‘Giustizia consensuale’: A New Law Journal on Consensual Justice in Its Many Nuances and Forms

In recent years, the debate surrounding consensual justice and party autonomy has received increasing attention in the national and international arenas and has raised a broad array of questions. In the pressing need to observe this phenomenon from different perspectives lies the rationale behind a newly founded biannual journal, *Giustizia consensuale*. The journal, founded and directed by Prof. Silvana Dalla Bontà and Prof. Paola Lucarelli, features contributions in both Italian and English.

By adopting an interdisciplinary and holistic approach, the journal aims to investigate the meaning of consensual justice, its relation with judicial justice, and the potential for integrating – rather than contrasting – these two forms of justice. This investigation is premised on the relationship between justice and private autonomy as well as forms of integrative, participatory, and restorative justice. By being particularly suited for meeting the needs of an increasingly complicated and multi-faceted society, these forms of justice ultimately promote social cohesion and reconciliation. Against this backdrop, *Giustizia consensuale* strives to make a valid contribution to the discourse on conflict and the meaning of justice by fostering an interdisciplinary dialogue which encompasses both theory and practice.

The first issue of *Giustizia Consensuale* has just been released and it features:

Silvana Dalla Bontà (University of Trento), *Giustizia consensuale* (‘Consensual Justice – A Foreword’; in Italian)

Paola Lucarelli (University of Firenze), *Mediazione dei conflitti: una spinta generosa verso il cambiamento* (*Conflict Mediation: A Push for Cultural Change*; in Italian)

From the Italian Recovery and Resilience Plan to the guidelines of the Italian Ministry of Justice, the urgency of a reform to strengthen out-of-court dispute resolution procedures clearly emerges. Recovery and resilience become

fundamental objectives. Conflict mediation is the path chosen to achieve social cohesion and reconciliation. Promoting and strengthening this dispute resolution mechanism is important not only to reduce the judicial backlog, but also to empower the parties to self-tailor the solution of their conflict with the assistance of their attorneys. By fostering responsibility, self-determination, awareness and trust, mediation makes citizens and professionals protagonists in the process of change that combines judicial and consensual justice.

Francesco P. Luiso (University of Pisa), *La «proposta» del mediatore* (*The Mediator's 'Dispute Settlement Offer'*; in Italian)

The Italian Legislative Decree No. 28 of 4 March 2010 – implementing the Directive 2008/52/EC – enables, in certain conditions, the mediator to submit a settlement offer to the conflicting parties. In the case that the mediation fails, the judge, in the subsequent court proceedings, might sanction the non-accepting party when allocating procedural costs. Nonetheless, the aforementioned Legislative Decree does not compel the mediator to submit such a settlement offer. However, the mediation rules of some institutions oblige the mediator to make a settlement offer to the parties. Against this background, when ordering the parties to attempt mediation, some courts require them to file their mediation application with a mediation institution allowing the mediator to submit a settlement offer to the parties. In this article, the author argues that these court orders are against the above-mentioned Legislative Decree. In fact, this does not permit the judge to make any particular determination regarding the mediation procedure, the parties, or the mediator themselves. Furthermore, the author underlines how the judge could never take the mediator's settlement offer into consideration in the pending proceedings. While the judge grounds their decision on what is right and what is wrong, the mediator's settlement offer revolves around the needs and interests of the conflicting parties, thus impeding any comparison between their contents.

Antonio Briguglio (University of Rome 'Tor Vergata'), *Conciliazione e arbitrato. Conciliazione nell'arbitrato. Appunti sparsi fra diritto, psicologia e prassi* (*Conciliation and Arbitration. Conciliation in Arbitration. Notes on Law, Psychology, and Practice*; in Italian)

The article deals with the relationship between conciliation and arbitration within the overall ADR system. It first analyses the conceptual, legal and systematic

differences between conciliation and arbitration, with references to some areas of partial overlap (such as, for example, the one now opened by the Singapore Convention of 2019). The author then takes into consideration the parties' and adjudicators' different approaches to conciliation both in in-court proceedings and arbitration. Subsequently, the attention is focused on the attempt of conciliation in the course of the arbitral proceedings; on the so-called multi-step clauses that provide for a mandatory attempt of conciliation before the commencement of arbitration; and on the 'award by consent' in the practice of international arbitration.

Neil Andrews (University of Cambridge), *Procedure, Party Agreement, and Contract* (in English)

In this piece the author considers three points of interaction between agreement and procedure. (1) The parties might consensually choose the applicable procedure, notably the choice between (a) judicial proceedings and (b) arbitration. If they have chosen (a), the parties might stipulate which court and in which jurisdiction the matter will be litigated. Having chosen instead (b) arbitration, the parties will normally make explicit the 'seat' (London, Milan, New York, etc) and the size of the arbitral tribunal (one, three, five, etc). Also falling within (1), there is possibility that the parties will agree to impose on themselves preliminary 'negotiation agreements' and/or mediation agreements. (2) The parties can take a further step and specify or modify the elements of the relevant formal process (whether that process is court proceedings or arbitration). This modification of the default elements of the procedure will involve a 'bespoke' or *ad hoc* agreement, rather than simply adopting national or institutional procedural rules. However, this is less common. Most parties adopt without modification the relevant procedure 'off the peg'. (3) Settlement is the consensual disposal or narrowing of the dispute. In practice, this is the most important way in which agreement and procedure interact. Settlement can occur before or after court or arbitration proceedings have commenced. It is also possible that settlement might occur even after the first-instance judgment has been obtained, for example, when appeal or enforcement proceedings are pending.

Margherita Ramajoli (University of Milan), *Per una giustizia amministrativa alternativa con particolare (anche se non esclusivo) riguardo alle transazioni pubblicistiche* (*For an Alternative Administrative Justice: Focusing on Public Dispute Settlements*; in Italian)

The use of alternative dispute resolution mechanisms in public interest litigation brings both substantial and procedural advantages. They may improve the quality of public decision-making, foster the adoption of shared solutions, re-establish dialogue between parties whose relations are bound to last over time, contribute to moralisation by making clear agreements otherwise not intended to emerge, and finally, make the administrative judicial review more efficient by directing the demand for justice elsewhere. In addition, alternative dispute resolution mechanisms are in tune with the current changes in administrative law; there is a deep link between *droit souple* and *justice douce*, between soft law and ADR, between non-traditional substantive law and alternative administrative judicial review. However, alternative justice is a phenomenon not yet sufficiently developed in public litigation, because of some debated issues in its use. Specifically, it is not easy to harmonise the very purpose of ADR to definitively settle a dispute with the perpetual protection of public interest institutionally entrusted to administrative authorities, as demonstrated by how the latter use the settlement. The introduction of a framework law on ADR in public interest litigation could solve some of the most dramatic issues, naturally maintaining the indispensable flexibility.

Teresa Arruda Alvim (Pontifícia Universidade Católica de São Paulo) and **Márcio Bellocchi** (Universidade de São Paulo), *Mediazione. Il frutto di un buon esercizio del diritto* (*Mediation. The Result of a Mindful Exercise of Rights*; in Italian)

In the last few decades, even civil law jurisdictions have witnessed an increase in the promotion of alternative dispute resolution. Among various reasons for its adoption, ADR affords the parties the possibility to self-tailor a solution to their conflict while significantly diminishing the case overload of the judiciary. Nevertheless, just as varied are the obstacles to the diffusion of ADR, ranging from the lack of preparation of mediators to the traditional adversarial approach of attorneys. The authors examine each of these profiles in the perspective of the Brazilian legal system, analysing the reasons behind the promotion of ADR, its practical implications, and the future outlook on a multi-door justice.

Colin Rule (University of Stanford), *Reinventing Justice with Online Dispute Resolution* (in English)

Online Dispute Resolution (ODR) is the study of how to use technology to help

parties resolve their disputes. Originally created to help e-Commerce companies build trust with their users, ODR is now being integrated into the courts to expand access to justice and reduce costs. With the expansion of artificial intelligence and machine learning, ODR has the potential to play a major role in the justice systems of the future, but there are many questions that still need to be answered. This article outlines the need for ODR, provides a short history of its development, and describes some of the challenges that could accompany its expansion.

Silvana Dalla Bontà (University of Trento), *Una giustizia «co-esistenziale»* online *nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i consumatori (‘Co-Existential’ Online Justice within the EU Judicial Area? Some Constructive Criticism on the Consumer ADR/ODR Package*; in Italian)

Since the 1990s, the European Community, now the European Union, has shown particular regard to the matter of extra-judicial settlement of civil and commercial disputes. The European Union recognized the added value brought by alternative dispute resolution mechanisms in answering the problems posed by cross-border litigation and thus facilitating the creation of the Single Market. The Community's attention first focused on consumer disputes (Recommendations 98/257/EC and 2001/310/EC); it subsequently extended its reach to all civil and commercial disputes (Directive 2008/52/EC); ultimately, it reverted its focus back to consumer disputes with the Directive on consumer Alternative Dispute Resolution (ADR) and the Regulation on consumer Online Dispute Resolution (ODR), both adopted in 2013. This article proposes an in-depth analysis of the objectives, the scope, and the application of the two above-mentioned legal acts composing the so-called ADR/ODR package for consumers, highlighting its strengths and weaknesses. In particular, the discussion focuses on the ODR Platform for the resolution of consumer-to-business disputes launched by the European Union in 2016. In reviewing its functioning through the statistical data collected by the European Union, the author inquires whether the ODR Platform provides for the creation of a ‘co-existential justice’ in the European legal area or whether other complementary instruments should be implemented to grant a high standard of protection for consumers as the European Treaties impose.

The Latest Development on Anti-suit Injunction Wielded by Chinese Courts to Restrain Foreign Parallel Proceedings

(This post is provided by Zeyu Huang, who is an associate attorney of Hui Zhong Law Firm based in Shenzhen. Mr. Huang obtained his LLB degree from the Remin University of China Law School. He is also a PhD candidate & LLM at the Faculty of Law in University of Macau. The author may be contacted at the e-mail address: huangzeyu@huizhonglaw.com)

When confronted with international parallel proceedings due to the existence of a competent foreign court having adjudicative jurisdiction, the seized foreign court located in common law jurisdictions seems to see it as no offence to Chinese courts by granting anti-suit injunctions to restrain Chinese proceedings. This is because the common law court believes that "An order of this kind [anti-suit injunction] is made in personam against a party subject to the court's jurisdiction by way of requiring compliance with agreed terms. It does not purport to have direct effect on the proceedings in the PRC. This court respects such proceedings as a matter of judicial comity". [1] However, the fact that the anti-suit injunction is not directly targeted at people's courts in the PRC does not prevent Chinese judges from believing that it is inappropriate for foreign courts to issue an anti-suit injunction restraining Chinese proceedings. Instead, they would likely view such interim order as something that purports to indirectly deprive the party of the right of having access to Chinese court and would unavoidably impact Chinese proceedings.

The attitude of Chinese courts towards the anti-suit injunction – a fine-tuning tool to curb parallel proceedings – has changed in recent years. In fact, they have progressively become open-minded to resorting to anti-suit injunctions or other similar orders that are issued to prevent parties from continuing foreign proceedings in parallel. Following that, the real question is whether and how anti-

suit injunction is compatible with Chinese law. Some argued that Article 100 of the PRC CPL provides a legal basis for granting injunctions having similar effects with anti-suit injunction at common law. [2] It provides that:

“The people’s court may upon the request of one party to issue a ruling to preserve the other party’s assets or compel the other party to perform certain act or refrain from doing certain act, in cases where the execution of the judgment would face difficulties, or the party would suffer other damages due to the acts of the other party or for other reasons. If necessary, the people’s court also could make a ruling of such preservative measures without one party’s application.” [3]

Accordingly, Chinese people’s court may make a ruling to limit one party from pursuing parallel foreign proceedings if such action may render the enforcement of Chinese judgment difficult or cause other possible damages to the other party.

In maritime disputes, Chinese maritime courts are also empowered by special legislation to issue maritime injunctions having anti-suit or anti-anti-suit effects. Article 51 of the PRC Maritime Special Procedure Law provides that the maritime court may upon the application of a maritime claimant issue a maritime injunction to compel the respondent to do or not to do certain acts in order to protect the claimant’s lawful rights and interests from being infringed. [4] The maritime injunction is not constrained by the jurisdiction agreement or arbitration agreement as agreed upon between the parties in relation to the maritime claim. [5] In order to obtain a maritime injunction, three requirements shall be satisfied – firstly, the applicant has a specific maritime claim; secondly, there is a need to rectify the respondent’s act which violates the law or breaches the contract; thirdly, a situation of emergency exists in which the damages would be caused or increased if the maritime injunction is not issued immediately. [6] Like the provision of the PRC CPL, the maritime injunction issued by the Chinese maritime court is mainly directed to mitigate the damages caused by the party’s behaviour to the other parties’ relevant rights and interests.

In Huatai P&C Insurance Corp Ltd Shenzhen Branch v Clipper Chartering SA, the Maritime Court of Wuhan City granted the maritime injunction upon the claimant’s application to oblige the respondent to immediately withdraw the anti-suit injunction granted by the High Court of the Hong Kong SAR to restrain the Mainland proceedings. [7] The Hong Kong anti-suit injunction was successfully sought by the respondent on the grounds of the existence of a valid arbitration agreement. [8] However, the respondent did not challenge the jurisdiction of the Mainland maritime court over the dispute arising from the contract of carriage of goods by sea. Therefore, the Maritime Court of Wuhan City held that the

respondent had submitted to its jurisdiction. As a result, the application launched by the respondent to the High Court of the Hong Kong SAR for the anti-suit injunction to restrain the Mainland Chinese proceedings had infringed the legitimate rights and interests of the claimant. In accordance with Article 51 of the PRC Maritime Special Procedure Law, a Chinese maritime injunction was granted to order the respondent domiciled in Greece to withdraw the Hong Kong anti-suit injunction (HCCT28/2017). [9] As the maritime injunction in the Huatai Property case was a Mainland Chinese ruling issued directly against the anti-suit injunction granted by a Hong Kong court, it is fair to say that if necessary Chinese people's court does not hesitate to issue a compulsory injunction "which orders a party not to seek injunction relief in another forum in relation to proceedings in the issuing forum". [10] This kind of compulsory injunction is also called 'anti-anti-suit injunction' or 'defensive anti-suit injunction'. [11]

When it comes to civil and commercial matters, including preserving intellectual property rights, the people's court in Mainland China is also prepared to issue procedural orders or rulings to prevent the parties from pursuing foreign proceedings, similar to anti-suit injunctions or anti-anti-suit injunction in common law world. In Guangdong OPPO Mobile Telecommunications Corp Ltd and its Shenzhen Branch v Sharp Corporation and ScienBiziP Japan Corporation, the plaintiff OPPO made an application to the seized Chinese court for a ruling to preserve actions or inactions.[12] Before and after the application, the defendant Sharp had brought tort claims arising from SEP (standard essential patent) licensing against OPPO by commencing several parallel proceedings before German courts, a Japanese court and a Taiwanese court. [13] In the face of foreign parallel proceedings, the Intermediate People's Court of Shenzhen City of Guangdong Province rendered a ruling to restrain the defendant Sharp from pursing any new action or applying for any judicial injunction before a Chinese final judgment was made for the patent dispute. [14] The breach of the ruling would entail a fine of RMB 1 million per day. [15] Almost 7 hours after the Chinese 'anti-suit injunction' was issued, a German 'anti-anti-suit injunction' was issued against the OPPO. [16] Then, the Shenzhen court conducted a court investigation to the Sharp's breach of its ruling and clarified the severe legal consequences of the breach. [17] Eventually, Sharp choose to defer to the Chinese 'anti-suit injunction' through voluntarily and unconditionally withdrawing the anti-anti-suit injunction granted by the German court. [18] Interestingly enough, Germany, a typical civil law country, and other EU countries have also seemingly taken a U-turn by starting to issue anti-anti-suit injunctions in

international litigation in response to anti-suit injunctions made by other foreign courts, especially the US court. [19]

In some other IP cases involving Chinese tech giants, Chinese courts appear to feel more and more comfortable with granting compulsory rulings having the same legal effects of anti-suit injunction and anti-anti-suit injunction. For example, in another seminal case publicized by the SPC in 2020, Huawei Technologies Corp Ltd ("Huawei") applied to the Court for a ruling to prevent the respondent Conversant Wireless Licensing S.A.R.L. ("Conversant") from further seeking enforcement of the judgment rendered by the Dusseldorf Regional Court in Germany. [20] Before the application, a pair of parallel proceedings existed, concurrently pending before the SPC as the second-instance court and the Dusseldorf Regional Court. On the same date of application, the German regional court delivered a judgement in favour of Conversant. Within 48 hours after receiving the Huawei's application for an anti-suit injunction, the SPC granted the injunction to prohibit Conversant from applying for enforcement of the German judgment; if Conversant failed to comply with the injunction, a fine (RMB 1 million per day) would be imposed, accumulating day by day since the date of breach. [21] Conversant applied for a reconsideration of the anti-suit injunction, and it was however rejected by the SPC eventually. [22] The SPC's anti-suit injunction against the German regional court's decision compelled both parties to go back to the negotiating table, and the dispute between the two parties striving for global parallel proceedings was finally resolved by reaching a settlement agreement. [23]

The SPC's injunction in Huawei v. Conversant is commended as the very first action preservation ruling having the "anti-suit injunction" nature in the field of intellectual property rights litigation in China, which has prematurely established the Chinese approach to anti-suit injunction in judicial practice. [24] It is believed by the Court to be an effective tool to curb parallel proceedings concurrent in various jurisdictions across the globe. [25] We still wait to see Chinese court's future approach in other civil and commercial matters to anti-suit injunction or anti-anti-suit injunction issued by itself as well as those granted by foreign courts.

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1. See Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd [2015] EWHC 811, para.144.
2. See Liang Zhao, 'Party Autonomy in Choice of Court and Jurisdiction Over

Foreign-Related Commercial and Maritime Disputes in China' (2019) 15 Journal of Private International Law 541, at 565.
3. See Article 100, para.1 of the PRC CPL (2017).
4. See Article 51 of the PRC Special Maritime Procedure Law (1999).
5. See Article 53 of the PRC Special Maritime Procedure Law (1999).
6. See Article 56 of the PRC Special Maritime Procedure Law (1999).
7. See Huatai Property & Casualty Insurance Co Ltd Shenzhen Branch v Clipper Chartering SA (2017) E 72 Xing Bao No.3 of the Maritime Court of Wuhan City.
8. See HCCT 28/2017 of the High Court of the Hong Kong SAR.
9. See (2017) E 72 Xing Bao No.3.
10. See Andrew S. Bell, Forum Shopping and Venue in Transnational Litigation (Oxford University Press 2003), at 196.
11. See ibid.
12. See (2020) Yue 03 Min Chu No.689-1.
13. See ibid.
14. See ibid.
15. See ibid.
16. See ibid.
17. See ibid.
18. See ibid.
19. See Greta Niehaus, 'First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration' Kluwer Arbitration Blog, 28 February 2021.
20. See Huawei Technologies Corp Ltd and Others v Conversant Wireless Licensing S.A.R.L. (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-I.
21. See ibid.
22. See Conversant Wireless Licensing S.A.R.L. v Huawei Technologies Corp Ltd and Others, (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-II.
23. See Case No.2 of the "10 Seminal Intellectual Property Right Cases before Chinese Courts", Fa Ban [2021] No.146, the General Office of the Supreme People's Court.
24. See ibid.
25. See ibid.

Third-party Funding and E-Justice in International Dispute Resolution – Jean Monnet Module Annual Conference – 20 July 2021, Università degli Studi, Milan [live streaming]

On July 20, 2021 (14.00 – 19.00), Università degli Studi, Milan will host (in streaming) the Annual Conference of the EU-funded project Jean Monnet Module on "Multilevel, Multiparty and Multisector Cross-Border Litigation in Europe".

The topic of this year – "Incentives and Challenges to Transnational Access to Justice" – will be addressed by distinguished panelists in two Round-Tables on, respectively, Third-party Funding in International Dispute Resolution and E-Justice in International Dispute Resolution.

The event is organized with the support of the Eramus+Programme of the European Union, the Centre of Research on European and Transnational Dispute Settlement (EUTraDiS), the European Court of Arbitration (CEA) and the Jean Monnet Chair on EU Health Legal Framework and Competition Law (EHCL).

Please find here the complete programme.

Registration is due by 15 July 2021, by completing and submitting this registration form (also referred to in the flyer).

For any information, please contact Prof. Albert Henke (albert.henke@unimi.it)

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2021: Abstracts

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

O. Remien: **The European Succession Regulation and the many questions of the European court practice – five years after entry into force**

After five years of application of the European Succession Regulation it is time to have a look at European court practice: The general connecting factor of habitual residence has somehow been addressed by the European Court of Justice (ECJ) in *E.E.*, but especially national court practice shows many interesting cases of the necessary overall assessment. Choice of law by the testator is particularly important and a notary should point not only at the present situation, but also at possible developments in the future. Estate planning has become more interesting. The legacy *per vindicationem* (*Vindikationslegat*, i.e. with *in rem* effect) recognized in *Kubicka* poses specific problems. The position of the surviving spouse under § 1371 BGB in German law has become a highly debated subject and here the aspect of free movement of persons is highlighted. The European Succession Certificate also raises many questions, among them the applicability of the competence rules in case of national notarial succession certificates or court certificates, cases *Oberle*, *WB* and *E.E.*. The article pleads for an equilibrated multilateral approach. Donation *mortis causa* will have to be dealt with by the ECJ soon. Five years of application of the Succession Regulation – and many questions are open.

P. Hay: **Product Liability: Specific Jurisdiction over Out-of-State Defendants in the United States**

“Stream of commerce” jurisdiction in American law describes the exercise of jurisdiction in product liability cases over an out-of-state enterprise when a product produced and first sold by it in another American state or a foreign

country reached the forum state and caused injury there. The enterprise cannot be reached under modern American rules applicable to “general” (claim unrelated) jurisdiction. Can it be reached by exercise of “specific” (claim related) jurisdiction even though it did not itself introduce the product into the forum state? This is an important question for interstate American as well as for foreign companies engaged in international commerce. The applicable federal constitutional limits on the exercise of such “stream of commerce” jurisdiction have long been nuanced and uncertain. It was often assumed that the claim must have “arisen out of” the defendant’s forum contacts: what did that mean? The long-awaited U.S. Supreme Court decision in March 2021 in Ford vs. Montana now permits the exercise of specific jurisdiction when the claim arises out of or is (sufficiently) “related” to the defendant’s in-state contacts and activities. This comment raises the question whether the decision reduces or in effect continues the previous uncertainty.

W. Wurmnest: **International Jurisdiction in Abuse of Dominance Cases**

The CJEU (Grand Chamber) has issued a landmark ruling on the borderline between contract and tort disputes under Article 7(1) and (2) of the Brussels I-bis Regulation. *Wikingerhof* concerned a claim against a dominant firm for violation of Art. 102 TFEU and/or national competition law rules. This article analyses the scope of the ruling and its impact on actions brought against dominant firms for violation of European and/or national competition law and also touches upon the salient question as to what extent such disputes are covered by choice of court agreements.

C.F. Nordmeier: **The waiver of succession according to Art. 13 Regulation (EU) 650/2012 and § 31 IntErbRVG in cases with reference to third countries**

According to Art. 13 Regulation (EU) 650/2012, a waiver of succession can be declared before the courts of the state in which the declarant has his habitual residence. The present article discusses a decision of the Cologne Higher Regional Court on the acceptance of such a declaration. The decision also deals with questions of German procedural law. The article shows that – mainly due to

the wording and history of origin – Art. 13 Regulation (EU) 650/2012 presupposes the jurisdiction of a member state bound to the Regulation (EU) 650/2012 to rule on the succession as a whole. Details for establishing such a jurisdiction are examined. According to German procedural law, the reception of a waiver of succession is an estate matter. If Section 31 of the IntErbRVG is applicable, a rejection of the acceptance demands a judicial decree which is subject to appeal.

P. Mankowski: **The location of global certificates – New world greets old world**

New kinds of assets and modern developments in contracting and technology pose new challenges concerning the methods how to locate assets. In many instances, the rules challenged are old or rooted in traditional thinking. Section 23 of the German Code of Civil Procedure (ZPO) is a good example for such confrontation. For instance, locating global certificates requires quite some reconsideration. Could arguments derived from modern legislation like the Hague Intermediated Securities Convention, Art. 2 pt. (9) EIR 2015 or § 17a DepotG offer a helping hand in interpreting such older rules?

S. Zwirlein-Forschner: **All in One Star Limited – Registration of a UK Company in Germany after the End of the Brexit Transition Period**

Since 1 January 2021, Brexit has been fully effective as the transition period for the UK has ended. In a recent decision, the Federal Court of Justice (BGH) has taken this into account in a referral procedure to the Court of Justice of the European Union (CJEU). The decision raises interesting questions on the demarcation between register law and company law, on conflict of laws and on the interpretation of norms implementing EU law. This article comments on these questions.

K. Sendlmeier: **Informal Binding of Third Parties – Relativising the Voluntary Nature of International Commercial Arbitration?**

The two decisions from the US and Switzerland deal with the formless binding of

third parties to arbitration agreements that have been formally concluded between other parties. They thus address one of the most controversial issues in international commercial arbitration. Both courts interpret what is arguably the most important international agreement on commercial arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The Supreme Court has ruled that the Convention does not preclude non-signatories from being bound by arbitration based on equitable estoppel in US arbitration law. In the Swiss decision, the binding nature of a non-signatory is based on its interference in the performance of the main contract of other parties. According to the established case law of the Swiss Federal Tribunal, this binding approach does not conflict with the New York Convention either.

K. Bälz: **Can a State Company be held liable for State Debt? Piercing of the Corporate Veil vs. attribution pursuant to Public International Law – Cour d'appel de Paris of 5 September 2019, No. 18/17592**

The question of whether the creditor of a foreign state can enforce against the assets of public authorities and state enterprises of that state is of significant practical importance, particularly in view of the increasing number of investment arbitrations. In a decision of 5 September 2019, the Paris Court of Appeal has confirmed that a creditor of the Libyan State can enforce an arbitral award against the assets of the Libyan Investment Authority (LIA), arguing that – although the LIA enjoys separate legal personality under Libyan law – it was in fact an organ *(émanation)* of the Libyan State, that was functionally integrated into the state apparatus without clearly separated assets of its own. This approach is based on public international law concepts of state liability and diverges from corporate law principles, according to which a shareholder cannot generally be held liable for the corporation's debts.

O.L. Knöfel: **Liability of Officials for Sovereign Acts (acta iure imperii) as a Challenge for EU and Austrian Private International Law**

The article reviews a decision of the Supreme Court of the Republic of Austria (Case 1 Ob 33/19p). The Court held that a civil action for compensation brought in Austria, by the victim of a downhill skiing accident, against a German school

teacher on account of alleged negligence during a reconnaissance ride down an Austrian ski slope, does not constitute a “civil and commercial matter” under the Rome II Regulation, as it involves an *actum iure imperii* (Art. 1 cl. 1 Rome II Regulation). As a consequence, the Court applied German Law, relying on an alleged customary conflicts rule (*lex officii* principle), according to which indemnity claims against officials who act on behalf of the State are inevitably and invariably governed by the law of the liable State. Finally, the Court held that an action brought directly against a foreign official in Austria is not barred by sec. 9 cl. 5 of the Austrian Act of State Liability *(Amtshaftungsgesetz)*. The Court’s decision is clearly wrong as being at variance with many well-established principles of the conflict of laws in general and of cross-border State liability in particular.

E. Piovesani: **Italian Ex Lege Qualified Overriding Mandatory Provisions as a Response to the “COVID-19 Epidemiological Emergency”**

Art. 88-bis Decree-Law 18/2020 (converted, with modifications, by Law 27/2020) is headed “Reimbursement of Travel and Accommodation Contracts and Package Travel”. This provision is only one of the several provisions adopted by the Italian legislator as a response to the so-called “COVID- 19 epidemiological emergency”. What makes Art. 88-bis Decree-Law 18/2020 “special” is that its para. 13 qualifies the provisions contained in the same article as overriding mandatory provisions.

Chinese Private International Law

Chinese Private International Law

Edited by Xiaohong Liu and Zhengyi Zhang

Written with the assistance of a team of lecturers at the Shanghai University of Political Science and Law, this book is the leading reference on Chinese private

international law in English. The chapters systematically cover the whole of Chinese private international law, not just questions likely to arise in commercial matters, but also in family, succession, cross-border insolvency, intellectual property, competition (antitrust), and environmental disputes. The chapters do not merely cover the traditional conflict of law areas of jurisdiction, applicable law (choice of law), and enforcement. They also look into conflict of law questions arising in arbitration and assess China's involvement in the harmonisation of private international law globally and regionally within the Belt and Road Initiative. Similarly to the Japanese and Indonesian volumes in the Series, this book presents Chinese conflict of laws through a combination of common and civil law analytical techniques and perspectives, providing readers worldwide with a more profound and comprehensive understanding of Chinese private international law.

Xiaohong Liu *is Professor and President and* ***Zhengyi Zhang*** *is Associate Professor and Deputy Director of the International Affairs Office, both at Shanghai University of Political Science and Law, China.*

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Hague Academy of International

Law: Last chance to register for the online Summer Courses 2021!

The Hague Academy of International Law is holding its Summer Courses on Private International Law for the first (and perhaps last) time online from **26 July to 13 August 2021**. Registration is open until Sunday 27 June 2021 at 23:59 The Hague time. More information is available here.

As you may remember, we announced in a previous post that the 2020 Summer Courses were postponed and that the only prior time that the courses were cancelled was World War II.

This year's general course will be delivered by NYU Professor **Linda Silberman** and is entitled ***The Counter-Revolution in Private International Law in the United States: From Standards to Rules***. The special courses will be given by José Antonio Moreno Rodríguez, Mary Keyes, Pietro Franzina (former editor of Conflictoflaws.net), Sylvain Bollée, Salim Moollan, Jean-Baptiste Racine and Robert Wai. The inaugural lecture will be delivered by Alexis Mourre, President of the International Court of Arbitration of the ICC. The poster is available here.

The holding of the Summer Courses in times of the Covid-19 pandemic attests to the perseverance of the Hague Academy, which has organised two live broadcasts per day to cater to people living in different time zones.

Please note that "no certificate of attendance will be delivered upon completion of the courses. Instead, each attendee will receive an electronic certificate of enrolment at the end of the session."

If you are interested in a more full-fledged experience, you may consider registering for the Winter Course, which appears to be an in-person course. Registration for the Winter Courses 2022 is open since 1 June 2021 and will end 31 July (scholarships) and 29 September 2021 (full fee). For more information, click here.

Dickinson on European Private International Law after Brexit

Just as the Commission formally announced its refusal to give consent to the UK's accession to the Lugano Convention, Andrew Dickinson has provided a comprehensive overview on the state of Private International Law for civil and commercial matters in the UK and EU, which has just been published in the latest issue of *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* (IPRax 2021, p. 218).

The article sketches out this 'realignment of the planets' from three angles, starting with the legal framework in the UK, which will now be based on the Withdrawal Act 2018, several other statutes and multiple pieces of secondary legislation. The latter include the *Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations*, which entail a return to the rules previously applied only to non-EU defendants, and the *Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations*, which (by contrast) essentially carries over the Rome I and II Regulation. With regard to jurisdiction, the situation is of course complicated by some residual remains of the Brussels regime, some new provisions aiming to preserve certain jurisdictional advantages for consumers and employees, and the interplay with the Hague Choice of Court Convention, all of which the article also covers in detail. Interestingly, especially in the context of last week's news, Dickinson concludes the section on jurisdiction (on p. 218) as follows:

> *One might take comfort in the fact that there is nothing in the mechanisms and rules described above that is truly novel. In large part, the effect of the UK's withdrawal from the EU will be to extend to the province formerly occupied by the Brussels-Lugano regime the conflict of law rules for situations lacking an EU connection, with which many cross-border practitioners will be familiar. Some will welcome, for example, the increased role for the doctrine of forum non conveniens or the removal of fetters on the UK courts' ability to grant anti-suit injunctions. Others will see the transition to what is unquestionably a complex and piecemeal set of rules as a backward step, which nonetheless creates an opportunity to review, simplify and up- date the UK's private international law infrastructure.* ***The case for reform will grow if the UK's application to rejoin the 2007 Lugano Convention does not bear fruit.***

The text then goes on to describe the consequent changes in EU Private International Law and the effects of these changes on third states with whom the EU has concluded international agreements.

The article links up nicely with Paul Beaumont's article on The Way Ahead for UK Private International Law After Brexit, which has just been published in this year's first issue of the Journal of Private International Law and which considers the steps the UK should take to remain an effective member of international institutions such as the Hague Conference on Private International Law. Both articles can also be read in conjunction with Reid Mortensen's contribution on Brexit and Private International Law in the Commonwealth and Trevor Hartley's article on Arbitration and the Brussels I Regulation – Before and After Brexit, which appear in the same issue.

First Issue of 2021's Journal of Private International Law

The first issue of the *Journal of Private International Law* for 2021 was released today and it features the following articles:

Paul Beaumont, Some reflections on the way ahead for UK private international law after Brexit

Since 1 January 2021 the UK has moved out of the implementation period for its withdrawal from the European Union (EU) and it is an appropriate time to reflect on the way forward for the UK in developing private international law. This article considers the practical steps that the UK should take in the near future. There is significant work that the UK can do to progress its commitment to the "progressive unification of the rules of private international law" by improving its commitment to the effective functioning of several key Conventions concluded by the Hague Conference on Private International Law (HCCH). Some of these steps can and should be taken immediately, notably accepting the accessions of other States to the Hague Evidence and Child Abduction Conventions and extending the scope of the UK's ratification of the Adults Convention to England and Wales, and Northern Ireland. Other things require more consultation and time but there are great opportunities to provide leadership in the world by ratifying the Hague Judgments Convention 2019 and, when implementing that Convention which is based on minimum harmonisation, providing leadership in the Commonwealth by implementing, at least to some extent, the Commonwealth Model Law on Recognition and Enforcement of Civil and Commercial Judgments. Within the UK, as a demonstration of best constitutional practice, intergovernmental cooperation between the UK Government and the devolved administrations should take place to consider how intra-UK private international law could be reformed learning the lessons from the UK Supreme Court's highly divided decision in Villiers. Such work should involve the best of the UK's experts (from each of its systems of law) on private international law from academia, the judiciary and legal practice. Doing so, would avoid accusations that Brexit will see a UK run by generalists who give too little attention and weight to the views of experts. This use of experts should also extend to the UK's involvement in the future work of HCCH at all levels. The HCCH will only be able to be an effective international organisation if its Members show a commitment to harnessing the talents of experts in the subject within the work of the HCCH.

Reid Mortensen, Brexit and private international law in the Commonwealth

"Brexit is a trading and commercial opportunity for the countries of the

Commonwealth, as it makes it likely that, for many, their access to United Kingdom (UK) markets will improve significantly. The question addressed in this article is whether, to support more open and trading relationships, Brexit also presents opportunities for the development of the private international law of Commonwealth countries – including the UK. Focusing on Australia, Canada, New Zealand and Singapore, as well as the UK, an account is given of the relationship between the different systems of private international law in these Commonwealth countries in the period of the UK's membership of the European Union (EU). Accordingly, consideration is given to the Europeanisation of UK private international law and its resistance in other parts of the Commonwealth. The continuing lead that English adjudication has given to private international law in the Commonwealth and, yet, the greater fragmentation of that law while the UK was in the EU are also discussed. The conclusion considers the need to improve the cross-border enforcement of judgments within the Commonwealth, and the example given in that respect by its federations and the trans-Tasman market. Possible directions that the cross-border enforcement of judgments could take in the Commonwealth are explored."

Trevor Hartley, Arbitration and the Brussels I Regulation – Before and After Brexit

This article deals with the effect of the Brussels I Regulation on arbitration. This Regulation no longer applies in the UK, but the British Government has applied to join the Lugano Convention, which contains similar provisions. So the article also discusses the position under Lugano, paying particular attention to the differences between the two instruments. The main focus is on the problems that arise when the same dispute is subject to both arbitration and litigation. Possible mechanisms to resolve these problems – such as antisuit injunctions – are considered. The article also discusses other questions, such as freezing orders in support of arbitration.

Maksymilian Pazdan & Maciej Zachariasiewicz, The EU succession regulation: achievements, ambiguities, and challenges for the future

The quest for uniformity in the private international law relating to succession has

a long history. It is only with the adoption of the EU Succession Regulation that a major success was achieved in this field. Although the Regulation should receive a largely positive appraisal, it also suffers from certain drawbacks that will require a careful approach by courts and other authorities as to the practical application of the Regulation. The authors address selected difficulties that arise under its provisions and make suggestions for future review and reform. The article starts with the central notion of habitual residence and discusses the possibility of having a dual habitual residence. It then moves to discuss choice of law and recommends to broaden further party autonomy in the area of succession law. Some more specific issues are also addressed, including legacies by vindication, the relationship between the law applicable to succession, the role of the legis rei sitae and the law applicable to the registries of property, estates without a claimant, the special rules imposing restrictions concerning or affecting succession in respect of certain assets, as well as the exclusion of trusts. Some proposals for clarifications are made in that regard.

Stellina Jolly & Aaditya Vikram Sharma, Domestic violence and inter-country child abduction: an Indian judicial and legislative exploration

The Hague Convention on the Civil Aspects of International Child Abduction aims to prevent the abduction of children by their parents by ensuring the child's prompt return to his/her place of habitual residence. At the time of drafting the Convention, the drafters believed that non-custodial parents who were fathers perpetrated most of the abductions. However, the current statistics reveal the overwhelming majority of all abductors as primary or joint-primary caretakers. Unfortunately, it is unknown what exact proportion of these situations includes abductions triggered by domestic violence. In the absence of an explicit provision of domestic violence against spouses as a defence against an order of return, for a parent who has abducted a child to escape domestic violence, the relevant defence is of "grave risk of harm" to and "intolerable situation" for the child under Article 13(1)(b) of the Convention. However, the lack of guidance on what constitutes "grave risk" and "intolerable situation", at least in the past, and its operationalisation in the context of domestic violence brings in pervasive indeterminacy in child abduction. In 2012, the Hague Conference on Private International Law identified "domestic violence allegations and return proceedings" as a key issue and recommended steps for developing principles on

the management of domestic violence allegations in return proceedings leading to the adoption of a Good Practice Guide on this issue in 2020.

The Ministry of Women and Child Development (WCD) and the Ministry of Law and Justice, India, cite that most Indian parents who abduct their children happen to be women escaping domestic violence abroad. Thus, they are victims escaping for themselves and their children's safety. This research has summed up the judgments delivered by High Courts and the Supreme Court of India on child abduction between 1984 and 2019. Through judicial mapping, the paper discusses the cases in which battered women have highlighted and argued domestic violence as a reason against their children's return. The paper evaluates whether the reason given by the two ministries against India's accession to the Hague Convention is reflected in cases that have come up for judicial resolution and what are the criteria evolved by the judiciary in addressing the concerns of domestic violence against a spouse involved in child abduction. The paper analyses India's legislative initiative, the Civil Aspects of International Child Abduction Bill, 2016 and assesses the measures proposed by the Bill for considering domestic violence against a spouse in abduction cases.

Kittiwat Chunchaemsai, Legal considerations and challenges involved in bringing the 2005 Hague Convention on Choice of Court Agreements into force within an internal legal system: A case study of Thailand

Thailand must consider two vital elements, namely its internal legal system and environment before signing the Hague Convention on Choice of Court Agreements 2005 (Hague Convention). This paper investigates whether the law of Thailand in its current form is inconsistent with the Hague Convention. Articles 1–15 are examined to identify areas of inconsistency and to suggest appropriate solutions. This study finds that the internal legal system of Thailand is not quite in line with the Hague Convention. This conclusion leads to analytical recommendations to suit the needs of the current Thai legal system. Implementing these recommendations is necessary for Thailand if it intends to become a Party to the Hague Convention. Thailand must not only have a specific implementation act but must also review and revise the relevant laws appropriately.

Saeed Haghani, Evolution of *lex societatis* under Iranian law: current status and future prospects

There has been a growing attention to applicable law to companies (*lex societatis*) in Iranian legal research. A brief study of relevant legal literature leads us to a list of both disagreements and complexities on the subject. Meanwhile, a recent parliamentary effort on the issue, illustrates the importance of *lex societatis* in the eyes of the Iranian legislature. A comparative approach would be of great help in the analysis of the formation and evolution of relevant Iranian legal rules. This paper tries to provide the reader with a comprehensive view of the current transitory state of Iranian law regarding *lex societatis*.

Even Announcement: Deals and Disputes: China, Hong Kong, and Commercial Law

The University of Pittsburgh Center for International Legal Education (CILE) and Asian Studies Center (ASC) invite you to join us for a timely conference on Deals and Disputes: China, Hong Kong, and Commercial Law on May 18-20, 2021, from 8:00-11:00 a.m. EDT each day.

The May 18 panel will consider the lessons of Changzhou Sinotype Technology Co., Ltd. v. Rockefeller Technology Investments (Asia) in the California courts, considering contract terms, arbitration and litigation strategy, arbitral award and judgment recognition, and the application of the Hague Service Convention.

The May 19 panel will assess international commercial courts and arbitral

institutions in Asia, particularly in light of recent developments in Hong Kong.

The May 20 panel will take a broader view of political and legal challenges facing Hong Kong after the National Security Law in June 2020.

Keynote addresses on May 18 and 19 will be given by Professor Susan Finder of Peking University School of Transnational Law, and Antony Dapiran, author of City on Fire: The Fight for Hong Kong.

Registration is free, and can be achieved on the link in the full program for the conference, which is available here.

Pennsylvania lawyers may receive CLE substantive credits for up to 7 hours.

Book Launch: Choice of Law in International Commercial Contracts – 4 May 2021

Coming up tomorrow – Book Launch: Choice of Law in International Commercial Contracts – 4 May 2021

The global PIL community is invited to celebrate the launch of the book "Choice of Law in International Commercial Contracts" (Oxford University Press, 2021). This study provides a definitive reference guide to the key choice of law principles on international contracts, including 60 national and regional reports written by experts from all parts of the world, and a dedicated commentary on the Hague Principles as applied to international commercial arbitration.

When: May 4, 2021 02:00 PM CEST

Where: Online (Zoom-Webinar)

Register here:

https://unilu.zoom.us/webinar/register/WN_ivzYmgFQQkSdUKZCEDRriQ

After registering, you will receive a confirmation email containing information about joining the webinar. The event will also be live streamed via YouTube; the link will be posted five minutes before the start time here.

The programme reads as follows:

14:00-14:10 – Welcome and acknowledgments | Daniel Girsberger

14:10-14:35 – Overview of the process | Daniel Girsberger and Marta Pertegás

14:35-15:00 – General Comparative Report, with a focus on Art. 3 | Thomas Kadner Graziano

15:00-15:10 – Further general matters | Jan L Neels

15:10-15:15 – Publisher's address | Andrew Dickinson

15:15-15:20 – Regional perspective: Africa | Jan L Neels and Eesa A Fredericks

15:20-15:30 – Regional perspective: Asia | Yuko Nishitani and Béligh Elbalti

15:30-15:35 – Regional perspective: Australasia | Brooke Marshall

15:35-15:40 – Regional perspective: Europe | Thomas Kadner Graziano

15:40-15:50 – Regional perspective: Latin America | José A Moreno Rodríguez and Lauro Gama

15:50-15:55 – Regional perspective: North America | Geneviève Saumier

15:55-16:05 – HCCH, UNCITRAL and UNIDROIT perspectives | João Ribeiro-Bidaoui, Luca Castellani, and Anna Veneziano

16:05-16:15 – Future plans and concluding remarks | Agatha Brandão and Daniel Girsberger

16:15-16:45 – Q&A

More information about the book:

https://global.oup.com/academic/product/choice-of-law-in-international-commercial-contracts-9780198840107?cc=ch&lang=en&#

A 30% discount code will be available for all attendees.