Public*. In application of the PILA, Swiss civil status authorities are obliged to carry out the post-certification of such legal child relationship.

No Recognition in Switzerland of the Removal of Gender Information according to German Law

This note has been kindly provided by Dr. Samuel Vuattoux-Bock, LL.M. (Kiel), University of Freiburg (Germany).

On 8 June 2023, the Swiss Federal Supreme Court (Bundesgericht) pronounced a judgment on the removal of gender markers of a person according to German Law and denied the recognition of this removal in Switzerland.

Background of the judgment is the legal and effective removal 2019 of the gender information of a person with swiss nationality living in Germany. Such removal is possible by a declaration of the affected person (accompanied by a medical certificate) towards the Registry Office in accordance with Sect. 45b para. 1 of the German Civil Status Act (*Personenstandsgesetz*, PStG). The claimant of the present judgment sought to have the removal recognized in Switzerland and made a corresponding application to the competent local Swiss Office of the Canton of Aargau. As the Office refused to grant the recognition, the applicant at the time filed a successful claim to the High Court of the Canton of Aargau, which ordered the removal of the gender markers in the Swiss civil and birth register.

The Swiss Federal Office of Justice contested this decision before the Federal Supreme Court. The highest federal Court of Switzerland revoked the judgment of the High Court of the Canton of Aargau and denied the possibility of removing gender information in Switzerland as it is not compatible with Swiss federal law.

According to Swiss private international law, the modification of the gender indications which has taken place abroad should be registered in Switzerland according to the Swiss principles regarding the civil registry (Art. 32 of the Swiss Federal Act on the Private International Law, IPRG). Article 30b para. 1 of the Swiss Civil Code (ZGB), introduced in 2022, provides the possibility of changing gender. The Federal Supreme Court notes that the legislature explicitly refused to permit a complete removal of gender information and wanted to maintain a binary alternative (male/female). Furthermore, the Supreme Court notes that the legislature, by the introduction in 2020 of Art. 40a IPRG, neither wanted to permit the recognition of a third gender nor the complete removal of the gender information.

Based on these grounds, the Federal Supreme Court did not see the possibility of the judiciary to issue a judgment *contra legem*. A modification of the current law shall be the sole responsibility of the legislature. Nevertheless, the Supreme Court pointed out that, due to the particular situation of the affected persons, the European Court of Human Rights requires a continual review of the corresponding legal rules, particularly regarding social developments. The Supreme Court, however, left open the question of whether the recognition of the removal of gender information could be a violation of Swiss public policy. The creation of a limping legal relationship (no gender marker in Germany; male or female gender marker in Switzerland) has not been yet addressed in the press release.

Currently, only the press release of the Federal Supreme Court is available to the public (in French, German and Italian). As soon as the written grounds will be accessible, a deeper comment of the implications of this judgment will be made on ConflictOfLaws.

Change of gender in private international law: a problem arises between Scotland and England

Written by Professor Eric Clive

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

At present the rules on obtaining a gender recognition certificate, which has the effect of changing the applicant's legal gender, are more or less the same in England and Wales, Scotland and Northern Ireland. The Scottish Bill would replace the rules for Scotland by less restrictive, de-medicalised rules. An unfortunate side effect is that Scottish certificates would no longer have automatic effect by statute in other parts of the United Kingdom. The United Kingdom government could remedy this by legislation but there is no indication that it intends to do so. Its position is that it does not like the Scottish Bill.

One of the reasons given by the Secretary of State for making the order is that having two different systems for issuing gender recognition certificates within the United Kingdom would cause serious problems. A person, he assumes, might be legally of one gender in England and another in Scotland. There would therefore be difficulties for some organisations operating at United Kingdom level – for example, in the fields of tax, benefits and pensions. This immediately strikes a private lawyer as odd. Scotland and England have had different systems in the law of persons for centuries – in the laws on marriage, divorce, legitimacy, incapacity and other matters of personal status – and they have not given rise to serious problems. This is because the rules of private international law, even in the absence of statutory provision, did not allow them to.

In a paper on *Recognition in England of change of gender in Scotland: a note on private international law aspects*[1] I suggest that gender is a personal status, that there is authority for a general rule that a personal status validly acquired in one country will, subject to a few qualifications, be recognised in others and that there is no reason why this rule should not apply to a change of gender under the new Scottish rules.

The general rule is referred to at international level. In article 10 of its Resolution of September 2021 on *Human Rights and Private International Law*, the Institute of International Law says that:

> *Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person concerned has had a sufficient connection with the State of origin … as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ….*

So far as the laws of England and Scotland are concerned, there are authoritative decisions and dicta which clearly support such a general rule. Cases can be found in relation to marriage, divorce, nullity of marriage, legitimacy and legitimation. A significant feature is that the judges have often reasoned from status to particular rules. It cannot be said that there are just isolated rules for particular life events. And the rules were developed at common law, before there were any statutory provisions on the subject.

Possible exceptions to the general rule – public policy, no sufficient connection, contrary statutory provision, impediment going to a matter of substance rather than procedure – are likely to be of little if any practical importance in relation to the recognition in England of changes of gender established under the proposed new Scottish rules.

If the above arguments are sound then a major part of the Secretary of State's reasons for blocking the Scottish Bill falls away. There would be no significant problem of people being legally male in Scotland but legally female in England, just as there is no significant problem of people being legally married in Scotland but unmarried in England. Private international law would handle the dual system, as it has handled other dual systems in the past. Whether the Supreme Court will get an opportunity to consider the private international law aspects of

the case remains to be seen: both sides have other arguments. It would be extremely interesting if it did.

From the point of view of private international law, it would be a pity if the Secretary of State's blocking order were allowed to stand. The rules in the Scottish Bill are more principled than those in the Gender Recognition Act 2004, which contains the existing law. The Scottish Bill has rational rules on sufficient connection (essentially birth registered in Scotland or ordinary residence in Scotland). The 2004 Act has none. The Scottish Bill has a provision on the recognition of changes of gender under the laws of other parts of the United Kingdom which is drafted in readily understandable form. The corresponding provisions in the 2004 Act are over-specific and opaque. The Scottish Bill has a rule on the recognition of overseas changes of gender which is in accordance with internationally recognised principles.

The 2004 Act has the reverse. It provides in section 21 that: A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. This is alleviated by provisions which allow those who have changed gender under the law of an *approved overseas country* to use a simpler procedure for obtaining a certificate under the Act but still seems, quite apart from any human rights aspects, to be unfriendly, insular and likely to produce avoidable difficulties for individuals.

[1] Clive, Eric, Recognition in England of change of gender in Scotland: A note on private international law aspects (May 30, 2023). Edinburgh School of Law Research Paper No. 2023/06, Available at SSRN: https://ssrn.com/abstract=4463935 or http://dx.doi.org/10.2139/ssrn.4463935