Which law governs disputes involving corporations?

Guest post by Dr Sagi Peari, Senior Lecturer/Associate Professor at the University of Western Australia

When it comes to the question of the applicable law that governs disputes involving corporations: one must make a sharp distinction between two principal matters: (1) matters relating to external interactions of corporation (such as disputes between a corporation and other external actors, such as other business entities or individuals); and (2) matters relating to the internal interactions of a corporation (such as disputes within the corporate structure or litigation between a corporation and its directors). A claim of a corporation against another in relation to a breach of contract between the two is an example of a dispute related to external affairs of a corporation. A claim of a corporate shareholder against a director in the firm is an example of a dispute concerning corporate internal affairs.

The division between external and internal affairs of corporation is an important one for the question of applicable law. A review of the case law suggests a strong tendency of the courts to apply the same choice-of-law rules applicable to private individuals. Thus, the general rule of the place of tort applies equally to corporations and private individuals.[1] In similar, the advancing principle of party autonomy[2] does not distinguish between corporations and other litigants on its operational level. The very fact that litigation involves a corporation does not seem *prima facie* to affect the identity of the applicable law rules.

The situation becomes dramatically different in cases concerning the internal affairs of a corporation. These are the situations involving claims between the corporate actors (i.e. executives, shareholders and directors) and claims between those actors and the corporation itself. Here, different considerations seem to apply. *First*, internal affairs of corporations tend to be excluded by the various international statutes aiming to harmonise the applicable law rules.[3] *Second*, there is a clear tendency of the rules to adhere to a single connecting factor (such as the place of incorporation or corporate headquarters with some further constitutional implications[4]) to determine the question of the applicable law.

Thirdly, there is a clear tendency of rejecting the party autonomy principle in this sphere according to which corporate actors are not free to determine the applicable law to govern their dispute.[5]

One of the neglected frameworks for addressing the external/internal affairs distinction relates to the classical corporate law theory on the nature of corporations and the relationships within the corporate structure. Thus, the classical vision of corporations perceives a corporation as an artificial entity that places the state at the very centre of the corporate creation, existence and activity.[6] Another, perhaps contradictory vision, challenges the artificial nature of corporation. It views corporation as an independent moral actor what dissects its existence from the originating act of incorporation.[7] Lastly, the third vision of corporation evaluates the corporate existence from the internal point of view by focusing on the bundle/nexus of contracts within the corporate structure.[8]

One could argue that an exercise of tackling the various theories of corporations could provide an invaluable tool for a better understanding of the internal/external division and subsequently shed light on the question of applicable law rules. Thus, for example, the traditional insistence of choice-of-law to equalise between corporations and private individuals seems to correlate with the 'personality' vision of corporation. On a related note, the insistence of the choice-of-law doctrine on a single connecting factor that denies party autonomy seems to be at odds with the nexus-contract theory and aligns with the traditional artificial entity theory of the corporation.

From this perspective, placing this question within the conceptual framework of corporate law could enable us to grasp the paradigmatic nature of the division and contemplate on whether the various suggestions for reform in the area of choice-of-law rules applicable to corporations do not just correlate with the underlying concerns and rationales of private international law/conflict of laws, but also those of corporate law.

I have tackled these (and other) matters in my recent article published in the 45 (3) *Delaware Journal of Corporate Law* 469-530 (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3905751.

[1] See eg Regulation 864/2007, on the Law Applicable to Non-Contractual

Obligations (Rome II), 2007 O.J. (L 199) 40 (EC), art 4 (1).

[2] See eg Hague Principles on Choice of Law in International Commercial Contracts, 2015.

[3] See eg Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC), art 1 (2) (f).

[4] See eg Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, 2 C.M.L.R. 551 (1999).

[5] See eg Hague Principles, Commentaries, 1.27-1.29.

[6] See eg *Dartmauth College v Woodward* 17 U.S. 518, 636 (1819)

[7] See eg Peter A French, 'Responsibility and the Moral Role of Corporate Entities', in *Business as Humanity* (Thomas J Donaldson and RE Freeman eds, 1994) 90.

[8] Of course, the distinction between the above-mentioned three theories is not sharp and variations and overlaps have been suggested over the years in the corporate law literature.

Out now: Liber Amicorum Monika Pauknerová

On October 18, 2021 Professor Monika Pauknerová, professor for private international law and international trade law at Charles University in Prague, Czech Republic, celebrated a significant jubilee. Colleagues and friends from many countries contributed to a liber amicorum to her honour:

Magdalena Pfeiffer, Jan Brodec, Petr Bríza and Marta Zavadilová (eds.). Liber Amicorum Monika Pauknerová. Praha: Wolters Kluwer ?R, 2021, 552 p. ISBN

978-80-7676-186-5. The publication contains 47 contributions in English, Czech and Slovak, most of them on private international law.

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For further information see here.

Rechtbank Den Haag, Judgment of 26 March 2021: Milieudefensie et al. v. Royal Dutch Shell

The *Rechtbank* Den Haag, by judgment of 26 March 2021 – *Milieudefensie et al. v. Royal Dutch Shell,* ordered RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels.

This landmark case relies, inter alia, on the following choice of law analysis:

4.3.

Applicable law

4.3.1.Milieudefensie et al. principally make a choice of law within the meaning of Article 7 Rome II35, which according to Milieudefensie et al. leads to the applicability of Dutch law. Insofar as the choice of law of Article 7 Rome II does not lead to the applicability of Dutch law, Milieudefensie et al. claim in the alternative that the applicable law must be determined based on the general rule of Article 4 paragraph 1 Rome II. According to Milieudefensie et al., this general rule also leads to the applicability of Dutch law.

4.3.2.Article 7 Rome II determines that the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to the general rule of Article 4 paragraph 1 Rome II, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred. The parties were right to take as a starting point that climate change, whether dangerous or otherwise, due to CO2 emissions constitutes environmental damage in the sense of Article 7 Rome II. They are divided on the question what should be seen as an

'event giving rise to the damage' in the sense of this provision. Milieudefensie et al. allege that this is the corporate policy as determined for the Shell group by RDS in the Netherlands, whereby her choice of law leads to the applicability of Dutch law. RDS asserts that the event giving rise to the damage are the actual CO2 emissions, whereby the choice of law of Milieudefensie et al. leads to the applicability of a myriad of legal systems.

4.3.3.

The choice as laid down in Article 7 Rome II is justified with a reference to Article 1919 TFEU (Article 174 TEC), which prescribes a high level of protection.36 Both Milieudefensie et al. and RDS refer to the handbook by Von Hein. The complete entry for event giving rise to the damage in the sense of Article 7 Rome II reads as follows:

"Where events giving rise to environmental damage occur in several states, it is not possible to invoke the escape clause (Article 4(3)) in order to concentrate the applicable law with regard to a single act. Thus, the plaintiff may opt for different laws as far as acts by multiple tortfeasors acting in various states are concerned. If, however, an act in country A causes an incident in country B which then leads to an environmental damage in country C, it may be submitted that only the final incident should be characterized as the decisive 'event' within the meaning of Article 7. One has to concede that extending the victim's right to choose the law, of each place of act would considerably undermine legal predictability. On the other hand, such generous approach would fit the favor naturae underlying Article 7. Since the tortfeasor may be sued in country A under Article 7 no. 2 Brussels Ibis, extending the victim's option will also facilitate proceedings." 37

4.3.4.

The Court of Justice of the European Union (CJEU) has made no declaration on the 'event giving rise to the damage' in the sense of Article 7 Rome II. The court sees insufficient basis in the interpretation of this provision to seek a link with the CJEU rulings as cited by the parties on other principles of liability, some of which are subject in Rome II to specific choice-of-law rules (intellectual property rights, unlawful competition, and product liability and prospectus liability).38 Nor does the court see a basis to seek a link with the case law cited by RDS, in which it was determined that a purely internal decision cannot be designated as an injurious

event.39

The published corporate policy that RDS draws up for the Shell group, which was also discussed with the shareholders, and to which the claims of Milieudefensie et al. pertain, cannot be equated with this. The court also sees insufficient grounds to seek a link with the cases cited by RDS, in which parent companies were called to account for non-intervention in subsidiaries.40 A parallel with the law applicable to a participant in an unlawfully committed act perpetrated in concert (product liability) does not hold water due to the below-mentioned characteristics of the responsibility as regards environmental damage and imminent environmental damage, as raised in this case.

4.3.5.An important characteristic of the environmental damage and imminent environmental damage in the Netherlands and the Wadden region, as raised in this case, is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase. It is not in dispute that the CO2 emissions for which Milieudefensie et al. hold RDS liable occur all over the world and contribute to climate change in the Netherlands and the Wadden region (see also below under 4.4 (2)). These CO2 emissions only cause environmental damage and imminent environmental damage in conjunction with other emissions of CO2 and other greenhouse gases for Dutch residents and the inhabitants of the Wadden region. Not only are CO2 emitters held personally responsible for environmental damage in legal proceedings conducted all over the world, but also other parties that could influence CO2 emissions. The underlying thought is that every contribution towards a reduction of CO2 emissions may be of importance. The court is of the opinion that these distinctive aspects of responsibility for environmental damage and imminent environmental damage must be included in the answer to the question what in this case should be understood as 'event giving rise to the damage' in the sense of Article 7 Rome II.

4.3.6.

Milieudefensie et al. hold RDS liable in its capacity as policy-setting entity of the Shell group (see below under 4.4. (1.)). RDS does contest that its corporate policy for the Shell group is of may be of influence on the Shell group's CO2 emissions. However, RDS pleads for a restricted interpretation of the concept 'event giving rise to the damage' in the application of Article 7 Rome II. In its view, its

corporate policy is a preparatory act that falls outside the scope of this article because in the opinion of RDS, the mere adoption of a policy does not cause damage.

The court holds that this approach is too narrow, not in line with the characteristics of responsibility for environmental damage and imminent environmental damage nor with the concept of protection underlying the choice of law in Article 7 Rome II. Although Article 7 Rome II refers to an 'event giving rise to the damage', i.e. singular, it leaves room for situations in which multiple events giving rise to the damage in multiple countries can be identified, as is characteristic of environmental damage and imminent environmental damage. When applying Article 7 Rome II, RDS' adoption of the corporate policy of the Shell group therefore constitutes an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region.

4.3.7.Superfluously, the court considers that the conditional choice of law of Milieudefensie et al. is in line with the concept of protection underlying Article 7 Rome II, and that the general rule of Article 4 paragraph 1 Rome II, upheld in Article 7 Rome II, insofar as the class actions seek to protect the interests of the Dutch residents, also leads to the applicability of Dutch law.

The full text of the English version of the judgent is available here.

Dickinson on European Private International Law after Brexit

Just as the Commission formally announced its refusal to give consent to the UK's accession to the Lugano Convention, Andrew Dickinson has provided a

comprehensive overview on the state of Private International Law for civil and commercial matters in the UK and EU, which has just been published in the latest issue of *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* (IPRax 2021, p. 218).

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

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

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

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

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2021: Abstracts

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

A. Dickinson: **Realignment of the Planets – Brexit and European Private International Law**

At 11pm (GMT) on 31 December 2020, the United Kingdom moved out of its orbit of the European Union's legal system, with the end of the transition period in its Withdrawal Agreement and the conclusion of the new Trade and Cooperation Agreement. This article examines the impact of this realignment on private international law, for civil and commercial matters, within the legal systems of the UK, the EU and third countries with whom the UK and the EU had established relationships before their separation. It approaches that subject from three perspectives. First, in describing the rules that will now be applied by UK courts to situations connected to the remaining EU Member States. Secondly, by examining more briefly the significance for the EU and its Member States of the

change in the UK's status from Member State to third country. Thirdly, by considering the impact on the UK's and the EU's relationships with third countries, with particular reference to the 2007 Lugano Convention and Hague Choice of Court Convention. The principal focus will be on questions of jurisdiction, the recognition and enforcement of judgments and choice of law for contract and tort.

S. Zwirlein-Forschner: **Road Tolls in Conflict of Laws and International Jurisdiction – a Cross-Border Journey between the European Regulations**

Charging tolls for road use has recently undergone a renaissance in Europe – mainly for reasons of equivalence and climate protection. The payment of such road tolls can be organized either under public or under private law. If a person resident in Germany refuses to pay a toll which is subject to foreign private law, the toll creditor can sue the debtor for payment at its general place of jurisdiction in Germany. From the perspective of international private law, such claim for payment of a foreign toll raises a number of complex problems to be examined in this article.

T. Pfeiffer: **Effects of adoption and succession laws in US-German cases – the example of Texas**

The article discusses how adoption and succession laws are intertwined in cases of adoptions of German children by US-parents in post WW2-cases, when Germany still had a contract based system of adoptions. Addressing the laws of Texas as an example, the author demonstrates that, so far, the legal effects of these adoptions have not been analysed completely in the available case law and legal writing. In particular, the article sets forth that, in relation to adoption contracts, Texan conflicts law (like the law of other US States) refers to the law of the adoption state so that the doctrine of a so-called hidden renvoi is irrelevant. Furthermore, in this respect, the renvoi is a partial one only in these cases: Under Texan conflicts law, the reference to the laws of the adoption state is relevant only for the status of being adopted, not for the effects of adoption, e.g. the question to whom the adopted is related; the latter issue is governed by the law of the domicile of the child, which is identical to the adoptive parents' domicile, at

least if this is also the adoptive family’s domicile after the adoption.

Furthermore, the author discusses matters of succession and argues: According to the ECJ’s Mahnkopf decision, a right of inheritance of the adopted child in relation to the biological parents under the laws applicable to the effects of the adoption, as provided for in Texas, has to be characterised as a succession rule, at least if that law provides for a mere right of inheritance, whereas all legal family relations to the biological family are cut off. As a consequence, such a “nude” inheritance right cannot suffice as a basis of succession under German succession laws. Even if one saw that differently, Texan succession conflicts law, for the purpose of succession, would refer to the law of the domicile of the deceased for movables and to the law of the situs for real property. Additionally, even if the Texas right of inheritance in relation to the biological parents constituted a family relationship, this cannot serve as a basis for a compulsory share right.

W. Voß: **Qualifying Direct Legal Claims and culpa in contrahendo under European Civil Procedure Law**

Legal institutions at the interface between contract and tort, such as the culpa in contrahendo or direct claims arising out of contractual chains, typically elude a clear, uniform classification even within the liability system of substantive national law. Even more so, qualifying them adequately and predictably under European civil procedure law poses a challenge that the European Court of Justice (ECJ) has not yet resolved across the board. In two preliminary rulings, the ECJ now had the opportunity to sharpen the borderline between contractual and noncontractual disputes in the system of jurisdiction under the Brussels I bis Regulation, thus defining the scope of jurisdiction of the place of performance of a contractual obligation and, at the same time, of jurisdiction over consumer contracts. However, instead of ensuring legal clarity in this respect, the two decisions rendered by the ECJ further fragment the autonomous concept of contract under international civil procedural law.

C. Thomale: **International jurisdiction for rights in rem in immovable property: co-ownership agreements**

The CJEU decision reviewed in this case note, in its essence, concerns the scope of the international jurisdictional venue for immovable property under Art. 24 No. 1 Brussels Ia-Regulation with regard to co-ownership agreements. The note lays out the reasons given by the court. It then moves on to apply these reasons to the Austrian facts, from which the preliminary ruling originated. Finally, some rational weaknesses of the Court's reasoning are pointed out while sketching out a new approach to determining the fundamental purpose of Art. 24 No. 1 Brussels Ia-Regulation.

F. Rieländer: **Solving the riddle of "limping" legal parentage: "Pater est" presumption vs. Acknowledgment of paternity before birth**

In its judgment of 5/5/2020, the Kammergericht Berlin (Higher Regional Court of Berlin) addressed one of the main outstanding issues of German private international law of filiation. When children are born out of wedlock, but within close temporal relation to a divorce, the competing connecting factors provided for in Art. 19 (1) EGBGB (Introductory Act to the German Civil Code) are apt to create mutually inconsistent results in respect of the allocation of legal parentage. While it is firmly established that parenthood of the (former) husband, assigned at the time of birth by force of law, takes priority over any subsequently established filiation by a voluntary act of recognition, the Kammergericht held that where legal parentage is simultaneously allocated to the husband by one of the alternatively applicable laws and to a third person by way of recognition of paternity before birth according to a competing law, the (domestic) law of the state of the child's habitual residence takes precedence. Though the judgment is well argued, it remains to be seen whether the controversial line of reasoning submitted by the Kammergericht will stand up to a review by the Bundesgerichtshof (German Federal Court of Justice). Nonetheless, the decision arguably ought to be upheld in any event. In circumstances such as those in the instant case, where divorce proceedings had commenced, recognition of legal parentage by a third person with the consent of the child's mother and her husband is to be treated as a contestation of paternity for the purposes of Art. 20 EGBGB. Thus, according to domestic law, which was applicable to the contestation of paternity since the child's habitual residence was situated in Germany, any possible legal ties between the child and the foreign husband of its mother were eliminated by a recognition of parentage by a German citizen

despite suspicions of misuse. All in all, the judgment demonstrates once again the need for a comprehensive reform of German private international law of filiation.

Mark Makowsky: **The attribution of a specific asset to the heir in the European Succession Certificate**

According to Art. 63 (2) lit. b and Art. 68 lit. l of the European Succession Regulation, the European Certificate of Succession (ECS) may be used to demonstrate the attribution of a specific asset to the heir and shall contain, if applicable, the list of assets for any given heir. In the case at hand the ECS, which was issued by the Austrian probate court and submitted to the German land registry, assigned land plot situated in Germany solely to one of the co-heirs. The Higher Regional Court of Munich found, that the ECS lacked the presumption of accuracy, because the applicable Austrian inheritance law provides for universal succession and does not stipulate an immediate separation and allocation of the estate. Contrary to the court's reasoning, however, Austrian inheritance law does allow singular succession of a co-heir, if (1) the co-heirs agree on the distribution of the estate before the probate court orders the devolution of property and (2) the court's devolution order refers to this agreement. The presumption of accuracy of the ECS with respect to the attribution of specific assets is therefore not excluded by legal reasons. In the specific case, however, the entry in the land register was not based on the ECS, but on the devolution order of the Austrian probate court, which does not include a reference to a previous agreement of the co-heirs on the distribution of the estate. As a consequence, the devolution order proves that the land plot has become joint property of the community of heirs and that the ECS is therefore inaccurate.

R. Hüßtege: **Internet research versus expert opinion**

German courts have to determine the applicable foreign law by virtue of their authority. The sources of knowledge they rely on are based on their discretionary powers. In most cases, however, their own internet research will not be sufficient to meet the high demands that discretion demands. As a general rule, courts will therefore continue to have to seek expert opinions from a national or foreign scientific institute in order to take sufficient account of legal practice abroad.

A.R. Markus: **Cross-Border Attachment of Bank Accounts in Switzerland and the European Account Preservation Order**

On 18 January 2017 the Regulation on European Account Preservation Order (EAPO Regulation) came into force. It allows the creditor to place a security in a bank account so that enforcement can be carried out from an existing title or a title yet to be created. The provisions of the abovementioned Regulation stand beside existing national provisions with a similar purpose. As a non-EU member state, Switzerland does not fall within the scope of application of the EAPO Regulation and the provisional distraint of bank accounts is thus exclusively governed by national law. The present article illustrates in detail the attachment procedure under the Swiss Debt Enforcement and Bankruptcy Law. Comparative reference is made to the provisions of the EAPO Regulation. Finally, the recognition and enforcement of foreign interim measures, which is often crucial in cross-border cases, will be addressed. The article shows that there are considerable differences between the instruments provided by the Swiss law and those provided by the EU law.

J. Ungerer: **English public policy against foreign limitation periods**

Significantly different from the EU conflict-of-laws regime of the Rome I and II Regulations, the British autonomous regime provides for a special public policy exception in the Foreign Limitation Periods Act 1984, whose design and application are critically examined in this paper. When English courts employ this Act, which could become particularly relevant after the Brexit transition period, the public policy exception not only has a lower threshold and lets undue hardship suffice, it also leads to the applicability of English limitation law and thereby splits the governing law. The paper analyses the relevant case law and reviews the recent example of Roberts v Soldiers [2020] EWHC 994, in which the three-years limitation period of the applicable German law was found to cause undue hardship.

E. Jayme: **Forced sales of art works belonging to the Jewish art dealer René**

Gimpel in France during the Nazi-period of German occupation – The Court of Appeal of Paris (Sept. 30, 2020) orders the restitution of three paintings by André Derain from French public museums to the heirs of René Gimpel

The heirs of the famous French art dealer René Gimpel brought an action in France asking for the restitution of three paintings by André Derain from French public museums. René Gimpel was of Jewish origin and lost his art works – by forced sales or by expropriation – during the German occupation of France; he died in a concentration camp. The court based its decision in favor of the plaintiffs on the "Ordonnance n. 45-770 du 21 avril 1945" which followed the London Inter-Allied Declaration of Dispossession Committed in Territories Under Enemy Occupation Control (January 5th 1943).

M. Wietzorek: **First Experience with the Monegasque Law on Private International Law of 2017**

This essay presents the Monegasque Law concerning Private International Law of 2017, including a selection of related court decisions already handed down by the Monegasque courts. Followed by a note on the application of Monegasque law in a decision of the Regional Court of Munich I of December 2019, it ends with a short summary.

New book on International Negotiable Instruments by Benjamin Geva & Sagi Peari

(published by Oxford University Press, 2020)

The authors kindly provided the following summary:

The book marries two fields of law: negotiable instruments and choice-of-law. Bills of exchange, cheques and promissory notes are the main classical negotiable instruments. For centuries, these instruments have played a vital role in the smooth operation of domestic and international commerce, including in transactions between distantly located parties. Through their evolution, fusion, and sophistication, they have remained one of the primary tools for everyday commercial activity, serving as one of the primary methods of payment and credit and one of the cornerstones of the contemporary bank-centred system. The rapid technological progress of payment mechanisms has embraced the traditional institution of negotiable instruments leading to their further adaptation and sophistication in order to meet the challenges of the contemporary reality of frequent mobility of people, goods, and high daily volumes of cross-border transactions and international commerce.

The cross-disciplinary partnership between the authors, one specializing in negotiable instruments and the other in choice-of-law, aims to offer a comprehensive and thorough analysis of the choice-of-law rules applicable to negotiable instruments. The internal structure of negotiable instruments' law is complex, which has given rise to a popular view favouring the mythological 'law merchant',[1] the exclusion of negotiable instruments from the scope of general contract and property law doctrines, and their subsequent exclusion from ordinary choice-of-law analysis.

The central thesis of the book is to challenge this common view. Indeed, the complex structure of negotiable instruments creates a significant challenge for traditional contract and property doctrine and the choice-of-law analysis applicable to them. Yet, in contrast to the common view, the authors argue that the complex case of international negotiable instruments should be analyzed through the lens of traditional contract & property choice-of-law doctrines rather than by crafting new specially designed rules for negotiable instruments.

In order to illustrate this point, consider the – well-known in choice-of-law literature – *Giuliano & Lagarde* Report ('The Report'),[2] which has served as a basis for contemporary European Rome Regulations[3] on the question of applicable law. The Report excludes negotiable instruments law from the scope of ordinary choice-of-law analysis.[4]However, one can reassess the three rationales mentioned in the Report to justify negotiable instruments' law exclusion. *First*, it makes a point that a negotiable instrument is not a contract.[5] In this book, the

authors argue the opposite – from their very origin to their present-day doctrinal analysis, negotiable instruments are very much contracts and carefully follow the essentials of contract law doctrine, alongside the basic elements of tangible property law.[6]

Second, the Report characterizes a negotiable instrument as a 'complex contract'.[7] Indeed, in their study the authors provide a precise demarcation of the special nature of the negotiable instrument as a 'special' contract to delineate its divergence from the 'ordinary' contract; its relation to basic elements of tangible property transfer; and how this divergence affects (if at all) the choice-of- law rules of negotiable instruments, comparatively to choice-of-law rules of 'ordinary' contracts and tangible property. While throughout their book the authors show that negotiable instruments present 'complicated special rules' that should be analyzed, modified and distinguished from 'ordinary' contract law/property law rules, they are very much based on them.

Finally, the Report makes a reference to the existing harmonization processes.[8] In this book, the authors provide a detailed comparative analysis of the various rules in diverse legal systems and they show that they are far from uniform.[9] The authors discuss the various harmonization processes of negotiable instruments,[10] and make some suggestions for possible reforms within the process of international harmonization of the choice-of-law rules,[11] which would capture the challenges of the digital age.[12] In contrast to the Report, the authors argue that the traditional choice-of-law rules in the areas of contract law and tangible property can serve as a model for such reform of choice-of-law rules of negotiable instruments.

In effect, authors' call for a redesign of the present choice-of-law rules relating to negotiable instruments finds traces in contemporary literature. The commentators of one of the leading textbooks in the field have framed the need for a reconsideration of the choice-of-law rules of negotiable instruments in the following terms:

…it must be noted that the Bills of Exchange Act 1882 and much of the case referred to in the following paragraphs is now more than a century old. In that time, the role and significance of bills of exchange in commercial intercourse and the approach of the conflict of laws to freely incurred obligations such as these has changed radically. As the following commentary makes clear, the rules

contained in the 1882 Act are neither comprehensive nor easy to understand and apply. A radical overhaul of the law in this area, whether by legislation or international convention, seems long overdue.[13]

In this book, the authors are indeed willing to take up the challenge of a ‘radical overhaul’. In line with the above-stated quotation, they suggest a radical reorientation of choice-of-law rules. They argue that choice-of-law rules in the area of international negotiable instruments need to be dramatically amended and harmonized.

The contemporary choice-of-law rules within this area of law have originated from flawed premises about the nature of the subject. Further, contemporary rules have left behind the modern development of choice-of-law doctrine. Relying on the foundation of negotiable instruments’ law within the traditional ordinary doctrines of contract and movable property and invoking developments within modern choice-of-law thought, the authors endeavour to challenge the traditional orthodoxy and offer a complete re-examination of the choice-of-law rules of negotiable instruments.

[1] See Chapter II.

[2] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, Official Journal C 282, 31/10/1980 P. 0001 – 0050.

[3] Commission Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 (EU); Commission Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC)

[4] *Giuliano & Lagarde* Report, sec. 4.

[5] Ibid.

[6] See Chapter I & Chapter II.

[7] Report, sec. 4.

[8] Ibid.

[9] See Chapter I.

[10] See Chapter I & Chapter III.

[11] See Chapters V-VII.

[12] See Chapter VIII.

[13] Lawrence Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th edn Sweet & Maxwell 2012) 2077.

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

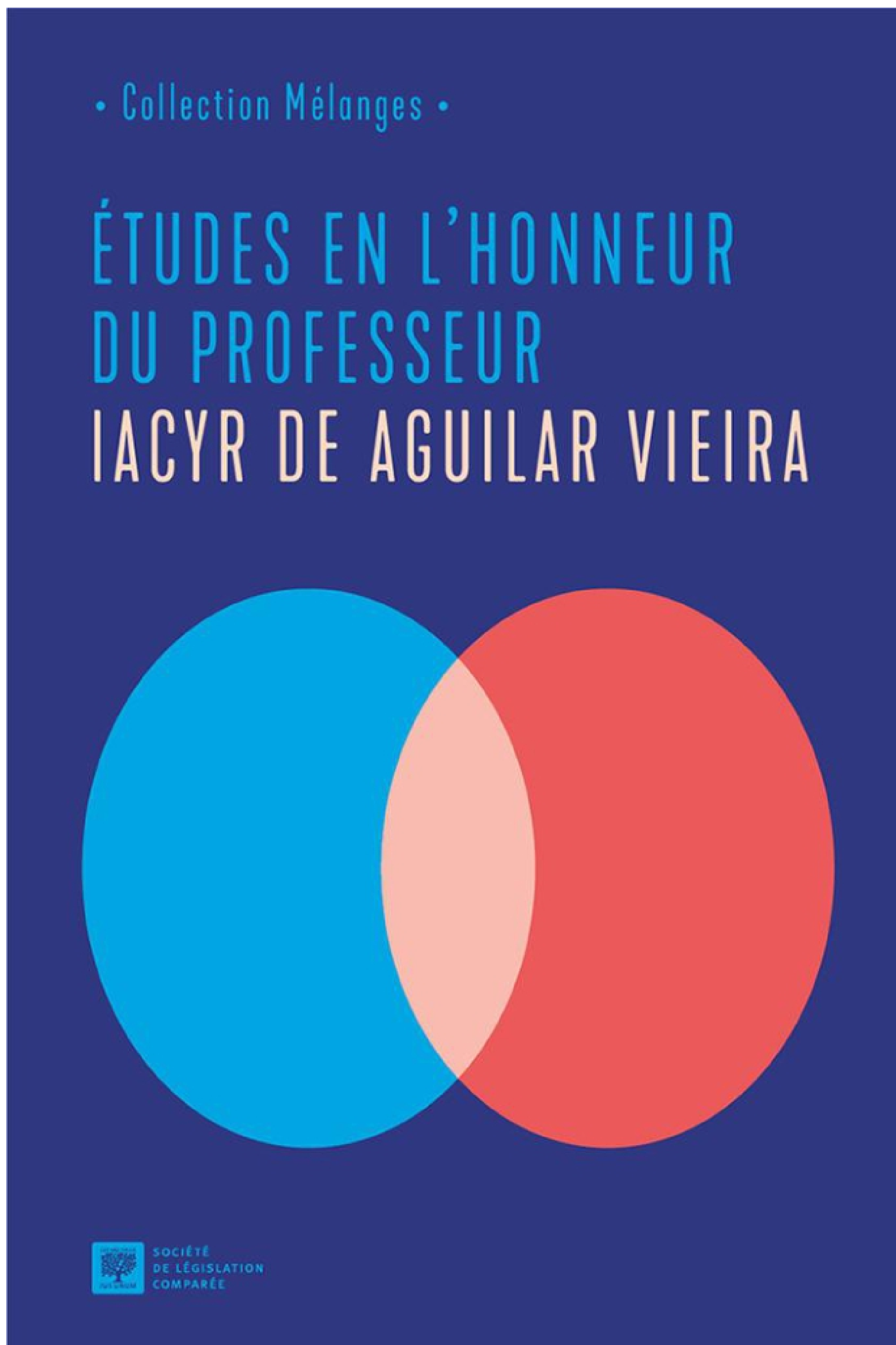
Federal Court's failure to defer to the Board's decision was a function of a disguised correctness review."

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.

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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Global sales law in a global pandemic: The CISG as the applicable law to the EU-AstraZeneca Advance Purchase Agreement?

Written by Dr Ben Köhler, MPI Hamburg

Last week, following severe criticisms of its procurement strategy and a dispute with AstraZeneca over the delays in delivery of the vaccine, the EU Commission has published the Advance Purchase Agreement for the Production, Purchase and Supply of a Covid-19 Vaccine in the European Union (APA) it had concluded with AstraZeneca in August 2020. Although some important clauses were blackened at the request of AstraZeneca, the document gives interesting insights into the procurement practice of the EU and has incited a plethora of comments by the legal experts. Despite the broad coverage in legal and non-legal press, the issue of applicable law has received comparably little attention (but see Till Maier-Lohmann on the CISG's potential applicability). In its first part, this post will argue that, as far as one can tell by the published document, the CISG is likely to be the applicable law to the contract, before outlining some of the consequences of the CISG's potential application in the second part.

I. The CISG as the applicable law to the APA?

The issue of the applicable law would be considered by Belgian courts that are exclusively competent under the APA's forum selection clause (§ 18.5 (b) APA). Since Belgium is a Contracting State to the CISG, Belgian courts are bound to apply the CISG's provisions on its sphere of application that take precedence over the conflict rules in the Rome I-Regulation (Article 25 Rome I-Regulation). Pursuant to Article 1 (1) (a) CISG, the Convention applies to contracts of sale of goods between parties that have their places of business in different Contracting States.

1. Vaccine procurement as a (private) contract for the sale of goods?

The CISG does not distinguish between private law and public law entities and is not limited to contracts between private parties.[1] It is therefore applicable to sales contracts concluded by public law entities such as States if these entities do not act in exercise of their sovereign powers but *iure gestionis* like a private person could act as well,[2] irrespective of whether a public law tender procedure has preceded the conclusion of the contract.[3] The tender process that precedes the conclusion of the contract also does not fall under the exclusion of sales by auction in Art. 2 (b) CISG.[4]

A more nuanced question is whether the APA is a contract for the sale of goods.

The question may seem moot since the parties themselves have labelled the agreement Advance Purchase Agreement and the contract provides for the delivery of vaccines against payment. However, it also contains some other elements that may be relevant for the qualification as a sales contract under Articles 1, 3 CISG. The first question is whether the buyers' involvement in the manufacturing process is relevant. Pursuant to Article 3 (1) CISG, the Convention applies to the sale of goods to be manufactured unless the party ordering the goods undertakes to supply a substantial part of the materials. Indeed, the APA contains an obligation of the buyers to "use Best Reasonable Efforts to assist AstraZeneca in securing the supply" of drug substances and other materials (§ 6.1 APA) as well as an obligation to provide funding to AstraZeneca in order to enable it to procure the necessary materials (§ 7.1 APA). However, this assistance and funding does not seem to amount to an undertaking to supply a substantial part of the materials, particularly as the contract stipulates that "AstraZeneca shall secure the supply of all drug substances [...] and drug product capacity [...] as well as components critical to the development, manufacture and supply of the Initial Europe Doses" (§6.1). The second question is whether the obligation to deliver vaccines is "the preponderant part of the obligations" of the seller under Article 3 (2) CISG. Here, it seems clear that the core of the contract is the delivery of the vaccines, not the provision of a service of any kind. Other obligations, such as the reporting obligations (§§ 6.3, 10.2 APA), only seem to serve a complementary purpose to ensure the successful delivery of effective vaccines.

Finally, the APA purports to be merely an advance agreement.[5] The decisive factor is, however, not the designation of the agreement but whether it already contains the essential features of a sales contract.[6] The APA contains obligations to produce and deliver the vaccine for AstraZeneca (using their 'best reasonable efforts' in the manufacturing) and obliges the Commission and the Participating Member States to acquire vaccines. The APA is thus a sales contract for the purposes of Article 1 (1) (a) CISG.[7]

2. Parties having their places of business in different Contracting States?

Pursuant to Article 1 (1) (a) CISG, the parties to the APA need to have places of business in different Contracting States. The first difficulty is thus to identify the parties to the APA.[8] According the APA, the parties are AstraZeneca AB and the

European Commission "acting on behalf and in the name of the member states of the European Union". The APA goes on to state that "[t]he Commission, the Participating Member States and AstraZeneca may each be referred to herein individually as a **'Party'** and collectively as the **'Parties'**." Taken at face value, this would mean that, on the side of the buyers, both the European Commission and the Participating Member States are the parties to the contract in terms of Article 1 (1) (a) CISG. This understanding is in line with the APA's provisions that not only contain obligations of the Participating Member States but also of the Commission (see e.g. § 9.1 APA).

The parties to the APA need to have their respective places of business in different Contracting States, irrespective of where the goods are manufactured or whereto they are delivered.[9] As per the APA, AstraZeneca AB has its place of business in Sweden while the Commission has its place of business in Brussels. Both Belgium and Sweden are Contracting States. Questions arise only in relation to some of the 27 Participating Member States.[10] While most Participating Member States are Contracting States to the CISG, Ireland and Malta are not. Portugal recently acceded to the CISG but the Convention has not yet entered into force. Amongst the other Participating Member States, Sweden has its place of business in the same Contracting State as AstraZeneca, ie in Sweden,[11] and Finland and Denmark are Contracting States in general but have declared a reservation under Article 94 CISG that exempts sales contracts between parties with their places of business in different Scandinavian States from the CISG's sphere of application.[12]According to the prevailing view, however, in cases of multiparty contracts, it is sufficient that one party on either side of the transaction have their respective places of business in different Contracting States for the whole contract to be governed by the CISG.[13] Given that the Commission and most of the Participating Member States have their respective places of business in Contracting States other than Sweden, Finland or Denmark, the CISG would be applicable. I have argued elsewhere that the prevailing view is too expansive and that, in cases of multiparty contracts, courts should apply Article 10 (a) CISG by analogy to the different parties (rather than merely to different places of business) on either side of the transaction.[14] Even if one were to follow this approach, the APA would arguably still fall within the sphere of application of the CISG, since the most closely connected place of business on the side of the buyers seems to be the place of business of the Commission that is acting on behalf and in the name of the Participating Member States. The Parties

to the APA thus have their respective places of business in different Contracting States pursuant to Article 1 (1) (a) CISG.

However, even if one of the parties were considered to have its place of business in a non-Contracting State,[15] the Convention would still apply by virtue of Article 1 (1) (b) CISG since the Belgian conflict of laws rules, most notably Article 3 (1) Rome I-Regulation, would point to the law of Belgium as a Contracting State to the CISG.

3. Exclusion of the CISG by the Parties in the APA?

The Parties are free to exclude the CISG pursuant to Article 6 CISG. In their choice of law clause, the Parties have chosen the "laws of Belgium" to govern the APA. Although the question of whether the parties wished to exclude the Convention is to be decided on a case-by-case basis, it seems firmly established that, as a general matter, the choice of the law of a Contracting State does not amount to an exclusion of the Convention as the CISG forms part of the Contracting State's law.[16] Importantly, Belgian courts have repeatedly held that the choice of Belgian law includes the Convention. The choice of law clause would thus in principle not impede the application of the Convention by Belgian courts.

An analysis of the publicly available documents seems to suggest that Belgian courts would indeed apply the CISG to the APA if a claim was brought.[17]

II. Some of the consequences of the CISG's application

The question one might ask now is: does it matter at all whether the CISG is applicable? After all, there are a lot of detailed provisions in the contract, for instance on force majeure (§ 18.7 APA) and termination for cause (§ 12.3 APA), that take precedence over the default rules laid down in the Convention (Article 6 CISG). I will briefly outline two of the many consequences of the application of the CISG to the APA.

1. Interpretation of contract

Many of the issues that are currently debated with respect to the contract are ultimately issues of interpretation of contract. For instance, the questions of whether AstraZeneca is only obliged to deliver vaccines that are produced in the EU or of how to apply the notion of 'best reasonable efforts' will turn on how

different sections of the APA are interpreted. The relevant CISG provision here is Article 8 CISG, although the Convention's rules on interpretation may, to a certain extent, be modified by the APA's provisions, most notably by the clause on interpretation of the agreement (§ 18.1 APA) and the Entire Agreement-Clause (§ 18.9 APA). Pursuant to Article 8 (1), (2) CISG, the interpretation of the contract is controlled by a common intention of the parties and, lacking such intention, by the understanding of a reasonable third party.

2. **Allocation of vaccines amongst several buyers in cases of shortage of supply**

It was reported that AstraZeneca limited its delivery to the EU while fulfilling its obligations towards other third-party buyers such as the United Kingdom. The allocation of scarce goods amongst competing buyers has been debated in CISG scholarship and the prevailing opinion seems to point to a pro rata delivery to the different buyers in proportion to their respective contractual entitlements.[18] Of course, this default position may need to be reconsidered in light of the provisions of the APA, eg the default allocation between Participating Member States on a pro rata basis reflecting the size of their respective populations (§ 8.3 (b)) or AstraZeneca's warranties (§ 13 APA).

III. Conclusion

The above analysis may be surprising: Why should a Convention that is unknown even to many lawyers govern the arguably most important procurement contracts in recent European history? Conversely, however, one might ask which legal instrument should be more appropriate to govern an international sales contract between 29 Parties from 27 different States? More than forty years after its adoption, the CISG may face its first test on global centre stage – it will be up to the test!

[1] Peter Mankowski in: Mankowski (ed.), *Commercial Law* (C.H. Beck Hart Nomos, 2019), CISG, Art. 1, para. 31; Ulrich G. Schroeter, „Grenzfragen des Anwendungsbereichs und international einheitliche Auslegung des UN-Kaufrechts (CISG)", IHR 2019, 133, 134.

[2] Mankowski (n 1) Art. 1, para. 31.

[3] Schroeter (n 1) 134.

[4] Ulrich Magnus in: *Staudinger-BGB, CISG*, [2018], Art.2, para. 34; Schroeter (n 1) 134; Frank Spohnheimer in: Kröll, Mistelis & Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, C.H. Beck Hart Nomos 2018), Art. 2, para. 30.

[5] Till Maier-Lohmann, "EU-AstraZeneca contract – applicability of the CISG?".

[6] See Magnus (n 4) Art. 1, para. 13; Ingeborg Schwenzer & Pascal Hachem in: Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, C.H. Beck Oxford University Press 2016) Art. 1, para. 8.

[7] Maier-Lohmann (n 5); see, on the application of the CISG to purchase options, Magnus (n 4) Art. 1, para. 41; Schwenzer & Hachem (n 6) Art. 1, para. 10.

[8] Maier-Lohmann (n 5).

[9] See Clayton P. Gillette & Stephen D. Walt, *The UN Convention on Contracts for the International Sale of Goods – Theory and Practice* (2nd edn, Cambridge University Press 2016) 27; Magnus (n 4) Art. 1, para. 11, with further references.

[10] See APA, Schedule B.

[11] Maier-Lohmann (n 5), with the question of how this may affect the CISG's applicability.

[12] According to the prevailing opinion, the reservation is also to be applied in other Contracting States such as Belgium, Johnny Herre in: Kröll et al. (n 4) Art. 94, para. 5; Schwenzer & Hachem (n 6) Art. 94, para. 7.

[13] Schweizerisches Bundesgericht, Entscheid vom 28.5.2019 – 4A_543/2018, CISG-online no. 4463, IHR 2019, 236; Ulrich G. Schroeter, „Irrtumsanfechtung nach nationalem Recht und Anforderungen an Ausschlussvereinbarungen bei Anwendbarkeit des UN-Kaufrechts (CISG)", IHR 2019, 231, 232.

[14] Claude Witz & Ben Köhler, "Panorama Droit uniforme de la vente internationale de marchandises", Recueil Dalloz 2020, 1074, 1077.

[15] See, the question of Maier-Lohmann (n 5), hinting at AstraZeneca's presence in the UK.

[16] Maier-Lohmann (n 5); see, with further references, CISG Advisory Council Opinion no. 16: "Exclusion of the CISG under Article 6, Rapporteur: Lisa Spagnolo, Comment 4 (b) (i); Mankowski (n 5) Art. 6, para. 8.

[17] See also Maier-Lohmann (n 5): „the Convention's applicability cannot be excluded from the outset".

[18] Christoph Brunner in: Brunner & Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Kluwer 2019) Art. 79, para. 12; Schwenzer in: Schwenzer (ed.) (n 6) Art. 79, para. 28; Ben Köhler, *Die Vorteils- und Gewinnherausgabe im CISG* (MohrSiebeck, forthcoming 2021) 225.

Issue Arbitration and PIL – NIPR 2020/4

The fourth issue of 2020 of the Dutch PIL journal Nederlands Internationaal Privaatrecht is dedicated to Arbitration and conflicts of laws.

Some of the papers are in English, others in Dutch.

Editorial

Peters & B. van Zelst (guest editors), Arbitration and conflicts of laws / p. 631-633

A.J. B?lohlávek, Determining the law governing obligations in arbitration and the applicability of the Rome I Regulation / p. 634-651

Factors specific to arbitration, and particularly the fact that the place of arbitration is often chosen as a neutral venue with no links to the domicile of the

parties or to the subject of the dispute, also influence the procedures followed to determine the substantive law governing obligations. Even so, it is essential to employ a method for determining this law that is transparent, that excludes arbitrariness on the part of arbitrators, and that allows the parties to rely on a certain degree of predictability. Considering the growing importance of the seat of arbitration, which has seen the relevance of the theory of the anationality of arbitration decline in most cases, it is always necessary to assess the importance of the lex fori arbitri in determining the applicable substantive law. Unless the application of EU legislation, and hence also the Rome I Regulation, on the law applicable to obligations stems, as a matter of necessity, from the mandatory lex fori arbitri (which tends to be the exception), the application of the Rome I Regulation must always be kept to a minimum. There is therefore no reason why the Rome I Regulation cannot also be used in arbitral proceedings to determine the applicable law. Arguments such as the fact that this is a regulation applicable exclusively to civil litigation must be rejected.

Meški? & A. Gagula, *Lex mercatoria* and its limits in international arbitration / p. 652-668

This contribution aims to provide guidance on the usual steps an arbitrator undertakes when using lex mercatoria in international arbitration. The first step is the identification of rules that represent lex mercatoria and deserve such a qualification. It involves a discussion on the private international law analysis, especially absent a choice of law by the parties and its relationship to (potentially) applicable national law. The statistics presented in this paper show that parties in an overwhelming majority of cases choose national law as the applicable law and that lex mercatoria needs to co-exist with national law. Here, the joint use of national law and lex mercatoria is discussed in the context of the example of construction arbitration as the most common area of international arbitration practice. The growing popularity of certain legal solutions of lex mercatoria in procedural or substantive matters followed by a codification trend contribute to an effect of a rebuttable presumption in the fields of its application. This triggers the question as to how the right to be heard can be preserved, especially when the initiative for the use of lex mercatoria does not come from the parties, but from the arbitral panel. The lack of a strict judicial review of the applicable law used in arbitration gives the arbitrators the power to find the right balance between the guidance offered by lex mercatoria and parties' expectations.

Shehata, Overriding mandatory rules and international commercial arbitration: the Swiss and French perspectives / p. 669-686

The treatment of overriding mandatory rules has always been the subject of multiple studies, especially in the field of international commercial arbitration. The fact that most arbitration jurists agree that arbitration does not have a lex fori is an essential reason for making this discussion a captivating one. Further, if we couple this lack of a lex fori in commercial arbitration with the arbitrators' duty to render enforceable awards, then we face an extremely intriguing dilemma in this regard.

Instead of reviewing how arbitral tribunals deal with this conundrum, I try to explore this issue through the lens of selected national reviewing courts (i.e., Swiss and French Courts). In my opinion, the review by the national courts represents the end game and should prove critical in guiding future arbitral tribunals in how they should treat overriding mandatory rules at the earlier stage of issuing their arbitral awards.

Ernste, Het toepasselijke bewijsrecht in arbitrage / p. 687-698

This article focuses on the applicable law of evidence, including the law that is applicable to the allocation of the burden of proof in the case of (international) arbitration with the seat of arbitration being in the Netherlands. In international arbitration, the applicable arbitration law, including the applicable law of evidence, shall be determined by the lex arbitri. The Dutch Arbitration Act is applicable if the seat of arbitration is in the Netherlands. An arbitral tribunal has to decide with respect to the allocation of the burden of proof whether it applies the law of the arbitral seat (based on the theory that the burden of proof is procedural) or the law governing the underlying substantive issues (based on the theory that the burden of proof is substantive). According to Dutch Arbitration law, the allocation of the burden of proof is procedural. As a result, an arbitral tribunal is not bound by rules regarding the allocation of the burden of proof laid down in the law governing the underlying substantive issues.

Zilinsky, Toepasselijk recht op de bindende kracht en de rechtsgevolgen van arbitrale uitspraken / p. 699-714

This contribution focuses on the res judicata of arbitral awards. What is actually the purpose of the res judicata of an arbitral award? Should an arbitrator or a

court verify ex officio whether an arbitral award had become res judicata or should this be invoked by the parties? As the parties are free to determine the manner in which and by whom dispute resolution takes place, the question arises as to which applicable law should determine the issue of an arbitral award becoming res judicata. Although the existing instruments, such as the 1958 New York Convention, deal with the recognition and enforcement of arbitral awards, these instruments leave this question unanswered. These instruments are based on the principle that the Contracting States recognize the arbitral awards and that a recognized arbitral decision is binding. This contribution discusses the different approaches to determining the res judicata effect of an arbitral award.

Peters, Enkele gedachten over de toepasselijkheid van het beginsel van *ius curia novit* in gerechtelijke procedures in verband met arbitrage en de gevolgen daarvan voor arbitrage / p. 715-730

It is often assumed that arbitrators are not obliged to apply conflict of laws rules or to add to the legal grounds ex officio, but this is not necessarily true. In this publication the author sets out that arbitrators, under specific circumstances, should have regard to the rules that the national courts should apply in annulment proceedings and should not consider themselves to be bound by the parties' submissions. In this respect, the arbitrators should have an understanding of the scope of annulment proceedings and the application of the principle of ius curia novit in these proceedings, which are also discussed in this publication.

Van Zelst, Het recht van toepassing op de aansprakelijkheid van arbiters / p. 731-747

This article investigates and challenges existing notions of private international law aspects of the liability of arbitrators. The starting point of the inquiry is a succinct comparative analysis of how the role of the arbitrator is viewed and which standards apply to arbitrator liability in various jurisdictions. The article proceeds with an analysis of the applicability of the Rome I Convention, finding that Rome I applies to the contractual liability of an arbitrator. Subsequently, the article assesses how Rome I's substantive provisions – Article 4 more specifically – should be applied. It concludes that the law of the habitual residence (of each) of the arbitrator(s) applies to contractual claims vis-a-vis the arbitrator(s).

In addition the issue contains a case note

X.P.A. van Heesch, Samenloopperikelen bij het aannemen van bevoegdheid o.g.v. Verordening Brussel I-bis. Hoge Raad 17 juli 2020, ECLI:NL:HR:2020:1280, *NIPR* 2020, 487 (*V Marine Fuels/Dexhon c.s.*) / p. 748-759

This article discusses the judgment of the Dutch Supreme Court dated 17 July 2020, ECLI:NL:HR:2020:1280. In this case, the Dutch Supreme Court answered the question of whether the Dutch Court had jurisdiction based on Article 5 of the Arrest Convention when the Court of Casablanca had arrested the ship in question. Even though Article 5 of the Arrest Convention does not grant explicit exclusive jurisdiction to the court of the forum arresti, exclusive jurisdiction can be assumed based on the interpretation of the Arrest Convention. The author then explains the relation between the Brussels I-bis Regulation and Conventions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments (specialized Conventions). The general rule regarding this relation is laid down in Article 71 Brussels I-bis Regulation and entails that the Brussels I-bis Regulation does not affect any specialized Conventions to which the Member States are parties. The Court of Justice of the European Union has provided two restrictions to this rule. These two restrictions entail that Article 71 Brussel I-bis Regulation (i) only applies to aspects that the specialized Convention governs and not to aspects that the specialized Convention does not govern and (ii) can only apply if the specialized Convention does not compromise the principles which underline judicial cooperation in the European Union (such as the free movement of judgments, predictability as to the courts having jurisdiction and legal certainty for litigants). In the legal literature, ideas differ on how to interpret this last restriction, which is set out by the author as well. Finally, the author construes whether the Dutch Supreme Court should have applied the two restrictions on Article 71 Brussels I-bis Regulation before it ruled that the Dutch Court did not have jurisdiction in this case.