Review of the AJIL Unbound symposium: Global Labs of International Commercial Dispute Resolution

By Magdalena Lagiewska, University of Gdansk

This post reviews the symposium issue of the *American Journal of International Law* Unbound on "Global Labs of International Commercial Dispute Resolution". This issue includes an introduction and six essays explaining the current changes and developments in the global landscape for settling international commercial disputes. The multifarious perspectives have been discussed to show tendencies and challenges ahead.

Overall, the *AJIL Unbound* special issue is, without doubt, one of the most impactful contributions on changes in international commercial dispute resolution landscape. It is a successful attempt and a fascinating analysis of recent developments in this field. This is certainly a must-read for anyone interested in reshaping the landscape of dispute resolution worldwide. Beyond the theoretical context, it includes many practical aspects and provides new insight into the prospects of its development and potential challenges for the future. I highly recommend it not only to the researchers on international commercial dispute resolution, but also to legal practitioners—lawyers, arbitrators, and mediators among others. Below, I have outlined each of the symposium's contributions.

As mentioned in the introduction by Anthea Roberts [1], instead of the previous bipolarity and centralization around New York and London, international commercial dispute resolution is facing a new process of decentralization and rebalancing. Today, we are all witnessing the adaptation to a new reality and the COVID-19 pandemic is speeding up the entire process. "New legal hubs" and "one-stop shops" for dispute resolution are springing up like mushrooms in Eurasia and beyond. Therefore, due to the competitiveness between the "old" and "new" dispute resolution institutions, these new bodies are more innovative and thus are expected to attract more and more interested parties.

The main aim of this symposium was to outline the new challenges of the international commercial dispute resolution mechanism around the world. New dispute resolution centres not only influence on the current landscape, but also they offer "fresh insight" in this field.

The first essay by Pamela K. Bookman and Matthew S. Erie, entitled "Experimenting with International Commercial Dispute Resolution" [2], pays attention to the new phenomena on emerging "new legal hubs" (NLHs), international commercial courts and arbitral courts worldwide. This new tendency has recently appeared in China, Singapore, Dubai, Kazakhstan and Hong Kong. All of these initiatives affect the international commercial dispute settlement landscape and increase the competitiveness among these centres. Those centres bravely take advantage of "lawtech" and challenge themselves. As a result, they are experimenting with legal reforms and some institutional design to attract more interested parties and to become well-known platforms providing high-quality dispute resolution services. The Authors set forth the challenges and threats that may exist in this respect. They also provide an insightful analysis of the impact of these new initiatives on the international commercial dispute resolution, international commercial law, and the geopolitics of disputes.

Further, Giesela Rühl's contribution focuses on "The Resolution of International Commercial Disputes – What Role (if any) for Continental Europe?" [3]. The author pays attention to the Netherlands, which took the initiative to establish a new court exclusively devoted to international cases, and Germany and France, which took more skeptical efforts to establish international commercial chambers both before and after the Brexit referendum in 2016. Rühl believes that the far-reaching reform should be implemented at the European level. Therefore, she advocates the establishment of a common European Commercial Court. This seems to be an interesting approach that would certainly strengthen Europe's position in the global dispute resolution landscape.

Julien Chaisse and Xu Qian outline the importance and key features of the recently established China International Commercial Court (CICC) [4]. Given its foundation, this court should operate as a "one-stop shop" combining litigation, arbitration, and mediation. It is dedicated to solving Belt and Road Initiative (BRI) related disputes. The Authors point out that this court is much more akin to a national court than a genuine international court. Therefore, they challenge its importance with respect to BRI-related disputes and attempt to determine

whether the Court will play a significant role in the international dispute settlement landscape. These considerations are especially important given the primary sources in Chinese which bring the reader closer to Chinese legislation.

The following essay, by Wang Guiguo and Rajesh Sharma, addresses the International Commercial Dispute Prevention and Settlement Organization (ICDPASO) established in 2019 [5]. It is another global legal hub that offers "one-stop" services in China. At first glance, the ICDPASO seems to be an interesting body with an Asian flavour, however, the Authors shine a spotlight on some practical challenges ahead and its limited jurisdiction. This body differs significantly from the aforementioned CICC. Whether the ICDPASO will be a game-changer in the BRI-related disputes and will influence importantly on international dispute resolution landscape seems to be a melody of the future. It is ultimately too soon to answer those questions now, but it is certainly worthwhile to watch this institution.

Further, S.I. Strong brings attention to the actual changes in international commercial courts in the US and Australia [6]. Although Continental Europe, the Middle East, and Asia try to reshape the current international dispute resolution landscape, common law jurisdictions, such as the United States and Australia, are less inclined to changes in establishing international courts specialized in cross-border disputes. Compared to the US, Strong believes that Australia has made more advanced efforts to establish such courts. Nevertheless, aside from the traditional international commercial courts, the newly emerging international commercial mediation services are gaining popularity, most notably due to the entry into force of the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).

Last but not least, Victoria Sahani contribution's outlines third-party funding regulation [7]. While third-party funding remains a controversial issue in litigation or arbitration, whether domestic or international, it is becoming much more popular globally. There are already over sixty countries experimenting with regulatory questions about third-party funding. In this case, we also deal with some "laboratories" that try out different methods of regulation.

The entire symposium is available here.

Private International Law in Europe: Webinar series on Current Developments in Jurisprudence

The **Interest Group on Private International Law of the Italian Society of International Law** invites you to a series of webinars on current developments in jurisprudence in various topics of private international law.

*The webinars will be hosted on **Teams** by Microsoft 365. In order to attend one or more webinars please write a message to the email address **sidigdipp@gmail.com** to be added to the relevant Teams group. Once the request has been made for one webinar, there will be no need to repeat it for subsequent events.*

The webinars will take place in English except where indicate otherwise.

All webinars will be chaired by **Prof. Stefania Bariatti** (Università degli Studi di Milano), convenor of the Interest Group.

Programme:

29 January 2021 @ 4-6 PM (CET):

Limiting European Integration Through Constitutional Law? Recent Decisions of the German Bundesverfassungsgericht and their Impact on Private International Law

Speaker: Christian Kohler, *Universität Saarbrücken*

Discussant: Giulia Rossolillo, *Università degli Studi di Pavia*

19 February 2021 @ 4-6 PM (CET):

State Immunity and Jurisdiction in Civil and Commercial Matters in Recent Court of Justice Rulings

Speaker: Alexander Layton, *King's College London*

Discussant: Lorenzo Schiano di Pepe, *Università di Genova*

12 March 2021 @ 4-6 PM (CET):

La trascrizione dell'atto di nascita nella recente giurisprudenza della Corte costituzionale italiana (in Italian)

Speaker: Sara Tonolo, *Università degli Studi di Trieste*

Discussant: Elena Rodriguez Pineau, *Universidad Autonóma de Madrid*

9 April 2021 @ 4-6 PM (CET):

Law Governing Arbitration Agreements in a Recent Judgment of the UK Supreme Court

Speaker: Adrian Briggs, *University of Oxford*

Discussant: Pietro Franzina, *Università Cattolica del Sacro Cuore*

TBC 23 April 2021 @ 4-6 PM (CET) **TBC:**

Jurisdiction in Matters Relating to Cross-Border Torts according to the Recent Volkswagen Judgment of the Court of Justice

Speaker: Giesela Rühl, *Humboldt-Universität zu Berlin*

Discussant: Fabrizio Marongiu Buonaiuti, *Università di Macerata*

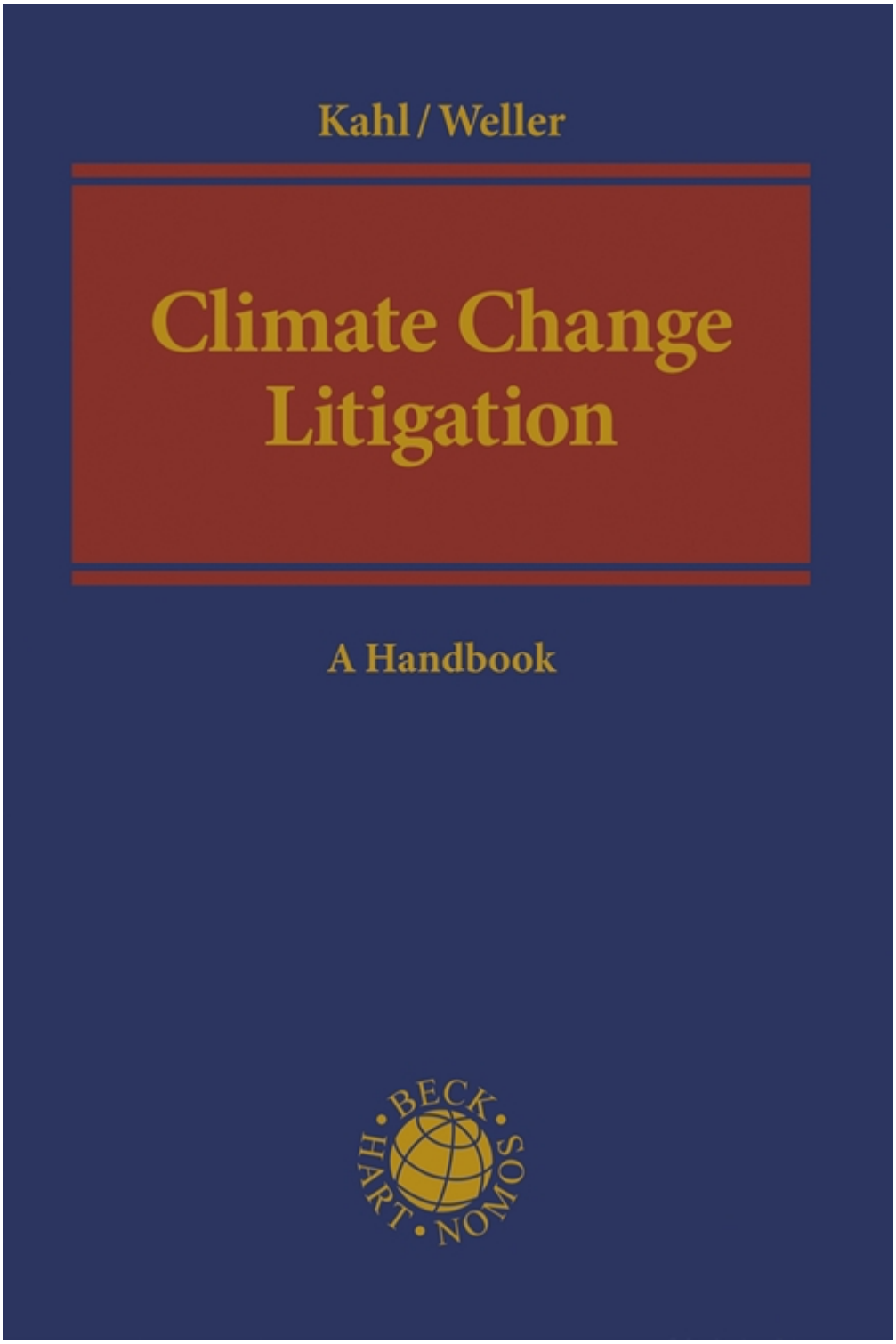
NYU, 25 January 2021: Autonomous v. Nationalistic Interpretation of the 1958 New York Convention – Part II

In the context of its investigation on the issues surrounding the *Autonomous v. Nationalistic Interpretation of the 1958 New York Convention*, and as a follow up to the first Seminar it organized in this framework, on 25 January 2021 the NYU Center for Transnational Litigation, Arbitration, and Commercial Law will host a second Seminar.

The event will feature internationally renowned scholars who will address core issues such as: 'Incapacity' (Francesca Ragno); 'Deviations from the agreed procedure' (Friedrich Rosenfeld); 'Public policy' (Giuditta Cordero-Moss); 'Procedure to enforce and arbitral award' (Lucas Siyang Lim).

More information on this event is available here.

Just Published: Kahl/Weller, Climate Change Litigation – A Handbook



From the publisher' site:

About Climate Change Litigation

This book investigates and discusses the respective issues arising in the current discourse on climate protection from different legal perspectives (including

international law, European law and national public and civil law). In particular, it addresses the issue of “climate protection by courts”.
It gives an overview of important jurisdictions in the field of climate change litigation, including the US, Canada, Australia, the UK, France, the Netherlands, Italy, Brazil and Germany.

The handbook provides answers and ideas both to scholars and practitioners in the field. Furthermore, it is guaranteed to provide an overview of the latest news in cases and progress in the field of climate change litigation.

Table Of Contents

Autonomous v. Nationalistic Interpretation of the 1958 New York Convention

The New York Convention of 1958 owes much of its success to being an international convention setting forth uniform rules. Its uniform enforcement regime not only lowers the parties' transaction costs of identifying under which circumstances an award will be recognized and enforced across jurisdictions; it also ensures that States cannot justify the failure to comply with their obligations under the New York Convention by reference to domestic law. Still, the courts of different contracting States apply the Convention differently. Oftentimes, this is due to the erroneous understanding of concepts employed by the drafters of the Convention.

To shed the light on this complex matter, on 21 January 2021 the NYU Center for Transnational Litigation, Arbitration, and Commercial Law will host a conference on *Autonomous v. Nationalistic Interpretation of the 1958 New York Convention*. In this context, a group of internationally renowned scholars will address core issues such as: 'Autonomous Interpretation of the New York Convention' (Franco Ferrari); 'The notion of an arbitral award' (Burkhard Hess); 'Arbitration agreement – Scope issues' (Dennis Solomon); and 'Arbitrability' (Winnie Ma).

More information on this event is available here.

The Chronology of Practice: Chinese Practice in Private

International Law in 2019

He Qisheng, Professor of International Law, Peking University Law School, and Chairman at the Peking University International Economical Law Institute, has published the 7th Survey on Chinese Practice in Private International Law.

This survey contains materials reflecting the practice of Chinese private international law in 2019. First, this paper describes the judiciary's caseload: Chinese courts decided some 17,000 foreign-related civil and commercial cases, 16,000 maritime cases and 9,648 requests for judicial assistance in 2019. Regarding changes in the statutory framework of private international law, four legislative acts, one set of Regulations and six Supreme People's Court (SPC) Judicial Interpretations were adopted or amended in 2019 on investment contracts, action preservation in intellectual property, punitive damages, *etc*. Second, eight typical cases on jurisdictional issues are selected, including jurisdiction clauses, parallel proceedings, and *res judicata*. Third, seven new representative cases on choice of law relating, in particular, to international transport, *force majeure*, gambling debts and public order, are examined. Fourth, five cases on the recognition and enforcement of foreign judgments and one SPC Opinion in favour of presumed reciprocity are briefly examined. Finally, this paper also covers seven key cases which reflect the latest development in Chinese private international law on other procedural issues, such as service of process abroad and authentication, and three cases on international arbitration (including the first decision rendered by the China International Commercial Court).

Here are the links to the article:

· Abstract:
https://academic.oup.com/chinesejil/advance-article-abstract/doi/10.1093/chinesejil/jmaa032/6032845

· Article (free access):
https://academic.oup.com/chinesejil/advance-article/doi/10.1093/chinesejil/jmaa032/6032845?guestAccessKey=02dcf09b-8bd6-4af4-bc02-9bf523212c37

New York Convention applies to the recognition and enforcement of Basketball Arbitral Tribunal awards

It has been widely supported in legal scholarship that arbitral awards issued by the Basketball Arbitral Tribunal may be recognized and declared enforceable by virtue of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. A recent judgment rendered by the Thessaloniki Court of first Instance examined a pertinent application, and granted recognition and enforcement of the BAT award in Greece.

THE PROCEEDINGS IN GENEVA

The Greek Player V.K. and his Agency, S. Enterprise Ltd., filed a claim against the Greek Club A. B.C. 2003 for outstanding salaries, bonuses, agent fees, declaratory relief and interest. The Claimant submitted that the Respondent breached the contractual relationship by failing to pay several salary instalments as well as the agent fees. The Respondent did not participate in the proceedings. The claim was partially upheld by the Arbitrator. The Tribunal ordered the Club to pay a series of amounts and costs to the applicants.

THE PROCEEDINGS IN THESSALONIKI

Less than a month later, the award creditors filed an application for the recognition and enforcement of the BAT award before the Thessaloniki 1st Instance Court. For this purpose, they submitted a true copy of the award and the arbitration agreement, both duly translated in Greek.

The Club countered with a number of defences:

- It was not summoned to the BAT proceedings, which resulted in its

default of appearance.

- After the application in Greece, the parties signed a private agreement, following which the player agreed to downsize his claim to the sum of 85.000 Euros, and both applicants agreed to be paid by instalments.
- The Club had already paid the amount of 51.000 Euros, which should not be declared enforceable.
- By seeking recognition of the BAT award before the court, the applicants violated the private agreement, where it was agreed that both parties would refrain from any legal action during its implementation.
- It was also agreed that the player would apply for discontinuance, and in the event of payment default, the applicants were obliged to send the Club a notice in written, which however was omitted.

THE JUDGMENT OF THE THESSALONIKI COURT

- The court saw no violation of the audience rights of the Club: the latter was duly and timely served with the application and the summons to appear in the proceedings, as evidenced by the documents submitted to the court.
- By signing the private agreement, the court saw a tacit acceptance of the BAT award by the Club.
- The court dismissed the Club's request to deny the enforceability of the amount already paid. It underlined that this would mean a revision on the merits. Apart from the above, the court continued, the Club is not deprived of its right to request partial stay of execution in the enforcement stage.
- For the same grounds the court refrained from the examination of the particulars of the agreement, considering that the allegations of the Club against the applicants are out of the scope of the exequatur proceedings.
- With respect to the grounds of refusal, the court dismissed the public policy defence raised by the Club in regards to the costs of the arbitration proceedings: The total amount of 12.500 Euros is not excessive, given the subject matter of the dispute (140.000 Euros).

SHORT COMMENT

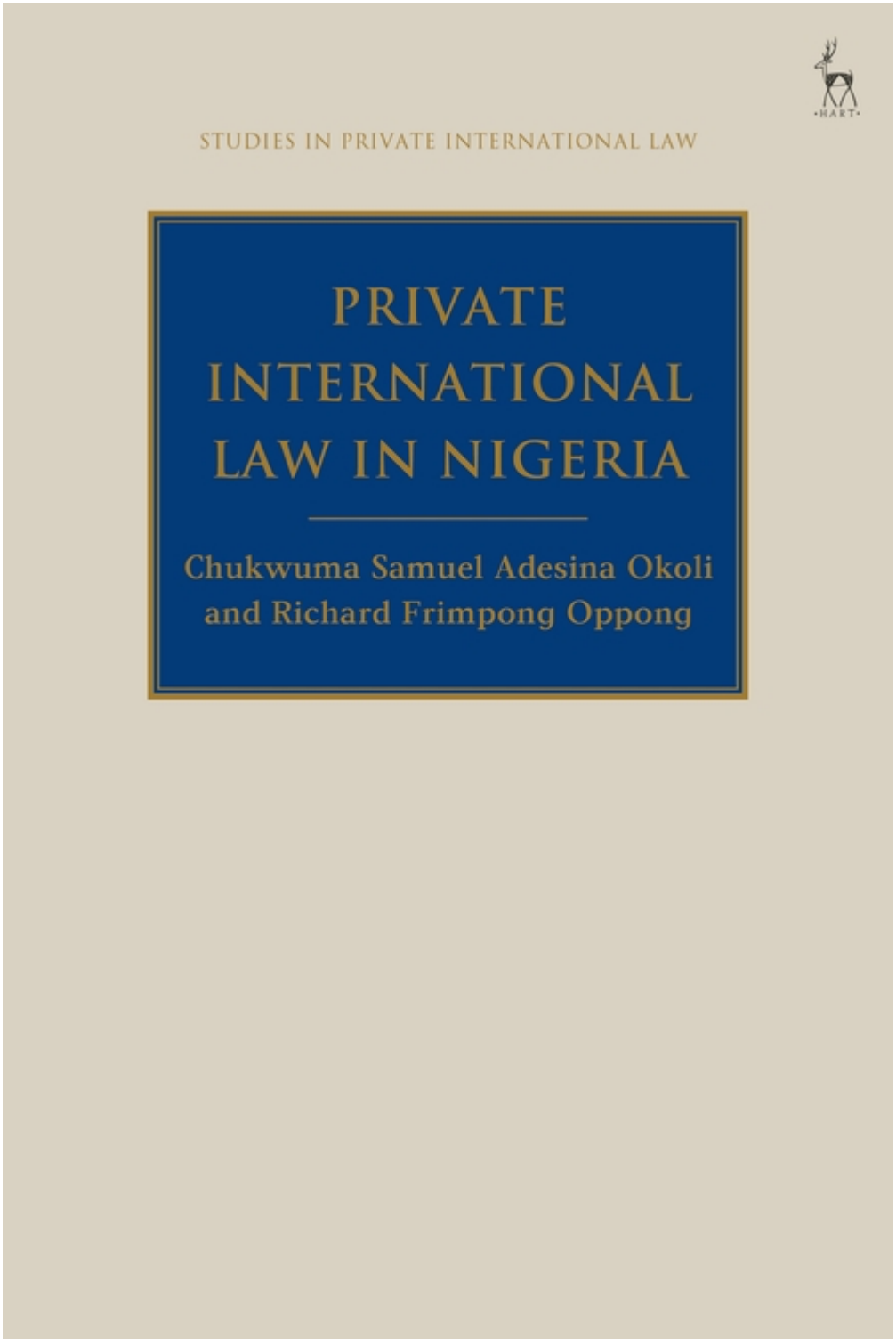
The judgment of the Greek court is a positive sign for the free circulation of BAT awards in national jurisdictions. The losing party failed to prove any grounds of refusal. The last bastion is now the application for a stay of execution. However, a re-examination on the merits is strictly forbidden in this stage; the Club's only hope is to trace potential flaws in the enforcement proceedings.

Finally, free circulation is also guaranteed for CAS rulings, as evidenced by a judgment issued by the same court nearly seven years ago.

The Practicality of the Enforcement of Jurisdiction Agreements in Nigeria

Written by ***Dr Abubakri Yekini, a Lecturer in Law at Lagos State University***

This is the fourth and penultimate online symposium on Private International Law in Nigeria *initially announced on this blog. It was published today on Afronomicslaw.org. The first introductory symposium was published here by Chukwuma Samuel Adesina Okoli and Richard Frimpong Oppong, the second symposium was published by Anthony Kennedy, and the third symposium was published by Richard Mike Mlambe. A final blog post on this online symposium will be published tomorrow.*



I. Introduction

Private international law (PIL) is not one of those fanciful subjects that command the attention of students, academics and practitioners at least in Nigeria. As important as this field, it is still largely ignored. Several legal commentators have called our attention to the poor state of PIL in Africa generally (Oppong, 2006;

Okoli, 2019). So, we can say Nigeria is not standing alone here. Dr Oppong is one of those who are passionate about the development of PIL in Africa, and I may add Nigeria. In a piece titled 'Private International Law and the African Economic Community: A Plea for Greater Attention', he lamented the general state of neglect of PIL in the African economic integration project. What caught my attention in that article was his remark on the treatment of jurisdiction agreements in some African countries such as Angola and Mozambique. He noted that:

"This hostility to jurisdiction agreements is akin to Latin American countries' historical disdain for similar clauses founded on their rejection of the principle of party autonomy- a principle so important in international commerce. This treatment of jurisdiction agreements can be a disincentive to international commercial relations since they are very much part of the current modes of dealing across national boundaries" (p.917)

Although Dr Oppong did not examine the attitude of Nigerian courts on this issue, his new work which he co-authored with Dr Okoli (Okoli and Oppong, 2020) gives us an insight. The book is an excellent piece. For the first time, students and practitioners can have access to an avalanche of Nigerian PIL cases and they can measure the mood of Nigerian courts on important subject matters such as jurisdiction agreements. This topic was conceived while reviewing the book.

In recent years, Nigeria has been making frantic efforts to turn around its economy. There is a consistent drive at improving the ease of doing business, and various investment promotion laws have also been enacted to that effect. However, we seem not to appreciate the nexus between PIL and the promotion of cross border commercial transactions. We agree with Dr Oppong that PIL has a role to play in making Nigeria attractive for international trade and commerce. International businesspersons are more interested in economies that enforce contracts, protect and secure property rights, and have simple and efficient dispute resolution mechanisms in place. Jurisdiction agreements are part of contractual terms. As observed from the analysis of Okoli and Oppong (2020), it is difficult to give a straight answer on whether jurisdiction agreements are enforced by Nigerian courts. This calls for great concern as a negative attitude to jurisdiction agreements can potentially disincentives the inflow of foreign direct investment or international business transactions to Nigeria generally. Even if such businesses must be done in Nigeria, the least is that the non-enforcement of

jurisdiction agreements will lead to an increase in transaction cost since there are uncertainties surrounding the enforcement of contracts. Investors may envisage multiple proceedings and the cost of such proceedings are factored into the contract ab initio. They might also envisage that judgments obtained abroad may not be enforced by Nigeria courts that might have earlier exercised jurisdiction in breach of the agreement. There is also the tendency to have inconsistent judgments. These uncertainties are drawbacks on whatever reforms the Nigerian government might have been carrying out in the area of trade and investment.

Jurisdiction agreements are otherwise called choice of court agreements. In most cases, they form part of the contract agreement. They come in various forms. They may be symmetric (exclusive or non-exclusive) or asymmetric where one party is free to choose any preferred forum and the other party is restricted to a particular venue. Jurisdiction agreement is party autonomy has been embraced in almost all jurisdictions. Like arbitration agreements, parties are allowed to contract out of certain jurisdictions. While a contract may be formed or executed in jurisdiction A and B, the parties may wish that their disputes be resolved in jurisdiction C. For instance, many international contracts choose English courts as their preferred venue for litigation. Several reasons have been offered for this. They include case management system of the English courts (procedural efficiency), expertise in English law and complex commercial transactions, the quality of the English bar, availability of varieties of interim measures, prioritisation of private justice, independence of the judiciary, pro-enforcement of contracts and judgments amongst others.

II. Jurisdiction agreements in Nigerian courts

What is the attitude of Nigerian courts to jurisdiction agreements? Theoretically, we may say that Nigerian courts enforce jurisdiction agreements. There are numerous precedents extolling party autonomy and the need to enforce contracts freely negotiated by parties. Nevertheless, in practice, Nigerian courts assume jurisdiction, in some cases, in breach of jurisdiction agreements. There is hardly any distinction between exclusive and non-exclusive jurisdiction agreements. From Okoli and Oppong (2020), and my assessment of reported cases, jurisdiction agreements have only been upheld in five cases: *Nso v Seacor Marine (Bahamas) Inc* (2008) LPELR-CA*, Beaumont Resources Ltd v DWC Drilling Ltd* (2017)

LPELR-42814 (CA), *Nika Fishing Co Ltd v Lavina Corporation* (2008) 16 NWLR (Pt 1114) 509, *Megatech Engineering Ltd Sky Vission Global Networks LLC* (2014) LPELR-22539 (CA) and *Damac Star Properties LLC v Profitel Limited* (2020) LPELR-50699 (CA).

An analysis of the reported cases on jurisdiction agreements reveals that jurisdiction agreements are jettisoned on three main grounds as presented below.

1. **The mischaracterisation of jurisdiction agreement as an ouster clause**

Nigerian jurisdictional law generally lacks any coherent theoretical foundation. Okoli and Oppong's treatment of the topic in chapter 5 attest to this fact. Credit must be given to them for an attempt to synchronise and present in an intelligible form, a body of precedents that is riddled with inconsistencies and contradictions. Unlike elsewhere where courts consider many factors (eg reasonableness, party autonomy, due process, proximity, foreseeability) when treating adjudicatory jurisdiction, Nigerian courts largely see it from the prisms of territorialism and power. It is no surprise that the courts are extremely protective/jealous of their power when a matter is connected to the forum. They generally frown at any attempt to divest the courts of their jurisdiction. Hence, they characterise jurisdiction agreements as ouster clauses.

This mischaracterisation can be traced to *Sonnar (Nig.) Ltd. v Nordwind*(1987) 4 NWLR (Pt.66) 520 where the Supreme Court imported this idea relying on *The Fehmarn*[1957] 1 W.L.R. 815. In this case, Oputa JSC had this to say on jurisdiction agreements:

"[A]s a matter of public policy our courts should not he too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws simply because parties in their private contracts chose a foreign forum and a foreign law. Courts guard rather jealously their jurisdiction and even where there is an ouster of that jurisdiction by Statute It should be by clear and unequivocal words, If that is so, as indeed It is, how much less can parties by their private acts remove the jurisdiction properly and legally vested In our courts? Our courts should be in charge of their own proceedings. When it Is said that parties make their own contracts and that the courts will only give effect to their intention as expressed in and by the contract, that should generally be understood to mean

and imply as contract which does not rob the court of its jurisdiction in favour of another foreign forum (p. 544 paras B-E)

While an earlier case of *Ventujol v Compagnie Francaise DeL'AfrriqueOccidentale* (1949) 19 NLR 32 mentioned an ouster clause, most recent cases rely on the above exceprt from *Sonnar.* Oputa's view was recently echoed by Nweze JSC in *Conoil v. Vitol S.A.* (2018) 9 NWLR (Pt. 1625) 463 at 502, para A-B where his Lordship noted that: "our courts will only interrogate contracts which are designed to rob Nigerian courts of their jurisdiction in favour of foreign fora or where, by their acts, they are minded to remove the jurisdiction, properly and legally, vested in Nigerian courts."

The Fehmarn was a 1957 English decision and may well reflect the mood of the courts in that era where party autonomy was still emerging. Two problems are identified here. First, laws should always be read in context. *The Fehmarn* did not treat jurisdiction agreement as an ouster clause. Rather, that case established the fact that a court which is properly seized, nevertheless, has the discretion to decline jurisdiction in deference to the parties' jurisdiction agreement. The substance of *The Fehmarn* is that "where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be overridden " (p. 820). Second, many Nigerian lawyers have equally misunderstood the nature of jurisdiction agreements. In those cases where the courts have shown this combative attitude, some counsel have asked courts for dismissal on the ground that the courts lacked jurisdiction based on jurisdiction agreements.

A wrong characterisation leads to negative treatment. While ouster clauses are special statutory clauses which are meant to prevent courts from entertaining specific cases that engage state interest, jurisdiction agreements only appeal to the courts to decline jurisdiction in deference to parties' choice. It is interesting to also note that an arbitration agreement is never treated as such and there area plethora of authorities on this point (For instance see *Felak Concept Ltd. v. A.-G., Akwa Ibom State* (2019) 8 NWLR (Pt. 1675) 433; *Mainstreet Bank Capital Ltd. v. Nig. RE* (2018) 14 NWLR (Pt. 1640) 423). One wonders whether there is any rational or legal basis to treat a jurisdiction agreement differently from an arbitration agreement.

2. Mandatory statutes

Some Nigeran statutes confer mandatory jurisdiction over some subject matters on Nigerian courts. The reasonability or otherwise of such sweeping and exclusive jurisdiction over matters that are purely civil and commercial will not be addressed here for want of space. Examples of these statutes are the Admiralty Jurisdiction Act and the Civil Aviation Act. One can sympathise with Nigerian courts when they are asked to enforce jurisdictional agreements which fall within the scope of these statutes. No amount of judicial pragmatism would override mandatory national statutes vesting exclusive jurisdiction in Nigerian courts. It was on this basis that the courts refused to enforce jurisdictional agreements in *Swiss Air Transport Coy Ltd v African Continental Bank* (1971) 1 NCLR 213, for instance.

3. *Forum non conveniens*

Forum non conveniens(FNC) is a pragmatic procedural mechanism developed by common law judges (even though it has a Scottish origin) to advance efficiency and justice in civil litigation. Many transactions have connections with more than one jurisdiction and parties would want to commence litigation in any of those fora that can deliver maximum results for them. In some cases, it may be simply to harass the opponent. Thus, where a court has jurisdiction over a matter under its national laws, it can decline jurisdiction (by staying an action) to allow parties to litigate in a more convenient forum.

FNC test as stipulated by Brandon J in *The Eleftheria*[1969] 2 All ER 641 has been adopted and applied by the Nigerian Supreme Court in *Sonnar (Nig.) Ltd. v Nordwind.* Brandon J was merely laying down general factors that the court should consider when asked to decline jurisdiction. Brandon test supports the enforcement of jurisdiction agreement. The underlying principles are largely based on convenience and justice. The case emphasised "a strong'" cause for assuming jurisdiction in breach of a jurisdiction agreement. The strong cause has further been qualified in subsequent cases such as *Donohue v Armco Inc &Ors* [2001] UKHL 64 where many FNC grounds were discountenanced (see para 24-39). The US Supreme Court would also require 'some compelling and countervailing reasons' to allow an action to proceed in a non-chosen court if the agreement was reached "by experienced and sophisticated businessmen" (See *Bremen v. Zapata Offshore* Co.92 S. Ct. 1907 (1972)). This is contrary to the Nigerian courts' approach where any FNC test no matter how weak may displace foreign jurisdiction clause. The Supreme Court recently re-emphasised the

approval of any of the FNCs grounds in *Nika Fishing Co Ltd*. However, an application for stay was granted in that case because the party in breach did not file any counter affidavit.

In *Ubani v Jeco Shipping Lines* (1989) 3 NSC 500 and *Inlaks Ltd v Polish Ocean Lines* (1989) 3 NSC 588, jurisdiction agreements were not enforced either because the matter would be statute-barred in the chosen jurisdiction or parties and evidence were located in Nigeria. It is conceded that one of the tests of FNC is the availability of an alternative forum. It can easily be argued that these decisions are justified on the ground of justice because the Claimants would not be able to file a claim in the chosen jurisdiction. However, there is a danger in applying FNC grounds to jurisdiction agreements. As rightly suggested in *Donohue* where jurisdiction agreement is in issue, FNC grounds should ordinarily not apply. Non-enforcement of jurisdiction agreement should be restricted to very strong reasons such as where third parties who are not bound by the agreement are parties to the suit or where the claim falls within the exclusive jurisdiction of the non-chosen forum (see *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90; *Continental Bank NA v Aeakos Compania Naviera SA and Others* [1994] 1 WLR 588). One can also add inability to sue in the chosen forum for reasons beyond parties' control such as the ongoing global lockdown (*RCD Holdings Ltd v LT Game International (Australia) Ltd* [2020] QSC 318) or the protection of weaker parties like consumers and employees. This is the approach of the English courts and the same is followed in other commonwealth jurisdictions such as Australia (FAI *General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559) and New Zealand (*RCD Holdings Ltd v LT Game International (Australia) Ltd* (supra); *Kidd v van Heeren* [1998] 1 NZLR 324). A party who agreed to litigate in a particular forum had contracted to be bound by the law and procedure of that jurisdiction. Limitation period, location of parties and evidence should not be a valid excuse without more. Put differently, inconvenience and procedural disadvantages should be discountenanced especially when those factors are forseeable when parties are negotiating the contract ()

III Conclusion

Legal certainty and predictability of results are key values of modern PIL

especially in the area of cross border commercial transactions. A PIL framework that is driven by these values will promote and enhance commercial activities because it is a risk management mechanism in itself. Businesspersons are interested to do business in jurisdictions where contracts are enforced. They want to make informed decisions about the governing law of the contracts, the jurisdiction in which contractual disputes are resolved, jurisdictions whose judgments can be respected and enforced abroad.

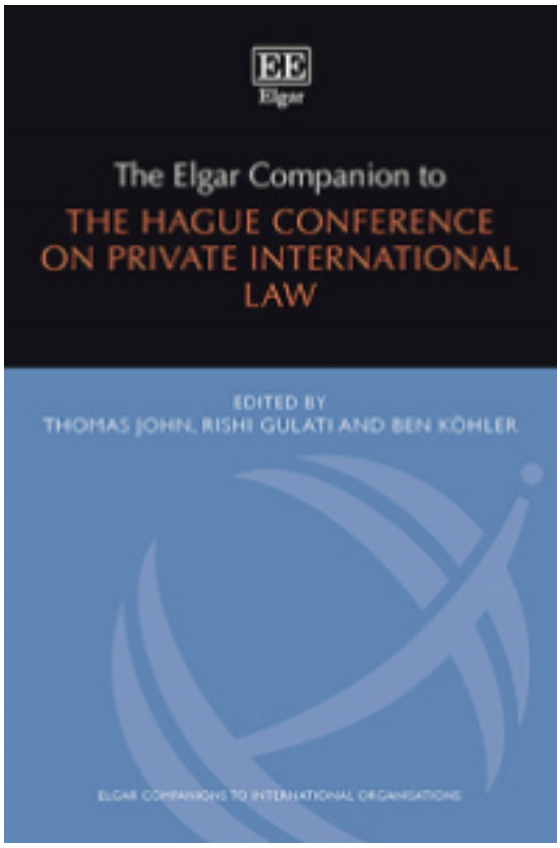
Courts ought to help parties to achieve their contractual goals. They should neither frustrate negotiated terms nor rewrite them for the parties provided it is a contract that is negotiated at arm's length. Nigerian courts should promote party autonomy as much as practicable. With this approach, foreign businesses would take the Nigerian justice system seriously and would be confident to do business with Nigeria. It can potentially attract more FDIs to Nigeria if we earn the trust of foreign investors.

Non-enforcement of jurisdiction agreements disincentives commercial transactions because of litigation and enforcement risks. Assuming that foreign companies must do business with Nigerians nevertheless, these risks ultimately be factored into contractual negotiations as businessmen would not want to spend their profits on litigation in unfamiliar/non-chosen fora. Cost of doing business with Nigeria will invariably be higher and this will further lead to an increase in the cost of goods and services in Nigeria.

Based on the foregoing, it is only sensible that Nigerian courts should give maximum effect jurisdiction agreements. The first task is to get the legislators to review some of the extant legislation such as the Admiralty Jurisdiction Act and Civil Aviation Act which vest exclusive jurisdiction in Nigerian courts over a wide range of purely private commercial transactions. Also, the courts can learn from the developments in other jurisdictions, particularly, how "strong cause" has been redefined in the light of modern developments to admit of only genuine cases where it is either practically or reasonable impossible to litigate in the chosen forum or where non-parties are genuinely involved in the suit. Lastly, Nigeria needs to join the Hague Conference and the 2005 Choice of Court Convention. It will benefit from the rich jurisprudence and expertise available at the Hague Conference and foreign businesspersons will be assured of the commitment of Nigeria to the enforcement of jurisdiction agreements.

Introduction to the Elgar Companion to the Hague Conference on Private International Law (HCCH) — Part I

The following entry is the first of two parts that provide an introduction to the Elgar Companion to the Hague Conference on Private International Law (HCCH). Together, the parts will offer readers an overview of the structure of the Companion (Part I) as well as of the core themes as they emerged from the 35 Chapters (Part II). Both parts are based on, and draw from, the Editors' Introduction to the Elgar Companion to the HCCH, which Elgar kindly permitted.



Introduction

The Elgar Companion to the HCCH will be launched on 15 December 2020 as part of a 1 h long virtual seminar. The Companion, edited by Thomas John, Dr Rishi Gulati and Dr Ben Koehler, is a unique, unprecedented and comprehensive insight into the HCCH, compiling in one source accessible and thought-provoking contributions on the Organisation's work. Written by some of the world's leading private international lawyers, all of whom have directly or indirectly worked closely with the HCCH, the result is a collection of innovative and reflective contributions, which will inform shaping the future of this important global institution.

The Companion is timely: for more than 125 years, the HCCH has been the premier international organisation mandated to help achieve global consensus on the private international law rules regulating cross-border personal and commercial relationships. The organisation helps to develop dedicated multilateral legal instruments pertaining to personal, family and commercial legal situations that cross national borders and has been, and continues to be, a shining example of the tangible benefits effective and successful multilateralism can yield

for people and businesses globally.

Approach to private international law

The Companion approaches private international law classically, that is, by understanding the subject matter with reference to its three dimensions: jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. But, as the contributions in this work show, since its inception, and in particular since the 1980s, the HCCH has helped to reach international consensus concerning a further, a "fourth" dimension of private international law: cross-border legal cooperation.

In line with this development, and with the firm belief that such cooperation is crucial to the private international law of the 21st century, the Companion has adopted a strong focus on cross-border legal cooperation, including by an increased use of technology. This deliberate choice was fortuitous: the global pandemic is testing the domestic and international justice sector like never before, bringing into sharp focus the often non-existing or still arcane methods prevalent especially in the area of cross-border legal cooperation.

Structure of the Companion

The Companion comprises 35 Chapters that are organised into three Parts.

Part I of the Companion: Institutional perspectives

Part I consists of three Sections. Section 1 considers the HCCH as an international organisation and the contributions trace the development of the Organisation from its inception in 1893 until the present day, including its trajectory towards a truly global organisation. The initial Chapters specifically concern the history of the HCCH; its institutional setting, especially in terms of

the HCCH's privileges and immunities; as well as a contribution on the relationship between the HCCH, and the other two international organisations dealing with international private law issues, i.e., UNCITRAL and UNIDROIT, often also referred to as the HCCH's 'Sister Organisations'.

The following Section is dedicated to the HCCH as an organisation with global reach. The Chapters demonstrate how the HCCH is evolving from an organisation whose membership was historically European-based into an increasingly global institution. The HCCH currently has 86 Members (as of December 2020), comprising 85 States and the EU. Perhaps other Regional Economic Integration Organisations (REIO) may also become members one day, and this should be encouraged. Remarkably, since the turn of the century, the HCCH has added 39 New Members (or 45% of its current membership), including six South American States, two States from North America, one in Oceania, fourteen in Asia, eleven in Europe and five in Africa.[1] Since 3 December, the HCCH has a further Candidate State: Mongolia, which has applied for membership and for which the six-month voting period is now running. Importantly, this Section considers the HCCH's expanded reach, including thoughtful contributions on the organisation's work in Latin America and the Caribbean; Africa; and in the Asia Pacific. The Chapters also reflect on the work of the HCCH's Regional Offices, namely, the Regional Office for Asia and the Pacific (ROAP), which is based in Hong Kong and commenced its work in 2012; as well as the Regional Office for Latin America and the Caribbean (ROLAC), operating out of Buenos Aires since 2005.

Part I's final Section looks at the HCCH as a driver of private international law. The Chapters contain stimulating contributions concerning some of the contemporary philosophical dimensions of private international law as shaped by globalisation, and the ways in which the HCCH can be understood in this context; the role the Organisation can play in shaping private international law into the future; considering whether the 2015 Choice of Law Principles establish a good framework for regulatory competition in contract law; what role the HCCH can play in further strengthening legal cooperation across borders; and the concept of *public order*, including its relationship with mandatory law.

Part II of the Companion: Current

instruments

Part II of the Companion concerns contributions on existing HCCH instruments. It traces the evolution, implementation, and effectiveness of each of those instruments, and looks forward in terms of how improvements may be achieved. The contributors not only provide a record of the organisation's successes and achievements, but also provide a critical analysis of the HCCH's current work. They canvassed the traditional tripartite of private international law, including forum selection, choice of law and the recognition and enforcement of judgments. In addition, they also provided their thoughts on the fourth dimension of private international law, i.e. cross-border legal cooperation, tracing the pioneering, as well as championing, role of the HCCH in this regard, resulting in cooperation being a quintessential feature, in particular of more modern conventions, developed and adopted by the HCCH.

Part II is organised following the three pillars of the HCCH: (1) family law; (2) international civil procedure, cross-border litigation and legal cooperation; and (3) commercial and financial law.

The first Section of Part II addresses HCCH instruments in the family law sphere. Contributions include an analysis of the HCCH and its instruments relating to marriage; the 1980 Child Abduction Convention; the 1993 Intercountry Adoption Convention; a Chapter on the challenges posed by the 1996 Child Protection Convention in South America; the 2000 Adult Protection Convention; a contribution on HCCH instruments in the area of maintenance Obligations; the work of the HCCH in the field of mediation in international children's cases; and a contribution overviewing the interaction between various HCCH instruments concerning child protection.

The second Section concerns HCCH instruments that are some of its major successes. But as the Chapters show, more work needs to be done given the ever-increasing cross-border movement of goods, services and people, and the need to better incorporate the use of technology in cross border legal cooperation. Contributions concern the 1961 Apostille Convention; the 1965 Service and 1970 Evidence Conventions; the 2005 Choice of Court Convention; and finally, the 2019 Judgments Convention which was decades in the making.

The final Section in Part II consists of contributions on HCCH commercial and

finance instruments. Contributions specifically focus on the 1985 Trusts Convention; the 2006 Securities Convention; and the 2015 Choice of Law Principles, which constitute a soft law instrument demonstrating versatility in the kind of instruments HCCH has helped negotiate.

Part III – Current and possible future priorities

Part III of the Companion consists of Chapters that discuss the substantive development of private international law focusing on current and possible future priorities for the HCCH. In that regard, this Companion seeks to bridge the HCCH's past and its future.

The first Section focuses on current priorities. It consists of contributions on a highly difficult and sensitive area of international family law, i.e. parentage and international surrogacy and how the HCCH may assist with its consensual solutions; how the HCCH may play a global governance role in the area of the protection of international tourists; and how the exercise of civil jurisdiction can be regulated. Specifically, this Chapter shows how the doctrine of *forum non conveniens* is increasingly being influenced by access to justice considerations, a matter borne out by comparative analysis.

The second Section of Part III, and of the Companion, contemplates possible future priorities for the HCCH. Contributions concern how private international law rules ought to be developed in the context of FinTech; what role the HCCH may play in setting out the private international law rules in the sphere of international commercial arbitration; how the digitisation of legal cooperation ought to reshape the fourth dimension of private international law; the potential development of special private international law rules in the context of complex contractual relationships; how the HCCH can engage with and embrace modern information technology in terms of the development of private international law; and finally, what role there is for the HCCH in developing a regulatory regime for highly mobile international employees. It is hoped that in addition to providing ideas on how progress may be made on its current priorities, the contributions in Part III can also provide a basis for the HCCH's future work.

Concluding remarks and outlook

The editors, who collaboratively prepared this entry, chose this structure for the Companion to provide the reader with an easy access to a complex organisation that does complex work. The structure also makes accessible the span of time the Companion bridges, chronicling the HCCH's history, reaching back to 1893, while looking forward into its future.

The second entry on Conflict-of-Laws.net will outline the editor's reflections on the 35 Chapters, drawing out some of the key themes that emerged from the Companion, including the HCCH's contribution to access to justice and multilateralism.

[1] HCCH, 'Members & Parties' <https://www.hcch.net/en/states> accessed 6 December 2020. The latest Member State is Nicaragua for which the Statute of the HCCH entered into force on 21 October 2020.

Report on the ERA conference of 29-30 October 2020 on 'Recent Developments in the European Law of Civil Procedure'

This report has been prepared by Carlos Santaló Goris, a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg.

On 29-30 October 2020, ERA – the Academy of European Law – organized a conference on "Recent Developments in the European Law of Civil Procedure", offering a comprehensive overview of civil procedural matters at the European and global level. The program proved very successful in conveying the status quo

of, but also a prospective outlook on, the topics that currently characterise the debates on cross-border civil procedure, including the Brussels I-bis Regulation and 2019 HCCH Judgments Convention, the digitalisation of access to justice, the recent developments on cross-border service of documents and taking of evidence, and judicial cooperation in civil and commercial matters in the aftermath of Brexit.

For those who did not have the opportunity to attend this fruitful conference, this report offers a succinct overview of the topics and ideas exchanged over this two-day event.

Day 1: The Brussels I (Recast) and Beyond

The Brussels regime, its core notions and the recent contributions by the CJEU via its jurisprudence were the focus of the first panel. In this framework, Cristina M. Mariottini (Max Planck Institute Luxembourg) tackled the core notion of civil and commercial matters (Art. 1(1)) under the Brussels I-bis Regulation. Relying, in particular, on recent CJEU judgments, among which C-551/15, *Pula Parking*; C-308/17, *Kuhn*; C-186/19, *Supreme Site Services*, she reconstructed the functional test elaborated by the CJEU in this area of the law, shedding the light on the impact of recent developments in the jurisprudence of the Court, i.a., with respect to immunity claims raised by international organizations.

Marta Pertegás Sender (Maastricht University and University of Antwerp) proceeded then with a comprehensive overview of the choice-of-court agreement regimes under the Brussels I-bis Regulation and the 2005 Hague Convention on choice of court agreements. Relying, inter alia, on the CJEU case law on Article 25 of the Brussels I-bis Regulation (C-352/13, *CDC Hydrogen*; C-595/17, *Apple Sales*; C-803/18, *Balta*; C-500/18, *AU v. Reliantco*; C-59/19, *Wikingerhof* (pending)), she highlighted the theoretical and practical benefits of party autonomy in the field of civil and commercial matters.

The interface between the Brussels I-bis Regulation and arbitration, and the boundaries of the arbitration exclusion in the Regulation, were the focus of Patrick Thieffry (International Arbitrator; Member of the Paris and New York Bars) in his presentation. In doing so he analysed several seminal cases in that subject area (C-190/89, *Marc Rich*; C-391/95, *Van Uden*; C-185/07, *West Tankers*; C?536/13, *Gazprom*), exploring whether possible changes were brought about by

the Brussels I-bis Regulation.

The evolution of the CJEU's jurisprudence vis-à-vis the notions of contractual and non-contractual obligations were at the heart of the presentation delivered by Alexander Layton (Barrister, Twenty Essex; Visiting Professor at King's College, London). As Mr Layton effectively illustrated, the CJEU's jurisprudence in this field is characterized by two periods marking different interpretative patterns: while, until 2017, the CJEU tended to interpret the concept of contractual matters restrictively, holding that "all actions which seek to establish the liability of a defendant and which are not related to a contract" fall within the concept of tort (C-189/87, *Kalfelis*), the Court interpretation subsequently steered towards an increased flexibility in the concept of "matters relating to a contract" (C-249/16, *Kareda*; C-200/19, *INA*).

The principle of mutual trust of the European Area of Freedom, Security and Justice vis-à-vis the recent Polish judicial reform (and its consequential backlash on the rule of law) was the object of the presentation delivered by Agnieszka Fr?ckowiak-Adamska (University of Wroc?aw). Shedding the light on the complex status quo, which is characterized by several infringement actions initiated by the European Commission (C?192/18, *Commission v Poland*; C?619/18, *Commission v Poland*; C?791/19 R, Commission v Poland (provisional measures)) as well as CJEU case law (e.g. C?216/18 PPU, *Minister for Justice and Equality v LM*), Ms Fr?ckowiak-Adamska also expounded on the decentralised remedies that may be pursued by national courts in accordance with the EU civil procedural instruments, among which public policy, where available, and refusal by national courts to qualify Polish judgments as "judgments" pursuant to those instruments.

The second half of the first day was dedicated to the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. In this context, it is of note that the EU, among others, has opened a Public Consultation into a possible accession to the Convention (see, esp., Thomas John's posting announcing the EU's public consultation). While Ning Zhao (Senior Legal Officer, HCCH) gave an overview of the *travaux preparatoires* of the 2019 HCCH Convention and of the main features of this instrument, Matthias Weller (University of Bonn) delved into the system for the global circulation of judgments implemented with the Convention, highlighting its traditional but also innovative

features and its potential contributions, in particular to cross-border dealings.

The roundtable that followed offered the opportunity to further expound on the 2019 HCCH Judgments Convention. Namely, Norel Rosner (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission) explained that the EU has a positive position towards the Convention, notably because it facilitates the recognition and enforcement of EU judgments in third countries and because it will help create a more coherent system of recognition and enforcement in the EU Member States of judgments rendered in other (of course, non-EU) Contracting States. The roundtable also examined the features and objectives of Article 29, which puts forth an "opt-out" mechanism that allows Contracting States to mutually exclude treaty obligations with those Contracting States with which they are reluctant to entertain the relations that would otherwise arise from the Convention. As Ms Mariottini observed, this provision – which combines established and unique characters compared to the systems put forth under the previous HCCH Conventions – contributes to defining the "territorial geometry" of the Convention: it enshrines a mechanism that counterbalances the unrestricted openness that would otherwise stem from the universality of the Convention, and is a valuable means to increase the likelihood of adherence to the Convention. Matthias Weller proceeded then to explore the consequences of limiting a Contracting State's objection window to 12 months from adherence to the Convention by the other Contracting State and raised the case of a Contracting State whose circumstances change so dramatically, beyond the 12-month window, that it is no longer possible to assure judicial independence of its judiciary. In his view, solutions as the ones proposed by Ms Fr?ckowiak-Adamska for the EU civil procedural instruments may also apply in such circumstances.

Day 2: European Civil Procedure 4.0.

Georg Haibach (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission), opened the second day of the conference with a detailed presentation on the ongoing recast of the Service Regulation (Regulation (EC) No 1393/2007). Emphasizing that the main objective of this

reform focuses on digitalization – including the fact that the proposed recast prioritises the electronic transmission of documents – Mr Haibach also shed the light on other notable innovations, such as the possibility of investigating the defendant's address.

The Evidence Regulation (Council Regulation No. 1206/2001), which is also in the process of being reformed, was at the core of the presentation delivered by Pavel Simon (Judge at the Supreme Court of the Czech Republic, Brno) who focuses not only on the status quo of the Regulation as interpreted by the CJEU (C-283/09, Wery?ski; C-332/11, ProRail; C-170/11, Lippens), but also tackled the current proposals for a reform: while such proposals do not appear to bring major substantive changes to the Regulation, they do suggest technological improvements, for instance favouring the use of videoconference.

In her presentation, Xandra Kramer (University of Rotterdam and Utrecht University) analysed thoroughly two of the CJEU judgments on "satellite" instruments of the Brussels I-bis Regulation: the EAPO Regulation (Regulation No. 655/2014); and the EPO Regulation (Regulation No. 1896/2006). C-555/18, was the very first judgment that the CJEU rendered on the EAPO Regulation. Xandra Kramer remarked the underuse of this instrument. In the second part of her lecture, she identified two trends in the judgments on the EPO Regulation (C?21/17, Caitlin Europe; Joined Cases C?119/13 and C?120/13, ecosmetics; Joined Cases C?453/18 and C?494/18, Bondora), observing that the CJEU tries, on the one hand, to preserve the efficiency of the EPO Regulation, while at the same time seeking to assure an adequate protection of the debtor's position.

In the last presentation of the second day, Helena Raulus (Head of Brussels Office, UK Law Societies) explored the future judicial cooperation in civil matters between the EU and the United Kingdom in the post-Brexit scenario. Ms Raulus foresaw two potential long-term solutions for the relationship: namely, relying either on the 2019 Hague Convention, or on the Lugano Convention. In her view, the 2019 Hague Convention would not fully answer the future challenges of potential cross-border claims between EU Member States and the UK: it only covers recognition and enforcement, while several critical subject areas are excluded (e.g. IP-rights claims); and above all, from a more practical perspective, it is still an untested instrument. Ms Raulus affirmed that the UK's possible adherence to the Lugano Convention is the most welcomed solution among English practitioners. Whereas this solution has already received the green light

from the non-EU Contracting States to the Lugano Convention (Iceland, Norway, and Switzerland), she remarked that to date the EU has not adopted a position in this regard.

The conference closed with a second roundtable, which resumed the discussions on the future relations between the EU and the UK on judicial cooperation in civil law matters. Christophe Bernasconi (Secretary General, HCCH) offered an exhaustive review on the impact of the UK withdrawal from the EU on all the existing HCCH Conventions. From his side, Alexander Layton wondered if it might be possible to apply the pre-existing bilateral treaties between some EU Member States and the UK: in his view, those treaties still have a vestigial existence in those matters non-covered by the Brussels I-bis Regulation, and thus they were not fully succeeded. In Helena Raulus's view, such treaties would raise competence issues, since the negotiating of such treaties falls exclusively with the EU (as the CJEU found in its Opinion 1/03). As Ms Raulus observed, eventually attempts to re-establish bilateral treaties between the Member States and the UK might trigger infringement proceedings by the Commission against those Member States. The discussion concluded by addressing the 2005 Hague Convention and it is applicability to the UK after the end of the transition period.

Overall, this two-day event was characterized by a thematic and systematic approach to the major issues that characterize the current debate in the area of judicial cooperation in civil and commercial matters, both at the EU and global level. By providing the opportunity to hear, from renowned experts, on both the theoretical and practical questions that arise in this context, it offered its audience direct access to highly qualified insight and knowledge.