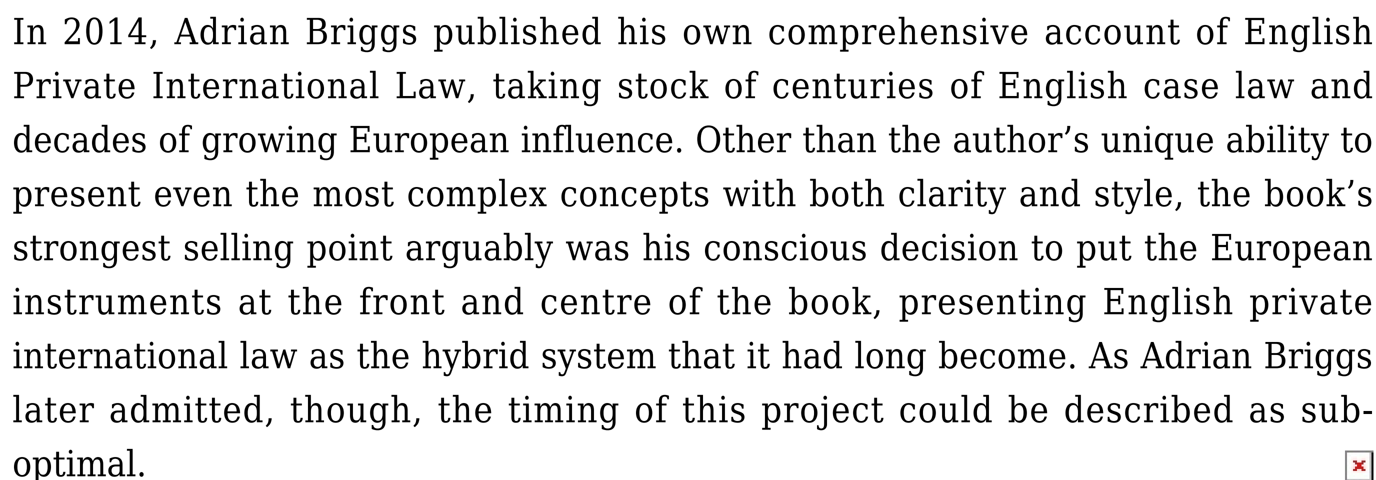
Out Now: Briggs, Private International Law in English Courts, 2nd edition

In 2014, Adrian Briggs published his own comprehensive account of English Private International Law, taking stock of centuries of English case law and decades of growing European influence. Other than the author's unique ability to present even the most complex concepts with both clarity and style, the book's strongest selling point arguably was his conscious decision to put the European instruments at the front and centre of the book, presenting English private international law as the hybrid system that it had long become. As Adrian Briggs later admitted, though, the timing of this project could be described as sub-optimal.



Indeed, in light of the UK's subsequent departure from the EU and the resulting 'realignment of the planets', the second edition required changes that went far beyond a mere update. While some parts of the first edition that engaged with European sources and materials could be preserved as historical background (see, eg, pp. 18-21; 123) or even as descriptions of what has now become 'retained EU law' (mainly the Rome I and II Regulations, and with important caveats), other parts had to be rewritten almost entirely. This is most notable in the chapter on Jurisdiction (ch. 3), which according to the author, is now subject to 'a *corpus iuris* which is a shambles', 'a mess in urgent need of reform' (p. 129).

It is all the more commendable that Adrian Briggs has undertaken this difficult and presumably depressing task to paint, for the second time, a full picture of English private international law as it stands, again drawing heavily from his decades of experience as an author, teacher, and practitioner. It seems fair to say that most of the apparent coherence of this picture is testimony not to the ease with which European instruments, rules and thoughts could be removed from English law but to the author's ability to patch up what was left.

(As a footnote, it is a pity for the reader that not only much European law but also the paragraph numbers have been lost between the first and second edition.)

The DSA/DMA Package and the Conflict of Laws

A couple of weeks ago, I had the pleasure of speaking about the scope of application of the Digital Services Act (DSA) and Digital Markets Act (DMA), which together have been labelled the 'European constitution for the internet', at an event at the University of Strasbourg, organized by Etienne Farnoux and Delphine Porcheron. The preprint of my paper, forthcoming at Dalloz IP/IT, can be found on SSRN.

Disappointingly, both instruments only describe their territorial scope of application through a unilateral conflicts rule (following a strict 'marketplace' approach; see Art. 2(1) DSA and Art. 1(2) DMA), but neither of them contains any wider conflicts provision. This is despite the many problems of private international law that it raises, e.g. when referring to 'illegal' content in Art. 16 DSA, which unavoidably requires a look at the applicable law(s) in order to establish this illegality. I have tried to illustrate some of these problems in the paper linked above and Marion Ho-Dac & Matthias Lehmann have also mentioned some more over at the EAPIL Blog.

Unfortunately, though, this reliance on unilateral conflicts rules that merely define the scope of application of a given instrument but otherwise defer to the general instruments of private international law seems to have become the norm for instruments regulating digital technology. It can be found, most famously, in Art. 3 of the GDPR, but also in Art. 1(2) of the P2B Regulation, Art. 3(1) of the proposed ePrivacy Regulation, and in Art. 1(2) of the proposed Data Act. Instruments that have taken the form of directive (such as the DSM Copyright Directive) even rely entirely on the general instruments of private international law to coordinate the different national implementations.

These general instruments, however, are notoriously ill-equipped to deal with the many cross-border problems raised by digital technology, usually resulting in large overlaps between national laws. These overlaps risk to undermine the regulatory aims of the instrument in question, as the example of the DSM Copyright Directive aptly demonstrates: With some of the most controversial questions having ultimately been delegated to national law, there is a palpable risk of many of the compromises that have been found at the national level to be undermined by the concurrent application of other national laws pursuant to Art. 8 I Rome II.

The over-reliance on general instruments of PIL despite their well-established limitations also feels like a step back from the e-Commerce Directive, which at least made a valiant attempt to reduce the number of national laws, although arguably not at the level of the conflict of laws (see CJEU, *eDate*, paras. 64–67). The balance struck by, and underlying rationale of, the e-Commerce Directive can certainly be discussed – indeed, given its importance for the EU's ambition of creating a 'Digital Single Market', it should be. The drafting of the DSA/DMA package would arguably have provided the perfect opportunity for this discussion.

Lex & Forum, Volume 4/2022 – A special on cross border family law

Family disputes constitute the majority of cases of cross-border nature. The free movement of people within the European judicial space and the integration of third-country nationals has created a considerable number of multinational family structures, that give rise to a significant number of legal disputes, leading to complex conflict of law issues. It is no coincidence that in the area of family disputes one could identify the most extended number of EU legislative initiatives, from Regulation 1347/2000 (Brussels II Regulation) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, followed by the "successors", i.e., Regulation No 2201/2003 (Brussels IIa Regulation) and

Regulation 2019/1111 (Brussels IIb Regulation), Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Regulation 1259/2010 (Rome III Regulation) on the applicable law to divorce and legal separation, as well as and Regulations 2016/1103 and 2016/1104 on international jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes and, registered partners, respectively, covering the maximum scope of personal or property family disputes. It is also notable that, as concluded after examining the data kindly brought to our attention by the Thessaloniki Court of First Instance Department of Publications, out of one hundred court judgments related to international law issued in the year 2022 by the above mentioned Court, approximately 70% of them concerned family disputes in a broader sense, either within the EU, or related to third countries, demonstrating the importance of the matter in practice.

Cross-border family disputes are the Focus of the current issue and were examined in an online conference of Lex and Forum (8.12.2022), under the Presidency of the Supreme Court Judge, *Ms. Evdoxia Kiouptsidou-Stratoudaki*. The topics of the conference concern the international jurisdiction on matrimonial and child custody disputes according to Regulation No 2019/1111, by *Ioannis Delikostopoulos*, Professor at the Faculty of Law of the University of Athens; the practical problems of the application of the Regulations for family disputes and parental custody disputes, by *Ms. Aikaterini Karaindrou,* Judge at the First Instance Court; the agreements on the exercise of parental care according to Regulation No 2019/1111 and their relationship with Greek law, by *Aikaterini Fundedaki,* Professor at the Law Faculty of the University of Thessaloniki; Law No 4800/2021 and the harmonization of the Greek legal provisions with international law, by *Ioannis Valmantonis,* Judge at the Court of Appeal, and the new Hague Convention for the protection of adults, by Dr. *Vasileios Sarigiannidis,* Head of the Private International Law Department at the Hellenic Ministry of Justice.

The present issue also contains case comments on the CJEU judgment, 15.11.2022, Senatsverwaltung/TB, on the recognition of dissolution of marriage from another member state, by *Dr. Apostolos Anthimos*; the CJEU judgments, 15.11 .2021, ??/FA and 10.2.2022, OE/VY, on the concept of habitual residence and, respectively, the importance of the length of residence of the claimant in a member state for the establishment of international jurisdiction under the

Brussels IIa/b Regulation, by *Paris Arvanitakis,* Professor at the University of Thessaloniki, and . *Stefania Kapaktsi,* Judge at the Court of First Instance; the Greek Supreme Court judgment No 30/2021 on the declaration of enforceability of a foreign decision on the distribution of the spouses' common property, by *Dr. Apostolos Anthimos*; the Greek Supreme Court cases No 48/2021 and 54/2021 on international child abduction, by *Ioannis Valmantonis*, Judge at the Court of Appeal; the judgment of the Thessaloniki First Instance Court No 1285/2022, on the temporary regulation of contact rights according to the Brussels IIb Regulation and the 1996 HAGUE Convention, by Professor *Delikostopoulos*, and the German Supreme Court judgment dated from 29.9. 2021, on the non-opposition to public order of a marriage performed by a proxy, with a note by *Dr*. Anthimos. The jurisprudence section also contains the CJEU decisions, 22.4.2022, Volvo/RM, regarding the temporal scope of the Directive No 2014/104 and their incorporation into substantive or procedural EU law, accompanied by the Opinion of the Advocate General, Mr. *Athanassios Rantos*, with a case comment by *Dr. Stefanos Karameros, PhD*, and the Court of First Instance case No 13535/2019, on the possibility of implicit prorogation of jurisdiction in case of provisional measures in the Brussels Ia Regulation, despite a contrary agreement, with a case comment by *Ioanna Pissina*, PhD Candidate.

The issue is completed with the Praefatio by *Vassilios Christianos,* Emeritus Professor at University of Athens, and former Director of the Center of International and European Economic Law, regarding the contribution of the comparative method to EU procedural law; the expert opinion by *Dimitrios Tsikrikas,* Professor at the Athens Faculty of Law, on the scope of application of choice-of-court agreements in bond loans and interest rate contracts; and finally, the analysis of practical issues on the recognition of foreign divorce decrees, focusing on the difficulties of the applicants to prove the finality of the foreign decision (L&F Praxis), by *Dr. Anthimos*.

[editorial prepared by Professor *Paris Arvanitakis*, scientific director of Lex & Forum]

Third Issue for Journal of Private International Law for 2022

The third issue for the *Journal of Private International Law* for 2022 was published today. It contains the following articles:

K Takahashi, "Law Applicable to Proprietary Issues of Crypto-Assets"

Crypto-assets (tokens on a distributed ledger network) can be handled much in the same way as tangible assets as they may be held without the involvement of intermediaries and traded on a peer-to-peer basis by virtue of the blockchain technology. Consequently, crypto-assets give rise to proprietary issues in the virtual world, as do tangible assets in the real world. This article will consider how the law applicable to the proprietary issues of crypto-assets should be determined. It will first examine some of the cases where restitution was sought of crypto-asset units and consider what issues arising in such contexts may be characterised as proprietary for the purpose of conflict of laws. Finding that the conventional connecting factors for proprietary issues are not suitable for crypto-assets, this article will consider whether party autonomy, generally rejected for proprietary issues, should be embraced as well as what the objective connecting factors should be.

GV Calster, "*Lis Pendens* and Third States: the Origin, DNA and Early Case-Law on Articles 33 and 34 of the Brussels Ia Regulation and its "*forum non conveniens*-light" Rules"

The core European Union rules on jurisdiction have only in recent years included a regime which allows a court in an EU Member State temporarily or definitively to halt its jurisdiction in favour of identical, or similar proceedings pending before a court outside the EU. This contribution maps the meaning and nature of those articles, their application in early case-law across Member States, and their impact among others on business and human rights litigation, pre and post Brexit.

F Farrington, "A Return to the Doctrine of *Forum Non Conveniens* after Brexit and the Implications for Corporate Accountability"

On 1 January 2021, the European Union's uniform laws on jurisdiction in cross-border disputes ceased to have effect within the United Kingdom. Instead, the rules governing jurisdiction are now found within the Hague Convention 2005 where there is an exclusive choice of court agreement and revert to domestic law where there is not. Consequently, the doctrine of forum non conveniens applies to more jurisdictional issues. This article analyses the impact forum non conveniens may have on victims of human rights abuses linked to multinational

enterprises and considers three possible alternatives to the forum non conveniens doctrine, including (i) the vexatious-and-oppressive test, (ii) the Australian clearly inappropriate forum test, and (iii) Article 6(1) of the European Convention on Human Rights. The author concludes that while the English courts are unlikely to depart from the forum non conveniens doctrine, legislative intervention may be needed to ensure England and Wales' compliance with its commitment to continue to ensure access to remedies for those injured by the overseas activities of English and Welsh-domiciled MNEs as required by the United Nation's non-binding General Principles on Business and Human Rights.

A Kusumadara, "Jurisdiction of Courts Chosen in the Parties' Choice of Court Agreements: An Unsettled Issue in Indonesian Private International Law and the way-out"

Indonesian civil procedure law recognises choice of court agreements made by contracting parties. However, Indonesian courts often do not recognise the jurisdiction of the courts chosen by the parties. That is because under Indonesian civil procedure codes, the principle of actor sequitur forum rei can prevail over the parties' choice of court. In addition, since Indonesian law does not govern the jurisdiction of foreign courts, Indonesian courts continue to exercise jurisdiction over the parties' disputes based on Indonesian civil procedure codes, although the parties have designated foreign courts in their choice of court agreements. This article suggests that Indonesia pass into law the Bill of Indonesian Private International Law that has provisions concerning international jurisdiction of foreign courts as well as Indonesian courts, and accede to the 2005 HCCH Choice of Court Agreements Convention. This article also suggests steps to be taken to protect Indonesia's interests.

Mohammad Aljarallah, "The Proof of Foreign Law before Kuwaiti Courts: The way forward"

The Kuwaiti Parliament issued Law No. 5/1961 on the Relations of Foreign Elements in an effort to regulate the foreign laws in Kuwait. It neither gives a hint on the nature of foreign law, nor has it been amended to adopt modern legal theories in ascertaining foreign law in civil proceedings in the past 60 years. This study provides an overview of the nature of foreign laws before Kuwaiti courts, a subject that has scarcely been researched. It also provides a critical assessment of the law, as current laws and court practices lack clarity. Furthermore, they are overwhelmed by national tendencies and inconsistencies. The study suggests new

methods that will increase trust and provide justice when ascertaining foreign law in civil proceedings. Further, it suggests amendments to present laws, interference of higher courts, utilisation of new tools, reactivation of treaties, and using the assistance of international organisations to ensure effective access and proper application of foreign laws. Finally, it aims to add certainty, predictability, and uniformity to Kuwaiti court practices.

CZ Qu, "Cross Border Assistance as a Restructuring Device for Hong Kong: The Case for its Retention"

An overwhelming majority of companies listed in Hong Kong are incorporated in Bermuda/Caribbean jurisdictions. When these firms falter, insolvency proceedings are often commenced in Hong Kong. The debtor who wishes to restructure its debts will need to have enforcement actions stayed. Hong Kong does not have a statutory moratorium structure for restructuring purposes. Between 2018 and 2021, Hong Kong's Companies Court addressed this difficulty by granting cross-border assistance, in the form of, inter alia, a stay order, to the debtor's offshore officeholders, whose appointment triggers a stay for restructuring purposes. The Court has recently decided to cease the use of this method. This paper assesses this decision by, inter alia, comparing the stay mechanism in the UNCITRAL Model Law on Cross Border Insolvency. It concludes that it is possible, and desirable, to continue the use of the cross-border assistance method without jeopardising the position of the affected parties.

Z Chen, The Tango between the Brussels Ia Regulation and Rome I Regulation under the beat of directive 2008/122/EC on timeshare contracts towards consumer protection

Timeshare contracts are expressly protected as consumer contracts under Article 6(4)(c) Rome I. With the extended notion of timeshare in Directive 2008/122/EC, the question is whether timeshare-related contracts should be protected as consumer contracts. Additionally, unlike Article 6(4)(c) Rome I, Article 17 Brussels Ia does not explicitly include timeshare contracts into its material scope nor mention the concept of timeshare. It gives rise to the question whether, and if yes, how, timeshare contracts should be protected as consumer contracts under

Brussels Ia. This article argues that both timeshare contracts and timeshare-related contracts should be protected as consumer contracts under EU private international law. To this end, Brussels Ia should establish a new provision, Article 17(4), which expressly includes timeshare contracts in its material scope, by referring to the timeshare notion in Directive 2008/122/EC in the same way as in Article 6(4)(c) Rome I.

Review Article

CSA Okoli, The recognition and enforcement of foreign judgments in civil and commercial matters in Asia

Many scholars in the field of private international law in Asia are taking commercial conflict of laws seriously in a bid to drive harmonisation and economic development in the region. The recognition and enforcement of foreign judgments is an important aspect of private international law, as it seeks to provide certainty and predictability in cross-border matters relating to civil and commercial law, or family law. There have been recent global initiatives such as The Hague 2019 Convention, and the Commonwealth Model Law on Recognition and Enforcement of Foreign Judgments. Scholars writing on PIL in Asia are making their own initiatives in this area. Three recent edited books are worthy of attention because of their focus on the issue of recognition and enforcement of foreign judgments in Asia. These three edited books fill a significant gap, especially in terms of the number of Asian legal systems surveyed, the depth of analysis of each of the Asian legal systems examined, and the non-binding Principles enunciated. The central focus of this article is to outline and provide some analysis on the key contributions of these books.

GEDIP's Reccommendation on the

Proposal for a Directive on Corporate Sustainability Due Diligence

Written by Hans van Loon, former Secretary General of the HCCH and Honorary Professor of the University of Edinburgh Law School

As reported in this blog before (see CSDD and PIL: Some Remarks on the Directive Proposal), the European Commission on 23 February 2022 adopted a proposal for a Directive on corporate sustainability due diligence.

Earlier, at its annual meeting in 2021, the European Group for Private International Law (GEDIP) had adopted a Recommendation to the EU Commission concerning the PIL aspects of corporate due diligence and corporate accountability, and this blog reported on this Recommendation too, see GEDIP Recommendation to the European Commission on the private international law aspects of the future EU instrument on corporate due diligence and accountability.

While some of the recommendations proposed by GEDIP last year are reflected in the Draft Directive, the Draft fails to follow up on several crucial recommendations concerning judicial jurisdiction and applicable law. This will detract from its effectiveness.

In particular:

- The Proposal, while extending to third country companies lacks a provision on judicial jurisdiction in respect of such companies;
- The Proposal, while extending a company's liability to the activities of its subsidiaries and to value chain co-operations carried out by entities "with which the company has a well-established business relationship", lacks a provision dealing with the limitation of the provision on co-defendants in the Brussels I bis Regulation (Article 8(1)) to those domiciled in the EU;
- The Proposal lacks a provision allowing a victim of a violation of human rights to also invoke, similar to a victim of environmental damage under Article 7 of Regulation 864/2007 (Rome II), the law of the country in

which the event giving rise to the damage occurred, and does not prevent companies from invoking a less strict rule of safety or conduct within the meaning of Article 17 of Rome II;

- The provision of the Proposal on the mandatory nature of the provisions of national law transposing the Directive (Article 22 (5)) is insufficient because (i) the words "in cases where the law applicable to actions for damages to this effect is not that of a Member State" are redundant and (ii) allthese provisions of national law transposing the Directive should apply irrespective of the law applicable to companies, contractual obligations or non-contractual obligations.

GEDIP therefore, on the occasion of its meeting in Oslo, 9-11 September 2022 adopted a Recommendation concerning the Proposal for a directive of 23 February 2022 on Corporate Sustainability Due Diligence, following up on its Recommendation to the Commission of 8 October 2021. The text of the Recommendation can be found here.

[This post is cross-posted at the EAPIL blog]

CSDD and PIL: Some Remarks on the Directive Proposal

by Rui Dias

On 23 February 2022, the European Commission published its proposal of a Directive on Corporate Sustainability Due Diligence (CSDD) in respect to human rights and the environment. For those interested, there are many contributions available online, namely in the Oxford Business Law Blog, which dedicates a whole series to it (here). As to the private international law aspects, apart from

earlier contributions on the previous European Parliament resolution of March 2021 (info and other links here), some first thoughts have been shared e.g. by Geert von Calster and Marion Ho-Dac.

Building on that, here are some more brief remarks for further thought:

Article 2 defines the personal scope of application. European companies are covered by Article 2(1), as the ones «formed in accordance with the legislation of a Member-State», whereas those of a «third country» are covered by Article 2(2). While other options could have been taken, this criterium of incorporation is not unknown in the context of the freedom of establishment of companies, as we can see in Article 54 TFEU (basis for EU legal action is here Article 50(1) and (2)(g), along with Article 114 TFEU).

There are general, non PIL-specific inconsistencies in the adopted criteria, in light of the *relative*, not *absolute*thresholds of the Directive, which as currently drafted aims at also covering medium-sized enterprises only if more than half of the turnover is generated in one of the high-impact sectors. As recently pointed out by Hübner/Habrich/Weller, an EU company with e.g. 41M EUR turnover, 21M of which in a high impact sector such as e.g. textiles is covered; whilst a 140M one, having «only» 69M in high-impact sectors, is not covered, even though it is more than three times bigger, including in that specific sector.

Article 2(4) deserves some further attention, by stating:

«As regards the companies referred to in paragraph 1, the Member State competent to regulate matters covered in this Directive shall be the Member State in which the company has its registered office.»

So, the adopted connecting factor as to EU companies is the *registered office*. This is in line with many proposals of choice-of-law uniformization for companies in the EU. But apparently there is no answer to the question of which national law of a Member-State applies to third-country companies covered by Article 2(2): let us not forget that it is a proposed Directive, to be transposed through national laws. And as it stands, the Directive may open room for differing civil liability national regimes: for example, in an often-criticised option, Recital 58 expressly

excludes the burden of proof (as to the company's action) from the material scope of the Directive proposal.

Registered office is of course unfit for third country-incorporated companies, but Articles 16 and 17 make reference to other connecting factors. In particular, Article 17 deals with the public enforcement side of the Directive, mandating the designation of authorities to supervise compliance with the due diligence obligations, and it uses the location of a branch as the primarily relevant connection. It then opens other options also fit as subsidiary connections: «If the company does not have a branch in any Member State, or has branches located in different Member States, the competent supervisory authority shall be the supervisory authority of the Member State *in which the company generated most of its net turnover in the Union*» in the previous year. Proximity is further guaranteed as follows: «Companies referred to in Article 2(2) may, on the basis of a change in circumstances leading to it generating most of its turnover in the Union in a different Member State, make a duly reasoned request to change the supervisory authority that is competent to regulate matters covered in this Directive in respect of that company».

Making a parallel to Article 17 could be a legislative option, so that, in respect to third-country companies, *applicable law* and *powers for public enforcement* would coincide. It could also be extended to *jurisdiction*, if an intention arises to act in that front: currently, the general jurisdiction rule of Brussels Ia (Article 4) is a basis for the amenability to suit of companies *domiciled* (i.e., with statutory seat, central administration, or principal place of business – Article 63) in the EU. In order to sue third country-domiciled companies, national rules on jurisdiction have to be invoked, whereby many Member-States include some form of *forum necessitatis* in their national civil procedure laws (for an overview, see here).The Directive proposal includes no rules on jurisdiction: it follows the option also taken by the EP resolution, unlike suggested in the previous JURI Committee draft report, which had proposed new rules, through amendments to Brusselas Ia, on connected claims (in a new Art. 8, Nr. 5) and on *forum necessitatis* (through a new Art. 26a), along with a new rule on applicable law to be included in Rome II (Art. 6a) – a pathway which had also been recommended by GEDIP in October 2021 (here).

As to the applicable law in general, in the absence of a specific choice-of-law rule,

Article 22(5) states:

«Member States shall ensure that the liability provided for in provisions of national law transposing this Article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.»

So, literally, it is «the liability provided for» in national transposing laws, and not the provisions of national law themselves, that are to be «of overriding mandatory application». This may be poor drafting, but there is apparently no material consequence arising out of it.

Also, the final part («in cases where the law applicable to claims to that effect is not the law of a Member State») does not appear to make much sense. It is at best redundant, as Geert van Calster points out, suggesting it to be struck out of the proposal. Instead of that text, it could be useful to add «irrespective of the law otherwise applicable under the relevant choice-of-law rules», miming what Rome I and II Regulations state in Articles 9 and 16.

A further question raised by this drafting option of avoiding intervention in Rome II or other choice-of-law regulations, instead transforming the new law into a big set of *lois de police*, is that it apparently does not leave room for the application of foreign, non-EU law more favourable to the victims. If a more classical conflicts approach would have been followed, for example mirrored in Article 7 of Rome II, the *favor laesi* approach could be extended to the whole scope of application of the Directive, so that the national law of the Member-State where the event giving rise to damage occurred could be invoked under general rules (Article 4(1) of Rome II), but a more favourable *lex locus damni* would still remain accessible. Instead, by labelling national transposing laws as overridingly mandatory, that option seems to disappear, in a way that appears paradoxical vis-à-vis other rules of the Directive proposal that safeguard more favourable, existing solutions, such as in Article 1(2) and Article 22(4). If there is a political option of not allowing the application of third-country, more favourable law, that should probably be made clear.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2022: 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/)

H.-P Mansel/K. Thorn/R. Wagner: **European Conflict of Law 2021: The Challenge of Digital Transformation**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from January 2021 until December 2021. It gives information on newly adopted legal instruments and summarizes current projects that are presently making their way through the EU legislative process. It also refers to the laws enacted at the national level in Germany as a result of new European instruments. Furthermore, the authors look at areas of law where the EU has made use of its external competence. They discuss both important decisions and pending cases before the CJEU as well as important decisions from German courts pertaining to the subject matter of the article. In addition, the article also looks at current projects and the latest developments at the Hague Conference of Private International Law.

H. Wais: **The Applicable Law in Cases of Collective Redress**

Both the European and the German legislator have recently passed legislation aimed at establishing access to collective redress for consumers. As European conflict of law rules do not contain any specific rules on the applicable law in

cases of collective redress, the existing rules should be applied in a way that enables consumers to effectively pursue collective actions. To that aim, Art. 4 (3) 1st S. Rome II-Regulation provides for the possibility to rely on the place of the event that has given rise to the damages as a connecting-factor for collective redress cases in which mass damages have occurred in different states. As a consequence of its application, all claims are governed by the same applicable law, thereby fostering the effectiveness of collective redress.

M. Lehmann: **Locating Financial Loss and Collective Actions in Case of Defective Investor Information: The CJEU's Judgment in VEB v BP**

For the first time, the CJEU has ruled in VEB v BP on the court competent for deciding liability suits regarding misinformation on the secondary securities market. The judgment is also of utmost importance for the jurisdiction over collective actions. This contribution analyses the decision, puts it into larger context, and discusses its repercussions for future cases.

M. Pika: **Letters of Comfort and Alternative Obligations under the Brussels I and Rome I Regulations**

In its judgment of 25 November 2020 (7 U 147/19), the Higher Regional Court of Brandenburg ruled on special jurisdiction regarding letters of comfort under Article 7 No. 1 Brussels I Regulation. While the court left the decision between lit. a and lit. b of that Article open, it ruled that either way, the courts at the domicile of the creditor of the letter of comfort (in this case: the subsidiary) have no special jurisdiction. This article supports the court's final conclusion. In addition, it assesses that Article 7 No. 1 lit. b Brussels I Regulation on services may apply to letters of comforts given the CJEU's decision in Kareda (C-249/16).

B. Hess/A.J. Wille: **Russian default interests before the District Court of Frankfort**

In its judgment of February 2021, the Landgericht Frankfurt a.M., applying Russian law, awarded a three-month interest rate of 37% to a defendant

domiciled in Germany. When examining public policy, the regional court assumed that there was little domestic connection (Inlandsbezug), as the case was about the repayment of a loan issued in Moscow for an investment in Russia. However, the authors point out that the debtor's registered office in Hesse established a clear domestic connection. In addition, the case law of German courts interpreting public policy under Article 6 EGBGB should not be directly applied to the interpretation of Articles 9 and 21 of the Rome I Regulation.

D. Looschelders: **Implied choice of law under the EU Succession Regulation – not just a transitional problem in connection with joint wills**

The decision of the German Federal Supreme Court focuses on the question, under which conditions an implied choice of law may be assumed within the framework of the EU Succession Regulation (Regulation No 650/2012). In this particular case, an implied choice of German law as the law governing the binding effect of the joint will drawn up by the German testator and her predeceased Austrian husband was affirmed by reference to recital 39(2) of the EU Succession Regulation. Actually, the joint will of the spouses stipulated the binding effect as intended by German law. As the spouses had drawn up their will before the Regulation became applicable, the question of an implied choice of law arose in the context of transition. However, the decision of the German Federal Supreme Court will gain fundamental importance regarding future cases of implied choices of law for all types of dispositions of property upon death, too. Nevertheless, since the solution of the interpretation problem is not clear and unambiguous, a submission to the ECJ would have been necessary.

M. Reimann: **Human Rights Litigation Beyond the Alien Tort Claims Act: The Crucial Role of the Act of State Doctrine**

The Kashef case currently before the federal courts in New York shows that human rights litigation against corporate defendants in the United States is alive and well. Even after the Supreme Court's dismantling of the Alien Tort Claims Act jurisdiction remains possible, though everything depends on the circumstances. And even after the Supreme Court's virtual elimination of federal common law causes of action claims under state or foreign law remain possible, though they

may entail complex choice-of-law issues.

Yet, so far, the most momentous decision in this litigation is the Court of Appeals' rejection of the defendants' potentially most powerful argument: the Court denied them shelter under the act of state doctrine. It did so most importantly because the alleged human rights abuses amounted to violations of jus cogens.

Coming from one of the most influential courts in the United States, the Second Circuit's Kashef decision adds significant weight to the jus cogens argument against the act of state doctrine. As long as the Supreme Court remains silent on the issue, Kashef will stand as a prominent reference point for future cases. This is bad news for corporate defendants, good news for plaintiffs, and excellent news for the enforcement of human rights through civil litigation.

J. Samtleben: **Paraguay: Choice of Law in international contracts**

To date, Paraguay is the only country to have implemented into its national law the Hague Principles on Choice of Law in International Commercial Contracts. Law No. 5393 of 2015, which closely follows the Hague model, owes its creation primarily to the fact that the Paraguayan delegate to the Hague was actively involved in drafting the Principles. Unlike the Principles, however, Law No. 5393 also regulates the law governing the contract in the absence of a choice of law, following the 1994 Inter-American Convention on the Law Applicable to International Contracts of Mexico. Contrary to the traditional rejection of party autonomy in Latin America, several Latin American countries have recently permitted choice of law in their international contract law. Paraguay has joined this trend with its new law, but it continues to maintain in procedural law that the jurisdiction of Paraguayan courts cannot be waived by party agreement.

Third Issue of Journal of Private International Law for 2021

The third issue of the *Journal of Private International law* for 2021 was released today. It features the following articles:

Jonannes Ungerer, "Explicit legislative characterisation of overriding mandatory provisions in EU Directives: Seeking for but struggling to achieve legal certainty"

Traditionally, the judiciary has been tasked with characterising a provision in EU secondary law as an overriding mandatory provision ("OMP") in the sense of Art 9(1) Rome I Regulation. This paradigm has however shifted recently as the legislator has started setting out such OMP characterisation explicitly, which this paper addresses with regard to EU Directives. The analysis of two Directives on unfair trading practices in the food supply chain and on the resolution of financial institutions reveals that their explicit legislative characterisations of OMPs can benefit legal certainty if properly drafted by the EU and correctly transposed into national law by the Member States. These requirements have not yet been fully met as there are inconsistencies and confusion with only domestically mandatory provisions, which need to be resolved. More generally, the paper elucidates the tensions of competence between legislators and courts on both the EU and national levels due to the explicit legislative characterisation. It also considers the side effects on pre-existing and future provisions in Directives without explicit legislative characterisation. Finally, it acknowledges that the extraterritorial effect of OMPs is intensified and therefore requires the legislator to seek international alignment.

Patrick Ostendorf, "The choice of foreign law in (predominantly) domestic contracts and the controversial quest for a genuine international element: potential for future judicial conflicts between the UK and the EU?"

The valid choice of a (foreign) governing law in commercial contracts presupposes, pursuant to EU private international law, a genuine international element to the transaction in question. Given that the underlying rationale of this requirement stipulated in Article 3(3) of the Rome I Regulation has yet to be fully

explored, the normative foundations as to the properties that a genuine international element must possess remain unsettled. The particularly low threshold applied by more recent English case law in favour of almost unfettered party autonomy in choice of law at first glance avoids legal uncertainty. However, such a liberal interpretation not only robs Article 3(3) Rome I Regulation almost entirely of its meaning but also appears to be rooted in a basic misunderstanding of both the function and rationale of Article 3(3) Rome I Regulation in the overall system of EU private international law. Consequently, legal tensions with courts based in EU member states maintaining a more restrictive approach may become inevitable in the future due to Brexit.

Darius Chan & Jim Yang Teo, "Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis"

Following two recent decisions from the apex courts in England and Singapore on the appropriate methodology to ascertain the proper law of an arbitration agreement, the positions in these two leading arbitration destinations have now converged in some respects. But other issues of conceptual and practical significance have not been fully addressed, including the extent to which the true nature of the inquiry into whether the parties had made a choice of law is in substance an exercise in contractual interpretation, the applicability of a validation principle, and the extent to which the choice of a neutral seat may affect the court's determination of the proper law of the arbitration agreement. We propose a re-formulation of the common law's traditional three-stage test for determining the proper law of an arbitration agreement that can be applied by courts and tribunals alike.

Amin Dawwas, "*Dépeçage* of contract in choice of law: Hague Principles and Arab laws compared"

This paper discusses the extent to which the parties may use their freedom to choose the law governing their contract under the Hague Principles on Choice of Law in International Commercial Contracts and Arab laws, namely whether they can make a partial or multiple choice of laws. While this question is straightforwardly answered in the affirmative by the Hague Principles, it is

debatable under (most) Arab laws. After discussion of the definition of dépeçage of contract, this paper presents the provisions of dépeçage of contract under comparative and international law, including the Hague Principles, and then under Arab laws. It concludes that Arab conflict of laws rules concerning contract should be reformed according to the best practices embodied in this regard by the Hague Principles.

Jan Ciaptacz, "*Actio pauliana* under the Brussels Ia Regulation – a challenge for principles, objectives and policies of EU private international law"

The paper discusses international jurisdiction in cases based on *actio pauliana* under the Brussels Ia Regulation, especially with regard to the principles, objectives and policies of EU private international law. It concentrates on the assessment of various heads of jurisdiction that could possibly apply to *actio pauliana*. To that end, the CJEU case law was thoroughly analysed alongside international legal scholarship. As to the jurisdictional characterisation of *actio pauliana*, the primary role should be assigned to teleological and systematic considerations. *Actio pauliana* can neither be characterised as an issue relating to torts nor as a right *in rem* in immovable property. Contrary to the recent position adopted by the CJEU, it should also be deemed not to fall within matters relating to a contract. The characterisation of *actio pauliana* as a provisional measure or an enforcement mechanism for jurisdictional purposes is equally incorrect.

Harry Stratton, "Against renvoi in commercial law"

The doctrine of renvoi is rightly described as "a subject loved by academics, hated by students and ignored (when noticed) by practising lawyers (including judges)". This article argues that the students have much the better of the argument. English commercial law has rightly rejected renvoi as a general rule, because it multiplies the expense and complexity of proceedings, while doing little to deter forum-shopping and enable enforcement. It should go even further to reject renvoi in questions of immovable property, because the special justification that this enables enforcement of English judgments against foreign land ignores the fact that title or possession of such land is generally not justiciable in English

courts and such judgments will not be enforced irrespective of whether renvoi is applied.

Yun Zhao, “The Singapore mediation convention: A version of the New York convention for mediation?”

Settlement agreements have traditionally been enforced as binding contracts under national rules, a situation considered less than ideal for the promotion of mediation. Drawing on the experience of the 1958 New York Convention on international arbitration, the 2019 Singapore Mediation Convention provides for the enforcement of settlement agreements in international commercial disputes. Based on its provisions and the characteristics and procedures of mediation, this article discusses the impact of the Singapore Mediation Convention on the promotion of mediation and its acceptance by the international community. It is argued that the achievements of the New York Convention do not necessarily promise the same success for the Singapore Mediation Convention.

Jakub Pawliczak, “Reformed Polish court proceedings for the return of a child under the 1980 Hague Convention in the light of the Brussels IIb Regulation”

In recent years a significant increase in applications sent to Polish institutions to obtain the return of abducted children under the 1980 Hague Abduction Convention can be observed. Simultaneously, Poland has struggled with a problem of excessively long court proceedings in those cases and the lack of specialisation among family judges. Taking these difficulties into consideration, in 2018 the Polish Parliament introduced a reform aimed at improving the effectiveness of the court proceedings for the return of abducted children. The work on the amendment of the Polish legal regulations was carried out in parallel to the EU legislative process in the field of international child abduction. Although the Polish reform had been introduced before Council Regulation (EU) 2019/1111 of 25 June 2019 (Brussels IIb) was adopted, the 2016 proposal for this Regulation had been known to the national legislature. When discussing the amended Polish legal regulations, it should be considered whether they meet their goals and whether they are in line with the new EU law.

Elaine O'Callaghan, "Return travel and Covid-19 as a grave risk of harm in Hague Child Abduction Convention cases"

Since February, 2020, courts have been faced with many novel arguments concerning the Covid-19 pandemic in return proceedings under the "grave risk exception" provided in Article 13(1)(b) of the 1980 Hague Convention. This article presents an analysis of judgments delivered by courts internationally which concern arguments regarding the safety of international travel in return proceedings during the Covid-19 pandemic. While courts have largely taken a restrictive approach, important clarity has been provided regarding the risk of contracting Covid-19 as against the grave risk of harm, as well as other factors such as ensuring a prompt return despite practical impediments raised by Covid-19 and about quarantine requirements in the context of return orders. Given that the pandemic is ongoing, it is important to reflect on this case law and anticipate possible future issues.

Chukwudi Paschal Ojiegbe, "The overview of private international law in Nigeria" (Review Article)

The Nigerian Court of Appeal declines to enforce an Exclusive English Choice of Court Agreement

The focus of this write-up is a case note on a very recent decision of the Nigerian Court of Appeal that declined to enforce an exclusive English choice of court

agreement.[1] In this case the 1st claimant/respondent was an insured party while the defendant/appellant was the insurer of the claimant/respondent. The insurance agreement between the 1st claimant/respondent and defendant/appellant provided for both an exclusive choice of court and choice of law agreement in favour of England. The claimants/respondents issued a claim for significant compensation before the High Court of Cross Rivers State, Nigeria for breach of contract and negligence on the part of the defendant/appellant for failure to fully perform the terms of the insurance contract during the period the 1st claimant/respondent was sick in Nigeria. The defendant/appellant challenged the jurisdiction of the High Court of Cross Rivers State, and asked for a stay of proceedings on the basis that there was an exclusive choice of court agreement in favour of England. The 1st claimant/respondent in a counter affidavit stated mainly at the trial court that he was critically ill, and the 2nd claimant/respondent (the employer of the 1st claimant/respondent) had serious financial difficulties in paying the 1st claimant/respondent's salaries, so in the interest of justice a stay should not be granted.

Both opposing parties were in agreement throughout the case that it was the Brandon test,[2] as applied by the Nigerian Supreme Court[3] that was applicable in this case to determine if a stay should be granted in the enforcement of a foreign choice of court agreement. Now the Brandon test (named after an English judge called Brandon J, who formulated the test) as applied in the Nigerian context is as follows:

"1. Where plaintiffs sue in Nigeria in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the Nigerian court, assuming the claim to be otherwise within the jurisdiction is not bound to grant a stay but has a discretion whether to do so or not. 2. The discretion should be exercised by granting a stay unless strong cause for not doing it is shown. 3. The burden of proving such strong cause is on the plaintiffs. 4. In exercising its discretion the court should take account of all the circumstances of the particular case. 5. In particular, but without prejudice to (4), the following matters where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that

on the relative convenience and expense of trial as between the Nigerian and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from Nigerian law in any material respects. (c) With what country either party is connected and how closely (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiff s would be prejudiced by having to sue in the foreign country because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in Nigeria; or (iv) for political, racial, religious, or other reasons be unlikely to get a fair trial (v) the grant of a stay would amount to permanently denying the plaintiff any redress."

The reported cases where the plaintiff(s) have successfully relied on the Brandon test to oppose the enforcement of a foreign jurisdiction clause are where their claim is statute barred in the forum chosen by the parties.[4] Indeed, the burden is on the plaintiff to show strong cause as to why Nigerian proceedings should be stayed in breach of a choice of court agreement; if not, Nigerian courts will give effect to the foreign choice of court agreement.[5]

The High Court (Ayade J) relying on the Nigerian Supreme Court's decision on the application of the Brandon tests declined to uphold the exclusive choice of court agreement in the interest of justice. It is fair to say that the trial judge applied a very flexible approach on the issue of whether the exclusive English choice of court agreement should be enforced. Indeed, he was very focused on substantial justice (rather than the strong cause test), thereby stretching the criteria provided in the Brandon test.[6] Ayade J's judgment is worth quoting thus:

"This Court is fully aware of the principles of party autonomy, freedom and sanctity of contract, the doctrine that parties should be held to their contract (pacta sunt servanda) and this puts the burden on the plaintiff to show why the proceedings should continue in Nigeria inspite of the foreign jurisdiction clause, which in the opinion of this Court, the plaintiff has rightly done."[7]

He also interestingly remarked that:

"Let it be remarked that this Court is not unmindful, and there is no

doubt that in an area of globalization, the issue of foreign jurisdiction clause and the subject of conflict of laws has a future and one of growing importance, see MORRIS: The conflict of laws, 7th Edition, Sweet and Maxwell, 2010 page 16. This is reflected in the expanded membership of the specialist international bodies such as the Hague Conference on Private International Law: Rome Convention on Contractual Obligations 1980, Convention on Choice of Court, 1965, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971, Convention on International Access to Justice, The Brussel Convention and the Lugano Convention, Convention on the Law Applicable to Contractual Obligation, Organization for the Harmonization of Business Law in Africa (OHADA), and the various efforts at Harmonization and Unification of Law are still in the inchoate stage in this part of the world. We shall get there at a time when there shall be one law, one forum and one world.
It is for the above reasons that I am of the view that the current attitude of the Nigerian Courts to foreign jurisdiction clauses remains as stated in the Norwind. Thus, I am inclined to agree that Courts are not bound to stay its proceedings on account of a foreign jurisdiction clause in a Court."[8]

In the final analysis, he held as follows:

"Applying the law as declared above to the instant case and after due consideration of all the circumstances of this case, and in the exercise of discretion as to whether or not to do so in this case and this Court, which endeavoured always to do substantial justice between the parties. The sole issue raised by the claimants/respondents is therefore resolved in their favour against the defendant/applicant. Accordingly, this application is hereby dismissed."[9]

On appeal, the defendant/appellant argued that in reality the test the High Court (Ayade J) applied was one of balance of convenience, and did not properly follow the strong cause test as stipulated by the Nigerian Supreme Court in applying the Brandon test.

The claimant/respondent brilliantly filed a respondent's notice to justify the High Court's decision on other grounds. The core argument was that the action will be

statute-barred in England if the action was stayed before the Nigerian Court. This argument was clearly supported by the Brandon test as applied by the Nigerian Supreme Court.[10]

The Court of Appeal unanimously dismissed the appeal. Shuaibu JCA in his leading judgment held that:

"In exercising its discretion to grant a stay of proceedings in a case filed in breach of an agreement to refer disputes to a foreign country, the Court would take into consideration a situation where the granting would spell injustice to the plaintiff as where the action is already time barred in the foreign country and the grant of stay would amount to permanently denying the plaintiff any redress."[11]

In analysing the Brandon test, as applied by the Nigerian Supreme Court he held that:

"It is imperative to state here that the Brandon Test is basically a guideline to judges in exercising their discretionary power to order a stay of proceedings where as in the present case, there is a foreign jurisdiction clause in the contract. It is to be noted however that like every discretion, the judge must exercise it judicially and judiciously based on or guided by law and discretion according to sound and well considered reason. Perhaps, the most noticeable guideline which I consider more novel is that the Brandon Test enjoins Court to exercise its discretion in favour of the applicant unless strong cause for not doing so is shown which places the burden of showing such strong cause for not granting the application on the respondent (claimant)."[12]

After referring to the counter-affidavit of the claimant/respondent where they mainly alleged at the trial court that the 1st claimant/respondent was sick and had financial difficulties, Shuaibu JCA adopted a similar flexible approach to the Brandon tests as Ayade J. He held that:

"What is discernible from the above is that the evidence on the issues of fact is situated and more readily available, in Nigeria and the lower Court, was therefore right in refusing to adhere to foreign jurisdiction clause on the basis that the case is more closely connected to Nigeria. In effect, the

trial Court has taken into account the peculiar circumstances of the case vis-à-vis the guidelines in the Brandon Test and thus exercised its discretion judicially and judiciously in refusing to grant stay of proceedings."[13]

Owoade JCA in his concurring judgment held that:

"In the instant case, more particularly by paragraphs 6, 7 and 8 of the Respondents counter-affidavit in opposition to the Appellant's motion for an order for stay, the Respondents have established that they would suffer injustice if the case is stayed. This is more so in the instant case where the Plaintiffs/1st Respondent action was statute barred in the foreign Court and the grant of stay would amount to permanently denying the Plaintiff/1st Respondent any redress."[14]

It is difficult to fault the decision of the High Court and Court of Appeal in this case, except for Shuaibu JCA's occasional confusion of choice of court with choice of law (a conceptual mistake some Nigerian judges make). An additional observation is that this procedural issue on foreign choice of court agreement took over 5 years to resolve so far. The issue of delay is something to look into in the Nigerian legal system – a topic for another day.

The standard test for determining if a stay should be granted in breach of a foreign jurisdiction clause is the Brandon test as applied by the Nigerian Supreme Court.[15] I am in total agreement with Shuaibu JCA that the Brandon test is a guideline. In other words, it must not be followed slavishly by Nigerian courts or indeed courts of other common law countries in Africa. A judge should be able to consider the facts of the instant case and decide if there is a strong cause for not granting a stay in breach of a foreign jurisdiction clause. In this case, the fact that the action will be statute-barred was a strong ground not to grant a stay in breach of the exclusive choice of court agreement in favour of England. The financial difficulties and sickness of the claimant/respondent were also factors that could be taken into account in the interest of justice, although they are not as strong as the claim that the action was statute-barred in a foreign forum. Indeed, I have argued elsewhere that the test of the interest of justice should not be excluded from the Brandon test analysis.[16] Of course, I agree this might create uncertainty and undermine party autonomy in some cases, but this problem can be curtailed if the burden is firmly placed at the door steps of the claimant as to

why a foreign jurisdiction clause should not be enforced.

Nigeria is a growing economy, and its lawyers, arbitrators and judges should be able to benefit from international commercial litigation and arbitration business like developed countries such as England. Of course, the best way to do this is to make Nigeria attractive for litigation in matters of speed, procedural rules, content of applicable laws, honesty of judges, and competence of judges to handle cases etc. However, Nigerian courts should not blindly apply party autonomy in the enforcement of choice of court agreements despite the certainty and predictability it offers to international commercial actors.

This brings me to an even more important issue. This case involved an insurance contract. The insured party – the 1st claimant/respondent – was obviously the weaker party in this case. The traditional common law in Nigeria has not created a clear exception for the protection of weaker parties in the enforcement of foreign choice of court agreements. The European Union has done that in the case of employees, consumers and insured persons.[17] Nigeria and the rest of common law Africa's legal system is not an island of its own. We can learn from the EU experience and borrow some good things from them. Indeed, the Nigerian Supreme Court had held that there is nothing wrong with borrowing from another legal system.[18] I will add there should be good reasons for borrowing from another legal system especially former colonial powers.

In this connection, it is proposed that in the case of weaker parties such as insured, consumers and employees, a party domiciled or habitually resident in Nigeria should be able to sue in Nigerian courts in breach of a foreign jurisdiction clause. In addition, the common law concept of undue influence could be applied so that cases where a party is presumably weak in the contractual relationship, such a party should not be bound by the foreign jurisdiction clause. Of course, there is a danger that this could create uncertainty. So I propose that in cases of business to business contracts, Nigerian and African courts should be more willing to enforce foreign choice of court agreements strictly.

Back to the case at hand, it is not unlikely that this case might come before the Nigerian Supreme Court on appeal. The Nigerian Court of Appeal has applied varied approaches to the enforcement of foreign choice of court agreements in Nigeria. Indeed, I noted three inconsistent decisions of the Nigerian Court of Appeal in this area of the law as recent as 2020.[19] On the one extreme hand,

there is the contractual approach that strictly treats a choice of court agreement like any ordinary commercial contract.[20] This approach is good in that it promotes party autonomy, but the problem with this approach is that it ignores the procedural context of a choice of court agreement and might spell injustice due to its rigid approach. On the other extreme hand, there is the ouster clause approach that strictly refuses to enforce a foreign choice of court agreement.[21] Though this approach might favour litigation in Nigeria and other African countries, it dangerously undermines party autonomy, and international commercial actors are likely to lose confidence in a legal system that does not uphold party autonomy. The other approach is the middle ground of the Brandon test, which upholds a choice of court agreement except strong reason is demonstrated to the contrary. This is standard approach the Nigerian Supreme Court has applied.[22]

It is recommended that if this case goes to the Nigerian Supreme Court, it should continue its endorsement of the Brandon test. It should also consider the addition of the interest of justice approach as was utilised by some of the High Court and Court of Appeal judges in this case. What is missing in the Nigerian Supreme Court's jurisprudence is a common law test that protects weaker parties like insured, consumers, and employees, as can be utilised in this case to protect the insured party (the 1st claimant/respondent). The time to act is now.

[1]*BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA).

[2] *The Owners of Cargo Lately Laden on Board the Ship or Vessel ' Elftheria ' v ' The Elftheria ' (Owners), ' The Elftheria '* [1969] 1 Lloyd ' s Rep 237 (Brandon J).

[3] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

[4]*Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520. See also *Hull Blyth (Nig) Ltd v Jetmove Publishing Ltd* (2018) LPELR-44115 (CA).

[5]*Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509. See also *Captain Tony Nso v Seacor Marine* (*Bahamas*) *Inc* (2008) LPELR-8320 (CA); *Beaumont Resources Ltd & Anor v DWC Drilling Ltd* (2017) LPELR-42814 (CA).

[6]Compare *Adesanya v Palm Lines Ltd* (1967) NCLR 133, which is one of the earliest cases where the balance of convenience and interest of justice test was

applied in enforcing a foreign choice of court agreement.

[7]Cited in *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 3.

[8]Cited in *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 3-4.

[9] Cited in *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 5.

[10] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520.

[11]*BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA).21.

[12]*BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA).

[13] *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 28.

[14] *BUPA Insurance v Chakraverti* & *Anor* (2021) LPELR-55940 (CA) 30.

[15] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

[16]CSA Okoli, "Analysis of Choice of Court Agreements in Nigeria in the Year 2020" (2021) 21 *Dutch Journal of Private International Law* 292, 305.

[17]See Article 10 – 23 of Brussels I Regulation Recast (Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 [2012] OJ L351/1.). See also recital 19 to Brussels I Regulation Recast.

[18]*Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11 (Ayoola JSC, Mohammed JSC (as he then was), Ejiwunmi JSC).

[19]CSA Okoli, "Analysis of Choice of Court Agreements in Nigeria in the Year 2020" (2021) 21 *Dutch Journal of Private International Law* 292 – 305.

[20] *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699(CA). See also *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC), 500-501 (Okoro JSC), 502 (Eko JSC).

[21]*A.B.U. v VTLS* (2020) LPELR-52142 (CA). See also *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC); *Sonnar (Nig) Ltd v Partenreedri MS Norwind* (1987) 4 NWLR 520, 544-5 (Oputa JSC); *LAC v AAN Ltd* (2006) 2 NWLR 49, 81

(Ogunbiyi JCA as she then was); *Ventujol v Compagnie Française De L'Afrique Occidentale* (1949) 19 NLR 32; *Allied Trading Company Ltd v China Ocean Shipping Line* (1980) (1) ALR Comm 146.

[22]*Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

GEDIP Recommendation to the European Commission on the private international law aspects of the future EU instrument on corporate due diligence and accountability

Written by Hans van Loon, a member of GEDIP and former Secretary General of the Hague Conference on Private International Law (HCCH). This post was previously published by the EAPIL blog.

The European Group for Private International Law (GEDIP) at its annual – virtual – meeting in September 2021 adopted a Recommendation to the EU Commission concerning the PIL aspects of corporate due diligence and corporate accountability.

The GEDIP adopted this Recommendation although the Commission has not yet published its legislative initiative on mandatory human rights and environmental due diligence obligations for companies, to which EU Commissioner for Justice, Didier Reynders, committed on 19 April 2019[1]. Meanwhile, however, on 10

March 2021 the European Parliament adopted a Resolution "with recommendations to the Commission on corporate due diligence and corporate accountability"[2]. As the Commission will likely draw inspiration from this document, the GEDIP considered the EP Resolution when drafting its Recommendation. The GEDIP also took into account various legislative initiatives taken by Member States such as the 2017 French *Loi sur le devoir de vigilance* and the 2021 German legislative proposal for a *Sorgfaltsplichtengesetz*[3], as well as recent case law in the UK and the Netherlands[4]

The Recommendation starts from the premise that the future EU Instrument (whether a Regulation or a Directive) will have a broad, cross-sectoral scope, and will apply both to companies established in the EU and those in a third State when operating in the internal market. In order to accomplish its aim, the Instrument, in addition to a public law monitoring and enforcement system, should create civil law duties for the relevant companies. Since such duties may extend beyond Member States' territories, they will give rise to issues of private international law. To be effective, the Instrument should not leave their regulation to the differing PIL systems of the Member States. Ultimately, the proposed rules may find their place in revised texts of EU regulations, including Brussels I recast, Rome I and Rome II. But since revisions of those regulations are unlikely to take place before the adoption of the Instrument, and as these rules are indispensable for its proper operation, the proposal is to include them in the Instrument itself.

The Recommendation therefore proposes that the Instrument extends the current provision on connected claims (Art. 8 (1) Brussels I) to cases where the defendant is not domiciled in a Member State, creates a *forum necessitatis* where no jurisdiction is available within the EU, determines that the Instrument's provisions have overriding mandatory effect whatever law may apply to contractual and non-contractual obligations and companies, and extends the rule of Art. 7 of Rome II to claims resulting from non-compliance in respect of all matters covered by the Instrument, while excluding the possibility of invoking Art. 17 of Rome II by way of exoneration[5]

[1] European Commission promises mandatory due diligence legislation in 2021 – RBC (responsiblebusinessconduct.eu).

[2] https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html.

[3] See II Background to the Proposal, 3.

[4] See II Background to the Proposal 2.

[5] The Annex to the Proposal contains suggestions concerning the form and the substantive scope of the future EU instrument.