European and International Civil Procedural Law: Some views on new editions of two leading German textbooks

For German-speaking conflict of law friends, especially those with a strong interest in its procedural perspective (and this seems to apply to almost all of them by now, I guess), the year 2021 has begun beautifully, as far as academic publications are concerned. Two fantastic textbooks were released, one on European civil procedural law, and one on international civil procedural law:

After more than ten years the second edition of Burkhard Hess's 2nd edition of his textbook on „Europäisches Zivilprozessrecht" is now on the table, 1026 pages, a plus of nearly 300 pages and now part of the renowned series „Ius Communitatis" by DeGruyter. It is a fascinating account of the foundations („Grundlegung", Part 1, pp. 3 – 311) of European civil procedure as well as a sharp analysis of the instruments of EU law („Europäisches internationales Zivilprozessrecht", Part 2, pp. 313 – 782). Part 3 focuses on the interplay between autonomous and European procedural law (pp. 783 – 976). Extensive tables of the cases by the ECJ and the ECtHR as well as a large subject index help to access directly the points in question. The foreword rightly points out that European civil procedural law has reached a new phase. Whereas 10 years ago, the execution of the agenda under the then still new competency in (now) Article 81 TFEU was at issue, today enthusiasm and speed have diminished. Indeed, the ECJ had to, and still has to, defend „the fundamental principles of EU law, namely mutual trust and mutual recognition, against populist attacks and growing breaks of taboos by right-wing populist governments in several Member States" (Foreword, p. 1, translation here and all following ones by myself; see also pp. 93 et seq. on the struggle for securing independence of the national judge in Hungary and Poland as a matter of the EU's fundamental values, Article 2 TEU). At the same time, the EU legislator and the ECJ had shown tendencies towards overstreching the

legitimatory potential of the principle of mutual trust before the EU returned to „recognition with open eyes“ (as is further spelled out at para. 3.34, at p. 119), as opposed to blind trust – tendencies that worried many observers in the interest of the rule of law and a convincing balancing of the freedom of movement for judgments and other juridical acts. The overall positive view by Hess on the EU’s dynamic patterns of judicial cooperation in civil matters, combined with the admirable clarity and comprehensiveness of his textbook, will certainly contribute considerably to address these challenges.

Equally admirable for its clarity and comprehensiveness is Haimo Schack’s 8th edition of his textbook on „Internationales Zivilverfahrensrecht“, including international insolvency and international arbitration, 646 pp., now elevated from the „short textbook series“ to the „large textbook series“ at C.H.Beck. The first part addresses foundations of the subject (pp. 1 – 68), the second part describes the limits of adjudicatory authority under public international law (pp. 69 – 90), the third part analyses all international aspects of the main proceedings (pp. 91 – 334), the fourth part recognition and enforcement (pp. 335 – 427), the fifth and sixth part deal with insolvency (pp. 428 – 472) and arbitration (pp. 473 – 544). Again, an extensive table of cases and a subject index are offered as valuable help to the user. Schack is known for rather sceptical positions when it comes to the narrative of mutual trust. In his sharp analysis of the foundations of international procedural law, he very aptly states that the principle of equality („*Gleichheit*“) is of fundamental relevance, including the assumption of a principal equivalence of the adminstrations of justice by foreign states, which allows trust in and integration of foreign judicial acts and foreign laws into one’s own administration of justice: *„Auf die Anwendung eigenen Rechts und die Durchführung eines Verfahrens im Inland kann man verzichten, weil und soweit man darauf vertraut, dass das ausländische Recht bzw. Verfahren dem inländischen äquivalent ist*“ (We may waive the application of our own law and domestic proceedings because and as far as we trust in the foreign law and the foreign proceedings are equivalent to one’s own, para. 39, at p. 12) – a fundamental insight based, inter alia, on conceptual thinking by Alois Mittermaier in the earlier parts of the 19th century (AcP 14 [1831], pp. 84 et seq., at pp. 95, justifying recognition of foreign judgments by the assumption that the

foreign judge should, in principle, be considered „as honest and learned as one's own"), but of course also on Friedrich Carl v. Sagigny, which I allowed myself to further substantiate and transcend elsewhere to the finding: to trust or not to trust – that is the question of private international law (M. Weller, RdC, forthcoming). In Schack's view, „the ambitious and radical projects" of the EU in this respect „fail to meet with reality" (para. 126, at p. 50). Equally sceptical are his views on the HCCH 2019 Judgments Convention („*Blütenträume*", para. 141, at p. 57, in translation something like „daydreams").

Perhaps, the truth lies somewhere in the middle, namely in a solid „trust management", as I tried to unfold elsewhere.

Emmanuel Gaillard died on April 1

Shocking, completely unexpected news: Emmanuel Gaillard, the leading scholar and practitioner of international arbitration and a giant in the field, died on April 1, at age 69. Pierre Mayer calls this "an immense loss;" Jean-Dominique Merchet calls him a "star". Le Monde du droit collected some further reactions from French colleagues. Some eulogies in English are here and here. The International Chamber of Commerce also published a brief statement, as did the International Academy of Comparative Law. Diego P. Fernández Arroyo and Alexandre Senegacnik have an extensive eulogy on the SciencesPo site that also includes links to further testimonies.

Only two months ago, Gaillard had left Sherman Sterling, whose international arbitration department he had founded in 1989 and led since then, and founded a spinoff with six other former Shearman Sterling colleagues, Gaillard Shelbaya Banifatemi. His new law firm, announcing the death, called him "a totem in the world of international arbitration and a source of inspiration for lawyers around the world." The law firm asks to share memories for a memorial book to be shared with his family and close ones.

Gaillard was well known as a practitioner (his biggest case may have been Yukos, though he had countless others) as well as a scholar (his Hague lectures on the "Legal theory of arbitration", republished as a book and translated into several languages,, were a crucial step towards a more theoretical understanding of the field.) Most recently, he had been instrumental for OHADA's decision to let Sherman Sterling draft a new private international law code for the region. The firm's own statement of that decision is, however, down. The project, if continued, will need to go on without him. RIP.

Out now: the Swiss IPRG in English

Information and text provided by Niklaus Meier, co-head of the Private International Law Unit at the Swiss Federal Office of Justice

The Swiss Federal Act on Private International Law (FAPIL), adopted in 1987, has had – and still has – a huge influence throughout the world. It is "possibly the most complete codification of private international law worldwide" (Kadner Graziano, Journal of Private International Law. 2015, vol. 11, no. 3, p. 585: "Codifying European Private International Law: The Swiss Private International Law Act – A Model for a Comprehensive European Private International Law Regulation?") and has influenced PIL codifications in many countries (Kadner Graziano, p. 589-90).

The global relevance of the Swiss Federal Act on PIL led to numerous translations, testament of its international character. Complete translations have been published by Prof. Andreas Bucher (last updated 2021): www.andreasbucher-law.ch; Umbricht attorneys (2017): www.umbricht.ch/de/schweizerisches-internationales-privatrecht-iprg; Gehri/Walther (2010): www.schulthess.com/verlag/detail/ISBN-9783280072509/Gehri-Myriam-A.-Walthe

r-Fridolin/Swiss-Laws-on-Civil-Procedure; the Swiss-American Chamber of Commerce (2nd edition 2004, 1st edition 1989); and Karrer/Arnold/Patocchi (1994): Switzerland's Private International Law (Schulthess/Kluwer). In addition, chapter 12 on arbitration has been translated by actors active in the field, such as the Swiss Arbitration Association (www.arbitration-ch.org/en/arbitration-in-switzerland/index.html).

Translation is a difficult task: "Mastery of the languages involved is necessary, but not sufficient, particularly where the user of a translation expects a literal translation, the legal systems of the starting languages and target language differ fundamentally and the subject matter is highly abstract." (Walter König, 11 Mich. J. Int'. L. 1294 (1990), 1295, "Translation of Legal Texts: Three English Versions of the Swiss Federal Statute on Private International Law"). Indeed, a civil law codification usually "contains many legal terms which either do not exist in common law jurisdictions or have different connotations in the case of literal translations".

In recent years, the importance of English versions of the Swiss legal texts has grown. To give just one example: Article 4.4 of the Swiss-Chinese Free Trade Agreement (page 23) explicitly states (under the heading "transparency") that "Each Party shall promptly publish on the Internet, and as far as practicable in English, all laws, regulations and rules of general application relevant to trade in goods between China and Switzerland." It goes without saying that the FAPIL is relevant for international trade.

Against this background, and in view of the growing demand for the availability of Swiss legal texts in English, **the official publication platform for Swiss law (Fedlex) has now released the "official non-official" translation of the FAPIL: www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en**. It is up to date as per February 2021 and includes the most recent DLT-related PIL amendments.

The character of the translation is "official" because it's published on the official publication platform for Swiss law, which speaks for itself; but it nevertheless is of "non-official" nature only because "English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force." In can perhaps best be described as "officially non-official, but unofficially official".

The translation is in large parts based on the translation published by Prof. Andreas Bucher, with the kind permission of the author. The translation does not aim to be (and is not) better than the various existing private translations of the FAPIL, which have provided useful guidance during the past decades. The translation simply wants to render the FAPIL more accessible to the international public, and in order to do so and in order to get approval for publication on the official publication platform for Swiss law, certain adaptations were necessary:

Where several choices of wording were possible, preference was given to expressions that are already in use in other translations of Swiss legislation (e.g. translations of the Swiss Civil Procedure Code, the Swiss Civil Code, or the Swiss Code of Obligations), in order to ensure coherence and consistency.

Due account was also given to the wording used in international conventions ratified by Switzerland (such as the numerous Hague Conventions).

In addition, the translation takes into account language requirements applicable to texts published by the Swiss federal administration, such as the use of gender-neutral language where appropriate and where possible; this led to the use of the "singular-they", applicable to both female and male persons.

People who work in different languages and who have compared the different language versions of the FAPIL will have noted some differences between the French, German and Italian versions of the texts. For example, art. 151 para. 3 in the German version, translated with deepl, states that "This jurisdiction cannot be excluded by a choice of court agreement.", whereas the French version starts the paragraph (again according to deepl) with "Notwithstanding a choice of court, …" In such circumstances, preference was given to the wording that seemed clearer and more in line with the interpretation given to the text by the Federal Supreme Court.

Traduire c'est trahir – translation is treason. Those who coordinated the translation (the Private International Law Unit at the Swiss Federal Office of Justice) are fully aware that critics will find areas for improvement. Feedback can be sent to ipr [at] bj.admin.ch. The translation will continue to be improved and updated in the years to come, in order to respond to new developments such as the upcoming revision of the chapter on succession law.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2021: Abstracts

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

H.-P. Mansel/K. Thorn/R. Wagner: **European Conflict of Law 2020: EU in crisis mode!**

This article provides an overview of developments in Brussels in the field of judicial cooperation in civil and commercial matters from December 2019 until December 2020. It provides an overview of 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.

C. Kranz: **International private law aspects of taking security over membership rights in international financing transactions**

In international financing transactions, pledges of membership rights play an important role. The private international law question, pursuant to which law the pledge is determined in the case of companies with a cross-border connection, cannot be answered in a generalised manner, but confronts those applying the

law with some differentiations, in particular where membership rights have been certified in share certificates. The following analysis undertakes the attempt to clarify the key aspects from the perspective of German international private law.

F. Eichel: **Choice of Court Agreements and Rules of Interpretation in the Context of Tort or Anti-trust Claims**

In its rulings CDC (C-352/13) and Apple Sales (C-595/17) the ECJ gave a boost to the discussion on the range of choice of court agreements vis-à-vis antitrust claims. The article discusses a decision of the OLG München (Higher Regional Court of Munich, Germany) which has decided on this topic. In spite of a choice of court agreement pointing to Irish courts for "all suits to enforce this contract" (translation), the OLG München has held itself competent for antitrust claims, as – according to the reasons given – no interpretation of the contract was necessary. In the opinion of the author, this decision will no longer be relevant in Germany because it is not consistent with the decision Apple Sales, which has been rendered almost a year later. However, the reasons given by the OLG München are of particular interest, as it has made reference to the ECJ's decision Brogsitter (C-548/12). Brogsitter is a decision on the range of the contractual jurisdiction of Art. 7 No. 1 Brussels Ia Regulation/Art. 5 No. 1 Lugano Convention 2007 vis-à-vis claims in tort. The present article has taken this as a reason to examine if the Brogsitter ruling can be understood as a "rule of interpretation" which comes into play once the intention of the parties of a choice of court agreement remains unclear. The article argues that in general the interpretation of choice of court agreements is subject to the lex causae of the main contract. However, with regard to torts and antitrust claims there are rules of interpretation arising from Art. 25 Brussels Ia Regulation itself. They are effective throughout the EU and are not influenced by the peculiarities of the national substantive law of the member states.

A. Kronenberg: **Yet again: Negative consequences of the discrepancy between forum and ius in direct lawsuits after traffic accidents abroad**

The Higher Regional Court (OLG) Saarbrücken had to decide upon appeal by a German-based limited liability company (GmbH) against a French motor vehicle

liability insurer on various questions of French indemnity law and its interaction with German procedural law. The case once again highlights both well-known and less prominent disadvantages of the discrepancy between international jurisdiction and applicable law in actions which accident victims can bring directly against the insurer of the foreign party responsible for the accident at their place of residence.

M. Andrae: Once Again: On Jurisdiction when the Child's Usual Residence Changes to Another Contracting Member State of the Hague Convention 1996

The discussed decision deals with the jurisdiction for a decision when it comes to a parent's right of access. If at the time of the decision of the court of appeal the child has their habitual residence in a contracting state of the Hague Convention 1996 for the Protection of Children that is not a member state of the European Union, the Convention shall apply. For the solution it cannot be left open at which date the change of habitual residence occurred. If the change took place before the family court made the decision on the matter, the court of appeal must overturn this due to a lack of jurisdiction. This is done afterwards, the court of appeal lacks international jurisdiction to make a decision on the matter. The decision of the family court that has become effective remains in force in accordance with Art. 14 (1) Hague Convention 1996 until an amended decision by the authorities of the new habitual state of residence is made.

D. Stefer: Third-Party Effects of Assignment of Claims – Not a Case for Rome I

While an assignment of claims primarily involves the assignor, the assignee and the debtor of the assigned claim, it may nevertheless concern third parties that, though not directly involved in the transfer of the claim itself, may still be subjected to its effects. Such third parties can be creditors of the assignor, a liquidator or another potential assignee of the same claim. From a conflict of laws perspective, it is of particular relevance to determine which law applies to these thirdparty effects, since the outcome may differ depending on the jurisdiction. For instance, in case of multiple assignments of the same claim, German law gives

priority to the assignment that was first validly concluded. Contrary to that, under Italian or English law priority will be given to that assignee who first notifies the debtor of the assignment. Yet, Article 14 of the Rome I Regulation does not contain an explicit rule governing the law applicable to third-party effects of an assignment. It is for that reason that the issue has been subject to constant debates. In particular, it was controversial to what extent the Rome I Regulation applied at all to the issue of third-party effects.

In BNP Paribas ./. Teambank AG, the Court of Justice recently held that no direct or implicit rule in that respect could be inferred from the Regulation. In the Court's view, it was a deliberate choice of the EU legislature not to include rules governing the third-party effects of assignments of claims into the Regulation. Consequently, de lege lata the issue is subject to the national rules of private international law. Hence, under the rules of German private international law, the law applicable to the third-party effects of an assignment is the law that applies to the assigned claim.

F. Rieländer: **The displacement of the applicable law on divorce by the law of the forum under Article 10 Rome III Regulation**

In its judgment (C-249/19) the ECJ provided clarification on the interpretation of Article 10 of Regulation No 1259/2010 in a twofold respect. Firstly, Article 10 of Regulation No 1259/2010 does not lead to the application of the law of the forum if the applicable foreign law permits divorce, but subjects it to more stringent conditions than the law of the forum. Since Article 10 of Regulation No 1259/2010 applies only in situations in which the lex causae does not foresee divorce under any form, it is immaterial whether in the specific case the individual marriage can already be divorced or can still be divorced according to the applicable foreign law. Secondly, the ECJ held that the court seised must examine and establish the existence of the substantive conditions for a mandatory prior legal separation of the couple under the applicable foreign law, but is not obliged to order a legal separation. Unfortunately, the ECJ missed the opportunity to give a clear guidance on distinguishing substantive conditions foreseen by the applicable law from procedural questions falling within the law of the forum. Apart from this, it remains uncertain whether recourse to the law of the forum according to Article 10 of Regulation No 1259/2010 is possible if the lex causae knows the institution

of divorce as such but does not make it available for the concrete type of marriage, be it a same-sex marriage or a polygamous marriage.

M. Scherer/O. Jensen: **The Law Governing the Arbitration Agreement: A Comparative Analysis of the United Kingdom Supreme Court's Decision in Enka v Chubb**

On 9 October 2020 the Supreme Court of the United Kingdom rendered its much-anticipated decision in Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb (Enka v Chubb). In an extensive judgment, the Supreme Court engaged in a detailed review of the different approaches to determining the law applicable to the arbitration agreement and set out the relevant test under English law. The present case note analyses the judgment, explains why the majority's decision is well-reasoned but its conclusion not inevitable and provides a comparative analysis of the English approach. The result: the age-old question of which law governs the arbitration agreement (and why) has not lost in complexity and continues to engage courts and scholars around the world.

D. Otto: **In-/validity of unconscionable arbitration clauses**

Impecunious parties occasionally are an issue in international arbitration. The Canadian Supreme Court had to decide a case involving a – nominally self-employed – driver of Uber, who commenced a class action in a Canadian court to have Uber drivers declared as employees and to challenge violations of Canadian employment laws. His standard-term service agreement with Uber provided for the application of Dutch law and for mediation and arbitration in the Netherlands, which would have required the driver to advance mediation and arbitration fees in an amount of over 70 % of his total annual income from Uber. Uber requested the court to stay proceedings in favour of arbitration in the Netherlands. The Supreme Court held that the arbitration clause was unconscionable and void. The court opined that in general parties should adhere to agreed arbitration clauses. However, the court found that in this case the driver was not made aware of the high costs of arbitration in the Netherlands, that Uber had no legitimate interest to have such disputes decided in far away countries and that the unusual high costs of such proceedings (amounting to over 70 % of the drivers total annual

income) effectively made it impossible for him to enforce his rights before the foreign arbitration tribunal. The court dodged the other issue (affirmed by the lower court) whether a dispute involving alleged violation of Ontario's Employee Standards Act was arbitrable at all.

V. Bumbaca: **Remarks on the judgment of the US Supreme Court "Monasky v. Taglieri"**

The decision of the US Supreme Court in Monasky v. Taglieri confirms that the determination of the newborn/infant's habitual residence should focus on the intention and habitual residence of his/her parents or caregiver – the analytical approach is parent-centered. The US Supreme Court ruling, in affirming the decision of the Sixth Circuit Court of Appeals, also clarifies that the determination of the habitual residence of the adolescent/older child should focus on his/her own acclimatization – the analytical approach is child-centered. According to the Supreme Court, the determination of the habitual residence of the child found to be within a transnational family conflict, such as that contemplating an international abduction or an international marital dispute concerning, inter alia, parental authority, must take into account the specific circumstances and facts of each individual case – fact-intensive determination. Based on the practice of other States and of the CJEU, this judgment considers that a predetermined formula applied to the analysis of the child's habitual residence cannot be deemed to be in conformity with the objectives of the 1980 Hague Convention (applicable to the United States and Italy, both of which are involved in this case) – in particular, by virtue of the fact-based approach followed by this notion, unlike other connecting factors such as domicile and nationality. Regrettably, in affirming the decision the Supreme Court upheld the reasoning of the Court of Appeal as a whole. Thus, it set aside two elements which were not considered in depth by the Court and which in the author's opinion it should have retained, regardless of the child's age and given the child's development within a potentially disruptive family context: The principle of the best interests of the child and the degree of instability attributed to the child's physical presence before the wrongful removal.

E. Jayme: **Canada: Export restriction for cultural property of national**

importance: The Federal Court of Appeal – Attorney General of Canada and Heffel Gallery Limited, 2019 FCA 82 (April 16, 2019) – restores the decision of the Canadian Cultural Export Review Board which rejected the export permit for a painting by the French artist Gustave Caillebotte

Canada: The case decided by the Federal Court of Appeal (Attorney General of Canada, Appellant, and Heffel Gallery Limited, Respondent, and 10 Canadian cultural institutions as interveners, 2019 FCA 82 [April 16, 2019]) involved the following facts: A Toronto based auction house sold a painting by the French impressionist Gustave Caillebotte ("Iris bleus") to a commercial gallery based in London, and applied to the Department of Canadian Heritage for a cultural export permit, which was refused following the recommendation of an expert examiner. Then, the auction house requested a review of that decision before the Canadian Cultural Export Review Board which rejected the export permit application. Then, the auction house asked for a judicial review of that decision: The Federal Court held that the Board's decision was unreasonable and remitted the case to another panel for reconsideration. This decision of the Federal Court was appealed by the Attorney General of Canada. Thus, the case passed to the Canadian Federal Court of Appeal which allowed the appeal, dismissed the application for judicial review and restored the decision of the Board, i.e. the refusal to issue an export permit for the painting, in the words of the court: "I am of the view that the Federal Court erred in failing to properly apply the standard of reasonableness. The Board's interpretation of its home statute was entitled to deference, and the Federal Court's failure to defer to the Board's decision was a function of a disguised correctness review."

The case involves important questions of international commercial law regarding art objects, questions which arise in situations where art objects have a close connection to the national identity of a State. The Canadian decision shows the importance of experts for the decision of whether a work of art is part of the national cultural heritage. The Canadian cultural tradition is based on English and French roots. In addition, the Canadian impressionism has been widely influenced by the development of French art. Thus, it is convincing that the painting by Caillebotte which had been owned and held by a private Canadian collector for 60 years forms part of the Canadian cultural heritage, even if the painter never visited Canada. In addition, the case is interesting for the general question, who is entitled to decide that question: art experts, other boards or judges. The court

applied the standards of reasonableness and deference to the opinion of the art experts.

A. Kampf: **International Insolvency Law of Liechtenstein**

Due to various crises, the International Insolvency Law increasingly comes into the focus of currently discussed juridical issues. With reference to this fact, the essay gives an overview of the corresponding legal situation in Liechtenstein, considering that the EU regulation 2015/848 on insolvency proceedings is not applicable. In particular, the author concerns himself with the complex of recognition and the insofar existing necessity of reciprocity. In comparison to the regulation mentioned above, the author comes to identical or at least similar results. He votes for necessity to be abolished and argues for recognition not only of movable assets being located in Liechtenstein.

Webinar: Brexit and International Business Law/ Brexit e diritto del commercio internazionale

by Fabrizio Marrella

Event: Brexit and International Business Law/ Brexit e diritto del commercio internazionale

When: 26 March 2021, at 14.30 CET

How: Free access upon enrolment by sending an email at fondazione@ordineavvocatifirenze.eu the contact person is: Ms. Giovanna Tello.

Working languages: English and Italian with no simultaneous translation.

Short description: Webinar on the most relevant legal profiles following the process following the Referendum of 23 June 2016, which led to BREXIT on 31 January 2020. The end of the transitional period on 31 December 2020 led to the Trade and Cooperation Agreement ("TCA") of 24 December 2020 which avoided the "No Deal". Since January 1st, 2021, the United Kingdom is no longer part of the EU's customs and tax territory. The TCA creates a free trade area for goods without extra duties or quotas for products, but introduces new rules on rules of origin and labelling of Italian products exported to the United Kingdom as well as new rules for online international sales contracts. The TCA does not clearly regulate the area of financial services, nor it provides detailed regulation for automatic mutual recognition of professional qualifications. All in all, Brexit and TCA require an assessment of current and future international commercial contracts between EU and British companies as well as an evaluation of civil and commercial dispute resolution tools, including arbitration.

Here is the link : https://www.unive.it/data/agenda/3/47520

Prof. Fabrizio Marrella

Prorettore alle Relazioni internazionali e alla Cooperazione internazionale/ Vice Rector for International Relations and International Cooperation

Ordinario di Diritto Internazionale / Chair of International Law

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Webinar: Asia-Pacific Commercial Dispute Resolution in the Aftermath of the Pandemic

The COVID-19 Pandemic has impacted on commercial dispute resolution in China, Singapore and Australia. The important question is whether these impacts will be transformed into legal doctrines and shape the development of law for commercial dispute resolution in the long term.

Experienced panellists will consider how Covid-19 has promoted online trials in China, influenced forum non conveniens and other aspects of international commercial litigation in the Singapore courts, and challenged service of process outside Australia and other private-international-law related issues.

In 2021, besides this panel discussion, the Centre for Asian and Pacific Law (CAPLUS) at the Sydney Law School will organize a series of events on the (post)development of Covid-19 in the Asia-Pacific region focusing on social justice, civil rights and religion, and trade and investment legal issues.

Moderator:

Professor Vivienne Bath's teaching and research interests are in international business and economic law, private international law and Chinese law. Professor Bath has extensive professional experience in Sydney, New York and Hong Kong, specialising in international commercial law, with a focus on foreign investment and commercial transactions in China and the Asian region.

Panellists:

Dr. Wenliang Zhang is an Associate Professor at Renmin University of China Law School. He has been teaching and doing research in the field of international disputes resolution, with a focus on international jurisdiction and global judgments recognition. His works appear in peer-reviewed international journals including Vanderbilt Journal of Transnational Law, Journal of International Dispute Settlement, Yearbook of Private International Law and Chinese Journal of International Law.

Dr. Adeline Chong is an Associate Professor at the School of Law, Singapore Management University. She has published in leading peer-reviewed journals such as the LQR, ICLQ, LMCLQ and JPIL. She is the co-author of Hill and Chong, International Commercial Disputes: Commercial Conflict of Laws in English Courts (Oxford, Hart, 4th edn, 2010). She is the Project Lead of the Asian Business Law Institute's project on the Recognition and Enforcement of Foreign Judgments in Asia. Her work has been cited by the Singapore, Hong Kong, New South Wales and New Zealand Court of Appeals, the Singapore and New Zealand High Courts, the UK Law Commission, as well as in leading texts on conflict of laws. She has appeared as an expert on Singapore law before a Finnish court and issued a declaration on Singapore law for a US class action.

Dr. Jie (Jeanne) Huang is an Associate Professor at the Sydney Law School. She teaches and researches in the fields of private international law and digital trade. She has published four books and authored many articles in peer-reviewed law journals, such as Journal of Private International Law and Journal of International Economic Law. She is the Deputy Director of CAPLUS. She also serves as an Arbitrator at the Hong Kong International Arbitration Center, Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center), Nanjing Arbitration Commission and Xi'an Arbitration Commission. She has also appeared as an expert witness for issues of Chinese law and private international law at the courts in Australia and the US.

Webinar via Zoom, Friday 12 March, 1pm AEST.

Once registered, you will receive Zoom details closer to the date of the webinar.

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Rivista di diritto internazionale

privato e processuale (RDIPP) No 4/2020: Abstracts

The fourth issue of 2020 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) has been released. It features:

Cristina Campiglio, Professor at the University of Pavia, **Il matrimonio in età precoce nel diritto internazionale privato** (Child Marriage in Private International Law; in Italian)

- In recent years, international instruments to combat early and forced marriages have been flanked by national legislative interventions aimed at denying, or at least limiting, the recognition of marriages concluded abroad by minors. The private international law techniques used in Europe are different but fundamentally referable to special public policy clauses, in some cases inspired by the German doctrine of *Inlandsbeziehung*. Failure to recognize marital status – with the inevitable repercussions on immigration policies, specifically in the context of family reunification – can harm the fundamental rights of those concerned. Due to its abstract nature, the legislative approach is not able to carry out the evaluation of the minor's concrete interest that only a case-by-case approach can ensure.

Costanza Honorati, Professor at the University Milan-Bicocca, I**l ritorno del minore sottratto e il rischio grave di pregiudizio ai sensi dell'art. 13 par. 1 lett. b della convenzione dell'Aja del 1980** (Return of the Abducted Child and the Article 13(1)(b) 'Grave Risk of Harm' Defence in the 1980 Hague Convention;

in Italian)

- The “grave risk of physical or psychological harm, or of an intolerable situation” defense pursuant to Article 13(1)(b) of the 1980 Hague Convention constitutes the central hub of the conventional system. In fact, it expresses the difficult balance between, on the one hand, the general imperative to return the abducted child and, on the other, the need to refuse his return in the individual specific case, when this is likely to cause the minor a grave risk of harm. This article examines the application that the exception receives both in the recent Guide to Good Practice prepared by the HCCH Conference and published in March 2020, and in the Italian courts. Through the analysis of many unpublished cases, the peculiarities of the Italian practice on a central provision for effective protection of the abducted child are thus highlighted.

The following comments are also featured:

Loris Marotti, Research Associate at the University of Milan, **Aspetti problematici dell’accordo sull’estinzione dei trattati bilaterali di investimento tra Stati membri dell’Unione europea** (Problematic Aspects of the Agreement for the Termination of Bilateral Investment Treaties between EU Member States; in Italian).

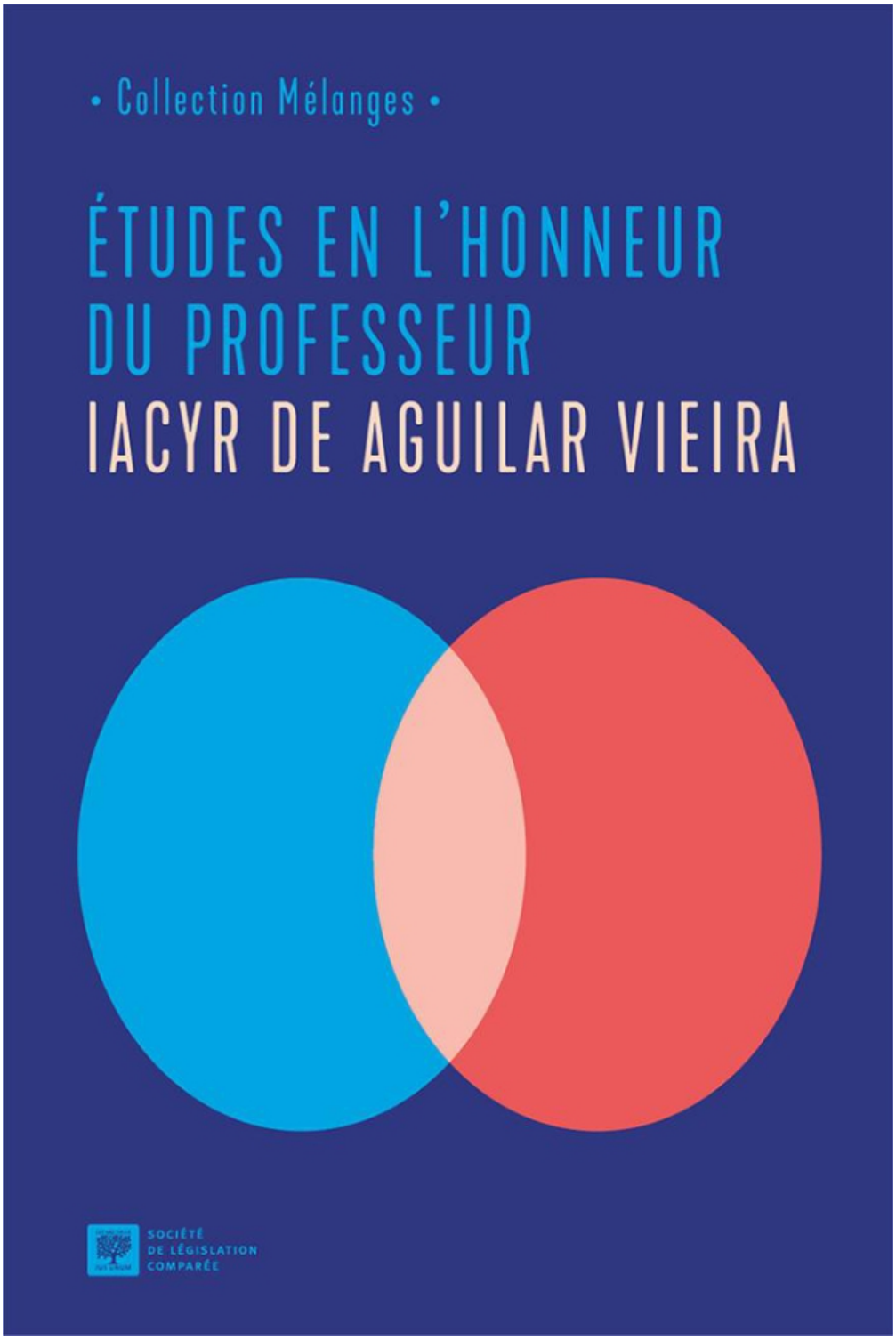
- On 5 May 2020, 23 Member States signed the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, providing for the termination of all Intra-EU BITs concluded between the parties. The Termination Agreement, which entered into force on 29 August 2020, represents the last step taken by Member States to comply with the European Court of Justice ruling in the *Achmea* judgment, where the Court found investor-State arbitration based on BITs incompatible with EU treaties. This paper discusses a number of issues arising out of the Termination Agreement. After illustrating its scope and content, the paper focuses on its most controversial aspects, namely the termination of BITs together with the sunset clauses therein contained, and the impact of the Agreement on pending arbitration proceedings. It is argued that while the Agreement seems to be in line with the general international law on treaty termination, its impact on pending proceedings is likely to be problematic according to the general

principles regulating the judicial function in international law. Moreover, the paper analyses the controversial implications stemming from the Agreement in terms of the relations between Member States parties to the Agreement and third parties to the ICSID Convention, as well as its impact on investors' position under international and domestic law.

Marco Pedrazzi, Professor at the University of Milan, **Dal disdegno per il diritto internazionale («notwithstanding»…) alla prevalenza del «rule of law»: il controverso percorso che ha portato alla promulgazione della legge del Regno Unito sul mercato interno** (From the Contempt for International Law ('Notwithstanding'…) to the Prevalence of the 'Rule of Law': The Controversial Path that Led to the Promulgation of the UK Internal Market Act 2020; in Italian).

In addition to the foregoing, this issue features the following book review by *Francesca C. Villata*, Professor at the University of Milan: Christopher Kuner, Lee A. Bygrave, Christopher Docksey (eds.), **The EU General Data Protection Regulation (GDPR). A Commentary**, Oxford University Press, Oxford, 2020, pp. XXXV-1393.

Liber amicorum in honour of Professor Iacyr de Aguilar Vieira



The *Société de législation comparée* will publish a liber amicorum in honour of Professor Iacyr de Aguilar Vieira entitled (in French): *Études en l'honneur du Professeur Iacyr de Aguilar Vieira*. This book has been coordinated/compiled by Gustavo Cerqueira and Gustavo Tepedino. More information is available here.

This book may be purchased in advance by clicking here (and here). A more favorable price is available until 8 April 2021. Those who acquire the book now (by way of a "souscription") may consent to having their name appear at the end

of the book.

Contributions are written in French, English, Italian and Spanish and range from commercial law to private international law to law and literature. Please find below the details as announced:

Droit civil, droit des affaires, droit international privé, droit privé comparé, droit du commerce international, littérature et droit, constituent autant de champs d'étude que des passions pour ***Iacyr de Aguilar Vieira*** *durant son intense et fructueuse activité de recherche et d'enseignement au Brésil comme en Europe.*

C'est dans ces domaines que ses élèves, collègues et amis, européens et sud-américains, rendent aujourd'hui un hommage amical à cette universitaire empreinte de liberté.

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HCCH 2019 Judgments Convention Repository Update

In preparation of the Conference on the HCCH 2019 Judgments Convention on 13/14 September 2021, planned to be taking place (if Covid-19 allows it) on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, and we will update …

Update of 16 February 2021: New entries are printed bold. Please also check the list of video recording of events on the Convention at the bottom, if you like.

Please also check the “official” bibliograghy of the HCCH for the instrument.

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Recordings of Events Related to the HCCH 2019 Judgments Convention

HCCH	“22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention”, 2 July 2020 (short documentary video available here)
University of Bonn; HCCH	“Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries”, 29 October 2020 (full recording available here)
JPRI; HCCH; UNIDROIT; UNCITRAL	“2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments”, 12 November 2020 (recording available here)
ASADIP; HCCH	“Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras”, 3 December 2020 (full recording available here and here)

New edition: Hess’ Europäisches Zivilprozessrecht

Burkhard Hess, *Europäisches Zivilprozessrecht,* De Gruyter 2021.

Just over ten years after the first edition of *Europäisches Zivilprozessrecht* (European Civil Procedure) by Burkhard Hess (director Max Planck Institute for Procedural Law, Luxembourg) a second – even more voluminous and impressive – edition was published early 2021. While updating this book after a decade that marks not only the further expansion but perhaps also the coming of age of European Civil Procedure is an immense task in itself, this new addition also expands in breadth. Particularly noteworthy is the new part on the interaction between European law and national civil procedure, including out-of-court procedures.

A must-read or even must-have for German readers having an interest in European Civil Procedure!

The blurb on the publisher's website reads:

This book explores the European law of civil procedure from a systematic and dogmatic perspective by comprehensively assessing and providing a detailed explanation of all the instruments adopted in this area of the law. Based on the case law of the Court of Justice of the European Union, it expounds on the legislative powers of the Union, the different regulatory levels of European procedural law, its underlying concepts and legislative techniques. Against this background, it addresses the interfaces of the European law of civil procedure with the civil procedures of the EU Member States and the judicial cooperation with third States. The 2nd edition of this treatise also focusses on latest

developments such as the protection the independence of the judiciary and of the rule of law in the Member States of the European Union. Moreover, it tackles alternative dispute resolution and arbitration, as well as the latest policy of the EU Commission in the digitization of national justice systems. To further contextualize the development of the European law of civil procedure, it also provides the reader with a thorough understanding of preliminary reference procedures before the Court of Justice. In its final chapter, it addresses the current policy debate towards a European code of civil procedure.

This reference book is an essential reading for academics, regulators, and practitioners seeking reliable and comprehensive information about the European law of civil procedure. It also addresses trainee lawyers and students interested in cross-border litigation and dispute resolution, as well as those who wish to specialize in European business law.