Casebook on CISG cases in Italy

Maura Alessandri just published *Casebook sui contratti di vendita internazionale* (in Italian) She kindly provided the following summary.

This year international trade law celebrates the 40th birthday of the "United Nations Convention on Contracts for the International Sale of Goods", adopted in Vienna on 11 April 1980 (hereinafter referred to as "CISG").

Although the CISG has been in force in Italy since 1 January 1988, Italian companies are often not familiar with its rules and tend to ignore its existence or not to apply it (even when it applies automatically). Case law on CISG is gaining an increasing importance in Italy.

With a view to making the CISG better and more readily known, this Casebook aims to provide international trade lawyers and practitioners with a guide, easy to read and quick to consult, of the most significant judgments and arbitration awards issued in Italy in application of CISG.

It includes a selection of 96 Italian judgments and 12 arbitral awards. These include some of the most significant and well-known judgments which have become an important and useful reference for Judges and lawyers since they deal with the most frequent questions in practice. The publication of most of the arbitral awards have been authorized by the National and International Chamber of Arbitration of Milan, one of the most prestigious Chambers of Arbitration which daily deals with international trade law issues.

The published materials aim to help international trade lawyers to easily track the precedents which solved specific issues regarding the CISG's autonomous and internationally oriented application and avoid what Honnold called "homeward trend".

The book is intended for consultation through an analytical index of selected keywords in order to lead the reader directly to the relevant judgments and arbitral awards.

The following issues come up in the decisions taken up in the Casebook:

- some decisions quote foreign decisions to promote the CISG's uniform interpretation and application;
- some decisions stress that uniform substantive law (i.e. the CISG) prevails over the rules of private international law (such as the Hague Convention of 1955);
- some show the correct steps to be followed in order to check whether the CISG applies (either directly or indirectly). The direct application of CISG represents the most frequent scenario, i.e. an Italian company selling goods to a company which has its place of business in another Contracting State;
- some decisions deal with the relationship between the CISG and the General terms and conditions (and the so-called Battle of the forms);
- other decisions focus on what is (under an autonomous and uniform interpretation) a reasonable time for the notice of lack of conformity of the goods or which is the place of delivery (including Incoterms) with a view to ascertaining the competent court (and thus dealing with forum shopping's issues);
- some decisions ascertain which is the competent court when dealing with an international sales contract, applying for example EU Regulation no. 44/2001 (precedessor of no. 1215/2012), or the Brussels Convention of 1968;
- in the same framework, arbitration is also frequently used in international trade law; the arbitral awards are intended to provide some cases (which are usually kept strictly private and confidential and not easily known) in which arbitrators have interpreted and applied CISG's rules.

The book contains: 1) a list of the judgments and awards cited in chronological order, 2) the text of these judgments and awards, 3) the Italian (unofficial) text of the CISG, 4) a list of the Contracting States, and 5) a reasoned analytical index that constitutes the true asset and increases the usefulness of the book.

Title: Maura Alessandri, "*Casebook* sui contratti di vendita internazionale. Raccolta ragionata della giurisprudenza italiana (sentenze e lodi arbitrali) sulla Convenzione di Vienna del 1980 sui contratti di vendita internazionale di beni mobili (CISG)", Bologna, Bonomo Editore, 2020, ISBN: 978-88-6972-156-4

Available at Bonomo Editore or on Amazon.

Application of the Brussels I bis Regulation ratione materiae, interim relief measures and immunities: Opinion of AG Saugmandsgaard Øe in the case Supreme Site and Others, C-186/19

Written by María Barral Martínez, a former trainee at the European Court of Justice (Chambers of AG Campos Sánchez-Bordona) and an alumna of the University of Amsterdam and the University of Santiago de Compostela

The Hoge Raad Neederlanden (The Dutch Supreme Court), the referring court in the case Supreme Site Service and Others, C-186/19, harbours doubts regarding the international jurisdiction of Dutch courts under the Brussels I bis Regulation, in respect to a request to lift an interim garnishee order. An insight on the background of the case can be found here and here, while the implications of that background for admissibility of request for a preliminary ruling are addressed in section 1 of the present text.

In replying to a preliminary ruling request made by that court, AG

Saugmandsgaard Øe issued his Opinion. Advocate General concluded that a flexible approach should be taken when interpreting the concept of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels I bis Regulation. AG was of the view that an action for interim measures as the one brought by SHAPE, aimed at obtaining the lifting of a garnishee order, qualifies as civil and commercial matters, within the meaning of Article 1(1), provided that such garnishee order had the purpose of safeguarding a right originating in a contractual legal relationship which is not characterised by an expression of public powers, a matter that is left to the referring court to verify. For presentation of AG reasoning and its analysis in relation to interim measures, see section 2.

Moreover, according to AG, alleged claims of immunity enjoyed under international law by one of the parties to the proceedings had no significance, when it comes to the analysis of the material scope of the Brussels I bis Regulation. Against this background, the case provides a good opportunity to explore jurisdictional issues in the face of immunities, such as the debate regarding international jurisdiction preceding the assessment of immunities, and what can be inferred from the case-law of the Court of Justice and the European Court of Human Rights in that respect. Next, it requires us to determine whether the case-law developed in relation to State bodies and their engagement in *acta iure imperii* can be applied mutatis mutandis to the international organisations. Finally, it revives the concerns on whether the scope of the Brussels I bis Regulation should be determined in a manner allowing to establish international jurisdiction under that Regulation even though enforcement against public authorities stands little chances, be that international organisations as in the present case. These issues are discussed in section 3.

1. Admissibility of the preliminary reference

Advocate General Saugmandsgaard Øe made some remarks on the admissibility of the preliminary ruling and on whether a reply of the Court of Justice would be of any avail to the referring court.

It should be recalled that at national level, two sets of proceedings were initiated in parallel. In the first set, – the proceedings on the merits – Supreme, the private-law companies, sought a declaratory judgment that it was entitled to the payment of several amounts by SHAPE, an international organisation. These proceedings

were under appeal before the Den Bosch Court of Appeal because SHAPE challenged the first instance court's jurisdiction. In the second set – the proceedings for interim measures where the preliminary ruling originated from – SHAPE brought an action seeking the lift of the interim garnishee order and requesting the prohibition of further attempts from Supreme to levy an interim garnishee order against the escrow account.

In the opinion of AG, the preliminary ruling was still admissible despite the fact that the Den Bosch Court of Appeal ruled on the proceedings on the merits granting immunity of jurisdiction to SHAPE in December 2019 – the judgment is under appeal before the Dutch Supreme Court. He opined that the main proceedings should not be regarded as having become devoid of purpose until the court renders a final judgment on the question whether SHAPE is entitled to invoke its immunity from jurisdiction, in the context of the proceedings on the merits and whether that immunity, in itself, precludes further garnishee orders targeting the escrow account (point 35).

2. Civil and commercial matters in respect of substantive proceedings or interim relief proceedings?

The Opinion addressed at the outset the question on whether the substantive proceedings should fall under the material scope of the Brussels I bis Regulation in order for the interim relief measures to fall as well within that scope. As a reminder, the object of the proceedings on the merits, is a contractual dispute over the payment of fuels supplied by Supreme to SHAPE, in the context of a military operation carried out by the latter.

As AG signalled, to answer the question several hypotheses have been put forward by the parties at the hearing held at the Court of Justice. The first hypothesis, supported by the Greek Government and Supreme, proposed that in order to determine if an action for interim measures falls within the scope of the Regulation, the proceedings on the merits should fall as well under the material scope of the Regulation. In particular, the characteristics of the proceedings on the merits should be taken into account. The second hypothesis, supported by SHAPE, considered that the analysis should be done solely in respect to the proceedings for interim measures. The European Commission and the Dutch and

Belgian Governments opined that in order to determine if the action for interim measures can be characterised as civil and commercial matters, it is the nature of the right which the interim measure was intended to safeguard in the framework of the interim relief proceedings that matters.

Endorsing the latter hypothesis, AG indicated that an application for interim measures cannot be regarded as automatically falling within or outside the scope of the Brussels I bis Regulation, depending on whether or not the proceedings on the merits fall within that scope, simply because it is ancillary to the proceedings on the merits (point 51). To support his conclusion, AG followed the line of reasoning developed by the Court in the context of the instruments preceding the Brussels I bis Regulation. In that regard, the Court has held that to ascertain that provisional/protective measures come within the scope of the Regulation, it's not the nature of the measures that should be taken into account but the nature of the rights they serve to protect. To illustrate this: in Cavel I, the Court held that interim measures can serve to safeguard a variety of rights which may or may not fall within the scope of the now Brussels I bis Regulation (then the Brussels Convention) depending on the nature of the rights which they serve to protect. This has been confirmed in Cavel II: "ancillary claims accordingly come within the scope of the Convention according to the subject-matter with which they are concerned and not according to the subject-matter involved in the principal claim". Further, in Van Uden, the Court held that "provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights". This case-law has been also confirmed in recent judgments of the Court, namely in Bohez – where a penalty payment was imposed as a measure to comply with the main judgment – and Realchemie Nederland concerning an action brought for alleged patent infringement in the context of interim proceedings, where a prohibition in the form of payment of a fine was ordered.

In brief, what matters in this discussion on interim measures falling or not within the scope of the Brussels I bis Regulation, is not the relation between the main proceedings and the interim measures, the crucial factor being the **purpose – determined from a procedural law standpoint –** of the interim relief measure vis-à-vis the proceedings on the merits: **an interim measure falling within the scope of the Regulation has to safeguard the substantive rights at stake in**

the main proceedings. In the present case, the substantive right in question is a credit arising from a contractual obligation that Supreme holds against SHAPE.

3. Whether immunities play a role in determining if an action can qualify as "civil and commercial matters" within the meaning of Article 1(1) of the Regulation

One of the particularities of the case is that in the second set of proceedings where the preliminary ruling originated, SHAPE and JFCB (NATO) have introduced an action for interim relief measures, based on immunity from execution. SHAPE alleged that its immunity from execution flowing from the 1952 Paris Protocol trumps any jurisdiction derived from that Regulation.

It is against this background that the Dutch Supreme Court asked the Court of Justice if the fact that an International Organisation claims to enjoy immunity from execution under public international law, bars the application of the Brussels I bis Regulation or has an impact on its application *ratione materiae*. In his Opinion, Advocate General considered that the referring court is concerned by the actions relating to "acts or omissions in the exercise of state authority" linked to the concept of "*acta iure imperii*" – a concept which is also used in international law in relation to the principle of State immunity.

The Opinion tackled the question of immunities under public international law and concluded that a dispute where an International Organisation is a party, should not be automatically excluded from the material scope of the Brussels I bis Regulation. Interestingly, some aspects of the reasoning that allowed to reach that conclusion echo the doctrinal debates on the interplay between the jurisdictional rules of EU private international law, on the one hand, and the immunity derived from public international law, on the other hand.

- **Does immunity precede the jurisdiction under EU PIL?**

At point 72, AG rejected the arguments advanced by the Austrian Government, who argued that the Brussels I bis Regulation should not apply to the case at

hand. In the view of this government, if an international organisation takes part in a dispute, the immunity that this organisation enjoys on the basis of customary international law or treaty law, characterizes the nature of the legal relationship between the parties. In other words, a criterion based on the nature of a party (*scil*. the fact that it is an international organization that is a party to proceedings) should suffice to decline jurisdiction under the Brussels I regime.

In that respect, AG made some interesting remarks: first, by applying the Brussels I bis Regulation to a dispute where an International Organisation is a party, there is no breach of Article 3(5) TUE and of the obligation to respect public international law enshrined in that provision. Second, if, based on the Brussels I bis regime, a national court declares its international jurisdiction over a dispute, potential immunity claims advance by the parties will not be affected, as they are to be considered at a later stage of the proceedings. AG departed from the premise that the assessment on immunities should take place after the national judge seised with the case looks into the substance of the merits, including party allegations. This is therefore, at a second stage, after the national court has decided over its international jurisdiction within the first stage, that the immunity needs to be ascertained and its limits set (point 69).

This approach resonates with the idea that national courts are not supposed to engage in an in-depth analysis of the substance at that very first stage, when they are determining their own jurisdiction. They should not be undertaking a mini-trial, ascertaining jurisdiction requires only a first approximation to the facts of the case, solely for the purpose of determining jurisdiction. In FlyLaL II, a case concerning jurisdictional issues pursuant to the Brussels I Regulation, in respect of an action for damages brought for infringement of competition law, the Court observed that at the stage of determining jurisdiction "the referring court must confine itself to a prima facie examination of the case without examining its substance". The statement draws on AG Bobek's Opinion presented in the aforementioned case: "[d]etermination of jurisdiction should be as swift and easy as possible. Thus, a jurisdictional assessment is by definition a prima facie one. […] The jurisdictional assessment will, in practice, require a review of the basic factual and legal characteristics of the case at an abstract level."

From the ECtHR case-law (see, most notably, Waite and Kennedy v. Germany) dealing with immunities of international organizations and the right to a remedy enshrined in Article 6 ECHR, a similar reading can be extracted. National courts

deciding on granting of an immunity – be [it] immunity of jurisdiction or from execution – and performing the "reasonable alternative means" test, inevitably engage in a substantive analysis of the merits. **To ensure that the claimant's right to access justice is not breached, requires more than an abstract examination of the facts**. This would seem to favour the idea **that determination of international jurisdiction precedes a substantive analysis of the circumstances of the case in respect to any alleged claim of immunities made by the parties**.

However, it is still not clear how this reasoning can be reconciled with judgments of the Court of Justice in the cases Universal Music International Holding and Kolassa. There, the Court of Justice held that according to the objective of the sound administration of justice which underlies the Brussels I Regulation, and respect for the independence of the national court in the exercise of its functions, a national court in the framework of ascertaining its international jurisdiction pursuant to the Brussels I regime, must look at all the information available to it. Although such an assertion seems to be construed in very general terms, one may well wonder what exactly a court assessing its international jurisdiction under the Brussels I bis Regulation is required to look at. Should it be a minimal review of the substance or a prima facie analysis strictly focused on the nature of the elements of the action – relevant in the context of the connecting factors used by the rules on jurisdiction –,including all the information available before the court?

If the answer would be the latter, that means that in the case at hand, the immunity from execution relied on by SHAPE in support of its action should be taken into account.

A reading of paragraphs 53 to 58 in the Court of Justice's recent judgment in Rina, hints that in order to establish its own jurisdiction under the Brussels I bis Regulation, a national court has to take into consideration all available information. In the case at issue, party allegations where a party (Rina) invokes immunity of jurisdiction. While at first glance this instruction does not steer away from the judgments in Universal Music International Holding and Kolassa, what the Court proposes here is definitely more complex than a first approximation to the facts of the case. At paragraph 55 the Court notes "a national court implementing EU law in applying [the Brussels I Regulation] must comply with the requirements flowing from Article 47 of the Charter. […] The **referring court must satisfy itself that, if it upheld the plea relating to immunity from**

jurisdiction, [the claimants] would not be deprived of their right of access to the courts, which is one of the elements of the right to effective judicial protection in Article 47 of the Charter." If the national courts were to engage in such analysis – in a similar fashion as the ECtHR established in regards to Article 6 ECHR – it will certainly go beyond a mere examination *in abstracto*, implying rather a deep dive on the merits.

Moreover, the judgment in Rina seems to suggest that the analysis of international law cannot be avoided even when it comes only to the question whether the Brussels I regime applies or not. At paragraph 60, the Court of Justice explained "[t]he principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court **finds that such corporations have not had recourse to public powers** within the meaning of international law." Again, for the examination of these matters in the framework of determining international jurisdiction, a greater level of scrutiny is required. A national judge would have to dig dipper in the facts and party allegations to come to the conclusion that a certain party did not have recourse to public powers. Something that is everything but a swift and easy exercise.

Does the case-law developed in the context of State bodies apply to international organisations?

Be that as it may, while an immunity claim does not automatically rule out the application of the Brussels I bis Regulation according to AG Saugmandsgaard Øe, the key question in his analysis is to determine if actions related to *acta iure imperii* under Article 1(1) of the Regulation are applicable to international organisations. It flows from the Court of Justice well-settled case-law that disputes between a State body and a person governed by private law come within the scope of civil and commercial matters, if the public authority in question does not act in the exercise of its public powers. At point 75 of his Opinion, AG made a reference to the judgment in Eurocontrol and indicated that exceptions under Article 1(1) *in fine* can extend to acts and omissions carried out by an international organisation. He remarked that, the concept of "public powers" established under the Court's case-law, not only relates to State responsibility but refers also to those situations where a public authority acts under the umbrella of

its public powers.

Advocate General moved then to analyse the Court of Justice case-law concerning liability of the State for acts and omissions carried out in the exercise of sovereign authority. Here matters get a bit complicated.

On the one hand, **it remains to be seen how that case-law could be applied mutatis mutandis to international organisations**. Leaving aside the question of immunities and putting emphasis on the notion of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels I bis Regulation, the acts and omissions of an international organization are strictly connected with the powers conferred to the organisation for its proper functioning. Thus, one could wonder whether a functional test would be more suitable to determine if the acts or omissions were carried out by an international organization in the exercise of its public powers: a demarcating line could be drawn between non-official (non-related to the mission of the organization) acts and omissions and those of official nature, therefore necessary to fulfil the organisation's mandate.

On the other hand, concerning the criteria applied by the Court when analysing if a public authority has exercised its powers of State authority, there is no "one size fits all" solution. As AG rightly pointed out at point 84 of his Opinion, the Court has still to sort out the interplay between different criteria: matters characterising the legal relationship between the parties, the subject-matter of the dispute and the basis of the action and the detailed rules governing the action brought.

To illustrate this point: in Préservatrice Foncière TIARD, the Court looked mainly at the legal relationship between the parties, while in Baten and Sapir and Others the Court did not refer to the legal relationship between the parties but focused on the subject-matter of the dispute and the basis of the action brought. Hence, the alternative or cumulative use of these criteria – or a flexible one- seem to reflect the need to provide an adequate response to the case-specific factual context of a particular case.

In that sense, AG pointed out that the criterion concerning the basis of the action is not relevant in all cases, it will be determinant in situations where is not established that the substantive basis of the claim is an act carried out in the exercise of public powers. For that reason, at 90, AG considered more appropriate

that **the action is based on a right originating from an act of public authority or in a legal relationship characterized by a manifestation of public power**.

- ## Does the perspective of anticipated recognition/enforcement influence the interpretation of the notion of "civil and commercial matters"?

It is worth mentioning that some commentators (see also Van Calster, G., European Private International Law, Hart Publishing, 2016, p. 32) pointed out that, in the light of the judgment in Eurocontrol, the scope of application of the Brussels I bis Regulation should be interpreted by taking into account the perspectives of recognition and enforcement. Thus, if immunity bears no significance at the stage of determining jurisdiction, but it is later granted/recognised resulting in refusal of recognition and/or enforcement, concerns are raised regarding what is the practical use of exercising jurisdiction under the Brussels I bis Regulation against public authorities when there are little chances of recognition/enforcement.

On this point, the Spanish Supreme Court – in a case concerning the enforcement of a judgment rendered in Germany in favour of a private party against the Republic of Argentina –, held that a declaration of enforceability issued in relation to a general enforcement order does not breach the rules on immunity of execution. The Spanish Court precised that only when specific legal attachment measures are taken, a court should determine if the property in question is subject to execution. Thus, **the issue of immunity of execution and the assessment whether the property to be executed is for commercial or official purposes would be at stake at a second stage of the enforcement procedure, not interfering with the application of the Brussels I regime.**

Italian textbook on International Business Law: Second edition of Marrella, “Manuale di diritto del commercio internazionale”

Prof. Fabrizio Marrella (“Cà Foscari” University of Venice) has recently published the second edition of his textbook on international business law: “Manuale di diritto del commercio internazionale” (CEDAM, 2020), with a foreword of Prof. Andrea Giardina. A presentation has been kindly provided by the author (the complete TOC is available on the publisher’s website):

The Second Edition of this reference textbook (the first and foremost in the Italian language) combines the best aspects of a conceptual, systemic approach and a practical approach. It provides a rigorous and well grounded intellectual framework for understanding the most significant contractual and regulatory issues in international business law. The new edition has been revised and updated to take into account Incoterms 2020 as well as new issues of sales, transport and insurance law, payments and bank guarantees. All aspects of private international law are developed in view of their application in an arbitration or State court context.

Title: F. Marrella, “Manuale di diritto del commercio internazionale”, Padua, CEDAM, 2020.

ISBN: 9788813373672. Pages: 936. Available at CEDAM.

Corona and Private International Law: A Regularly Updated Repository of Writings, Cases and Developments

by Ralf Michaels and Jakob Olbing

Note: This repository will stay permanent at

www.conflictoflaws.net/corona.
Please send additions to olbing@mpipriv.de

Updated: November 08, 2021

The coronavirus has created a global crisis that affects all aspects of life everywhere. Not surprisingly, that means that the law is affected as well. And indeed, we have seen a high volume of legislation and legal regulations, of court decisions, and of scholarly debates. In some US schools there are courses on the legal aspects of corona. Some disciplines are organizing symposia or special journal issues to discuss the impact of the pandemic on the respective discipline.

For a time Private international law has been vividly discussing the relevance of the crisis for the field, and of the field for the crisis Private international law matters are crucial to countless issues related to the epidemic – from production chains through IP over possible vaccines to mundane questions like the territorial application of lockdown regulations.

Knowledge of these issues is important. It is important for private international lawyers to realize the importance of our discipline. But it is perhaps even more important for decision makers to be aware of both the pitfalls and the potentials of conflicts of law.

This site, which we hope to update continually, is meant to be a place to collect, as comprehensively as possible, sources on the interaction of the new coronavirus and the discipline. The aim is not to provide general introductions into private international law, or to lay out sources that could be relevant. Nor is this meant to be an independent scholarly paper. What we try to provide is a one-stop place at which to find private international law discussions worldwide regarding to coronavirus.

For this purpose, we limit ourselves to the discipline as traditionally understood—jurisdiction, choice of law, recognition and enforcement, international procedure. Coronavirus has other impacts on transnational private law and those deserve attention too, but we want to keep this one manageable.

Please help make this a good informative site. Please share any reference that you have – from any jurisdiction, in any legislation – and we will, if possible, share them on this site. Please contact olbing@mpipriv.de

General

In the early beginning of the Pandemic, contributions from scholars, courts, international institutes and politicians where of a more general character as it was difficult to predict the scope and duration of the new situation.

The European Law Institute for example issued a set of Principles for the COVID-19 Crisis, covering a variety of legal topics such as Democracy (Principle 3) and Justice System (Principle 5) as well as Moratorium on Regular Payments, Force Major and Hardship, Exemption from Liability for simple Negligence (Principles 12 to 14). Ending with something everybody hopes for: Return to Normality (Principle 15).

The Secretary General of the Hague Conference recorded a short online message from his home addressing the most urgent topics. Ensuing, the Permanent Bureau developed a Toolkit for resources and publications relevant to the current global situation.

The university of Oxford‘s Blavatnik School of Government collects all measures by governments around the world in the “Coronavirus Government Response Tracker”.

A German journal is dedicated solely to the topic “COVID-19 and the Law”. The journal is interesting for academics and practitioners alike, since it publishes papers on specific COVID-19 related issues, as well as an extensive overview of German judgements.

An open access project by intersentia examines the COVID-19 legislation and its consequences in European states, bringing together contributions from over 85 highly regarded academics and practitioners in one coherent, open access resource.

Matthias Lehmann discusses the role of private international law on a number of issues – the impact of travel restrictions on transportation contracts, contract law issues for canceled events, canceled or delayed deliveries, but also liability for infections.

Online Workshops, Webinars and Conferences

In time of travel restrictions and social distancing the academic exchange is still active and sometimes more diverse than bevor, since people from all around the world come together, as the great number of workshops and symposiums that are held online shows.

Mid November (17 to 19), the Mexican Academy of Private International and Comparative Law discusses during its XLIV seminar among other topics the impacts of the pandemic on international family as well as aspects surrounding vaccines. participants will discuss in Spanish and the online participation is free of charge.

Contrary to the regular sessions of The Hague Academy of International Law's Centre for Studies and Research, the upcoming edition is entirely online. The topic will be "Epidemics and International Law" and held from September 2020 to June 2021. The collective works will be published later by the Academy. You will find application and programme here.

The Minerva Center for Human Rights at Tel Aviv University hosted an international socio-legal (zoom-) workshop on 22-23 June 2021 to explore the impact of the Covid-19 crisis and its regulation on cross-border families. A call for papers expired on 28 February 2021.

Another series of events organized by the University of Sydney's Centre for Asian and Pacific Law will regularly discuss topics such as social justice, civil rights, trade and investment in light of (post) pandemic developments. Of that series one webinar on the aftermath of the pandemic in the Asia-Pacific region focussed on commercial dispute resolution and issues related to private international law.

Marc-Philippe Weller discussed in a workshop on December 1, 2020 about "Nationalism, Territorialism, Unilateralism: Managing the Pandemic Through Private International Law?" if the measures enacted due to the pandemic may have an effect on the connecting factors in European private international law. He had a particular focus on the determination of habitual residence.

A comparative analysis of reactions in Japan and Germany on COVID-19 in private and public law with scholars from both jurisdictions was the topic of an online conference (mostly in German) on August 2020. Recordings of the presentations are online.

During a live youtube conference on July 23, 2020 Humberto Romero-Muci presented with several others his views on “Migrantes, pandemia y política en el Derecho Internacional Privado”. The video is still online.

A webinar organized by experts from MK Family Law (Washington) and Grotius Chamber (the Hague) discussed pertinent issues relating to international child abduction in times of COVID-19.

Matthias Lehmann presented his views on the application of force majeure certificates and overriding mandatory provisions n international contracts in an online-workshop on “COVID-19 and IPR/IZVR”.

Another webinar was held on “Vulnerability in the Trade and Investment Regimes in the Age of #COVID19”, which is available online, as part of the Symposium on COVID-19 and International Economic Law in the Global South.

The University of New South Wales held a talk on “COVID-19 and the Private International Law” in May, which you find on youtube.

As a follow-up of a webinar on PIL & COVID-19, Inez Lopez and Fabrício Polido give “some initial thoughts and lessons to face in daily life”

A group of Brazilian scholars organized an online symposium on Private International Law & Covid-19. Mobility of People, Commerce and Challenges to the Global Order. The videos are here.

The Organization of American States holds a weekly virtual forum on “Inter-American law in times of pandemic” (every Monday, 11:00 a.m., UTC-5h). One topic of many will be on “New Challenges for Private International Law” (Monday, June 15, 2020).

State Liability

Some thoughts are given to compensation suits brought against China for its alleged responsibility in the spread of the virus. One main issue here is whether China can claim sovereign immunity.

In the United States, several suits have been brought in Florida (March 12),

Nevada (March 23) and Missouri (April 21) against the Peoples republic of China (PRC), which plaintiffs deem responsible for the uncontrolled spread of the virus, which later caused massive financial damage and human loss in the United States. Not surprisingly officials and scholars in China were extremely critical (see here and here).

But legal scholars, including Chimène Keitner and Stephen L. Carter, also think such suits are bound to fail due to China's sovereign immunity, as do Sophia Tang and Zhengxin Huo. Hiroyuki Banzai doubts that the actions can succeed since it will be difficult to prove a causal link between the damages and the (in-) actions by the Chinese Gorvernment. Lea Brilmayer suspects that such a claim will fail since it would be unlikely, that a court will assume jurisdiction. The same conclusion is drawn by Angelica Bonfanti and Chimène Keitner after a thorough analysis of the grounds on which a liability of china could be based. An overview and detailed presentation of many class actions and suits filed by states can be found here.

Until now, only very little has happened concerning the American suits. Some suits where (voluntarily) dismissed or tossed. One suit against the PRC for damages amounting to $ 800 billion was ordered to be dismissed by the District Court, since the plaintiff failed to state a claim (*James-El v the Peoples Republic of China* (M.D.N.C. 2020) WL 3619870). For a general update on the lawsuits against the PRC from January 22, 2021 see here.

In an interview with a German newspaper Tom Ginsburg lays out the legal issues that will be faced, if the claims of state liability are brought in front of a German court. Fabrizio Marrella discusses the Italian perspective on that issue. Brett Joshpe analyzes more generally China's private and public liability in the domestic and international framework.

A Republican Representative is introducing two House Resolutions urging the US Congress to waive China's sovereign immunity in this regard; such a waiver has also been proposed by a Washington Post author. The claim has also found support by Fox News.

Interestingly, there is also a reverse suit by state-backed Chinese lawyers against the United States for covering up the pandemic. Guodong Du expects this will likewise be barred by sovereign immunity.

Martins Paparinskis shares the concerns about a successful litigation against foreign states. However, he suggests to change the law of state responsibility fundamentally to be prepared for further international catastrophes such as the current pandemic.

In the UK, the conservative Henry Jackson Society published a report suggesting that China is liable for violating its obligations under the International Health Regulations. The report discusses ten (!) legal avenues towards this goal, most of them in public international law, but also including suits in Chines, UK and US courts (pp 28-30). Sovereign immunity is discussed as a severe but not impenetrable barrier.

Contract Law

Both the pandemic itself and the ensuing national regulations impede the fulfilment of contracts. Legal issues ensue. An overview of European international contract law and the implications of COVID-19 is given here and here. Two chapters of the book "*La pandemia da COVID-19. Profili di diritto nazionale, dell'Unione Europea ed internazionale*" edited by Marco Frigessi di Rattalma are dedicated to jurisdiction and applicable law in contract matters.

The UNIDROIT Secretariat has released a Note on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 health crisis.

Bernard Haftel highlights three different techniques to apply COVID-19 legislation to an international contract: as *lex contractus*, as *lois des police* and through consideration within the applicable law.

Gerhard Wagner presents COVID caused defaults under the aforementioned ELI principles.

If a contracting party is unable to perform its contractual obligations, incapacity to perform can be based on force majeure or hardship. Some contributions suggest to apply for force majeure certificates which are offered by most countries, for example by China, Russia. How such a certificate can influence contractual obligations under English and New York Law is shown by Yeseung Jang. The German perspective is given by Philip Reusch and Laura Kleiner.

Further the South Korean, French and the Common Law perspective on force majeure have been published. Bruno Ancel compares the French and American approach. The difficulty to implement appropriate force majeure clauses in a contract is shown by Matteo Winkler.

Drawing from recent cases and experiences Franz Kaps analyses the difficulties in the operation within ICC force majeure clauses and suggests how "state-of-the-art force majeure clauses" should be constructed to include an international pandemic.

Victoria Lee, Mark Lehberg, Vinny Sanchez and James Vickery go beyond force majeure implications on contracts in their expert analysis.

William Shaughnessy presents issues which might occur in international construction contracts.

Another crucial aspect is the application of overriding mandatory rules on international contracts. Ennio Piovesani discusses whether Italian decree-laws enacted in view of the pandemic can operate as overriding mandatory rules and whether that would be compatible with EU law. So does Giovanni Zarra on international mandatory rules. Aposotolos Anthimos adds the Greek perspective, Claire Debourg the French to the discussion.

The applicability of self-proclaiming mandatory provisions in Italian law in respect to package travels in general and the Directive (EU) 2015/15 on package travel in particular, is discussed by Fabrizio Marongiu Buonaiuti.

Matthias Lehmann considers more broadly possible private international law issues and responses under European law. José Antonio Briceño Laborí and Maritza Méndez Zambrano add the Venezuelan view.

The crisis hits in particular global value and production chains. Impacts are discussed by Tomaso Ferando, by Markus Uitz and Hemma Parsché and by Anna Beckers, though neither focuses specifically on private international law.

Caterina Benini explains a new Italian mandatory rule providing a minimum standard of protection for employees.

Klaus Peter Berger and Daniel Behn in their historical and comparative study on force majeure and hardship, highlight that such remedies are quite regular to find

and fit to distribute the risk emanating from such a crisis evenly.

CISG

The CISG has long been of very little importance in international contract law but now is subject to many discussions. André Janssen and Johannes Wahnschaffe dedicate a detailed analysis to exemptions from liability and cases of hardship under the CISG.

Performance on advance purchase agreements on delivering the COVID-19 vaccines, have been a major political debate recently. While asking which law is applicable on such contracts Ben Köhler and Till Maier-Lohmann suspect, that if CISG is in fact the applicable law, the consequences would be far reaching and could be the very first time the CISG enters the "global centre stage". Unfortunately, a Belgian court deciding over a claim by the EU against AstraZeneca for the delivery of doses of vaccines, did not even consider the application of the CISG.

Corporate Law

If the questions of purchasing COVID-19 vaccines shifts to buying the entire company the issue at hand becomes more political. Arndt Scheffler analyses the situation in which a foreign investor tries to purchase a company, which is crucial for the domestic battle against the pandemic and the search for a vaccine.

Employment Law

Closed borders and practically everybody working from has its impact on employment law.

In export-oriented economies such as Germany, it is very common, that employees are posted abroad on a long-term basis. COVID-19 legislation shapes and influences the legal relation between employer and employee, but also between employee and host-country. Roland Falder and Constantin Franke-Fahle discuss

these influences with particular attention to the question of the applicable law here.

Tort Law

Damages caused by an infection are mostly subject to tort law but can also arise in a contractual relation. Focusing on the applicable law on non-contractual liability Rolf Wagner explains, that sometimes damages can be claimed both, as contractual and as non-contractual. He stresses that as the substantive law on damages caused by an infection is still to evolve, applying foreign law is a particular challenge.

An extensive overview about the law applicable to damages caused by an COVID-19 infection under Indian international tort law is given by Niharika Kuchhal, Kashish Jaitley and Saloni Khanderia. Khanderia published a second article, concerning the need of a codification of Indian conflict of laws on tort in respect of a foreseeable surge in international tort proceedings, caused by the pandemic.

General implications of the coronavirus on product liability and a possible duty to warn costumers, without specific reverence to conflict of laws.

In Austria, a consumer protection association is considering mass litigation against the Federal State of Tyrolia and local tourist businesses based on their inaction in view of the spreading virus in tourist places like Ischgl. A questionnaire is opened for European citizens. Matthias Weller reports.

Florian Heindler discusses how legal measures to battle the virus could be applicable to a relevant tort case (either as local data or by special connection), by analyzing the hypothetical case of a tourist who gets infected in Austria.

Jos Hoevenars and Xandra Kramer discuss the potential of similar actions in the Netherlands under the 2005 Collective Settlement Act, WCAM.

Family Law

Implications also exist in family law, for example regarding the Hague Abduction Convention.

In an Ontario case (Onuoha v Onuoha 2020 ONSC 1815), concerning children taken from Nigeria to Ontario, the father sought to have the matter dealt with on an urgent basis, although regular court operations were suspended due to Covid-19. The court declined, suggesting this was “not the time” to hear such a motion, and in any way international travel was not in the best interest of the child. For the discussion see here.

Further sspects of travel restrictions in international abduction cases are analysed by Gemme Pérez.

A general overview of abduction in times of corona was published by Nadia Rusinova. Another article by Nadia by her covers recent case law and legislation on remote child related proceedings which were conducted during the last weeks around the world. She also highlights, that COVID-19 measures can impact Article 8 ECHR.

Also cases of international surrogacy come into mind which are affected by COVID-19, as Mariana Iglesias shows.

Personal Data

The protection of personal data in transnational environments has always been a controversial topic in conflict of laws. Jie Huang shows, that due to COVID-19 existing tensions between the EU, the USA and China are reflected in their conflict of laws approach.

The European Commission published a “toolbox for the use of technology and data to combat and exit from the COVID-19 crisis”, which was an opportunity for some contributions on the GDPR and Tracing Apps.

Economic Law

The crisis puts stress on global trade and therefore also economic law. Sophie

Hunter discusses developments in the competition laws of various countries (though with no explicit focus on conflict of laws issues).

A list of authors from around the world analyses the interrelation between "Competition law and health crises" in its international context in the current issue Concurrences.

Intellectual Property

Due to lockdowns and school closures, online work and teaching has exorbitantly increased but, as Marketa Trimble stresses, with little notion of transnational copyright issues.

To tackle those a prominently endorsed letter to the World Intellectual Property Organization, emphasizes the need to ensure that intellectual property regimes should support the efforts against the Coronavirus and should not be a hindrance.

Public Certification

In times of lockdown and closed borders notarization and public certification become almost impossible. Therefore, various countries have adjusted their legislation. You will find an overview here.

The electronic Apostille Program (e-APP)experiences a new popularity, as a considerable number of countries have implemented new components of the e-APP. For more information see here.

Dispute Resolution

In Dispute resolution two main questions are being discussed.

On the one hand the question of jurisdiction as such, for example for claims suffered within contractual or non-contractual relationships. Rolf Wagner gives the European and German perspective presenting the possible courts of jurisdiction under Brussel I Regulation (recast), the Lugano Convention and the

German code of civil procedure.

In a recent case by the Supreme Court of Queensland (AUS), the court examined the impact of COVID-19 on a foreign jurisdiction clause. You can find Jie Huang's comments on the decision here.

One the other hand, it is being discussed to what extend the requirement of physical presence in courts can conform with social distancing and travel restrictions. As a more drastic reaction some courts suspended their activities except for urgent matters all together. Developments in Italy are discussed here, developments in English law here.

On the other hand, another possibility is the move to greater digitalization, as discussed comparatively by Emma van Gelder, Xandra Kramer and Erlis Themeli. The Hague Conference on Private International Law (HCCH) published a Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention, discussed also with reference to Corona by Mayela Celis.

Using the pandemic, Gisela Rühl analyses why the potential of digitalization is so scarcely used in civil procedure and how it can be improved to serve the needs of a digital society.

Benedikt Windau analyses the German civil procedure and how international digital heraings could be possible within the existing law.

In litigation, virtual hearings become a prominent measure to overcame restrictions on physical presence. While in on some jurisdiction such hearings are possible, Luigi Malferrari discusses the question if such hearings should also be enabled before the CJEU.

Maxi Scherer takes the crisis as an opportunity to analyse virtual hearings in international arbitration. Complications and long-term effects of virtual arbitration are presented here. Mirèze Philippe however sees this development as a positive game changer not just in health aspect but also to protect the environment and saving time as well as travelling costs (further articles covering international arbitration and virtual hearings: here and here).

A very broad presentation of legislation in France, Italy and Germany in civil procedure, including cross border service and taking of evidence as well as its

implications on international child abduction and protection, is given by Giovanni Chiapponi.

Jie Huang examines the case of substitute service under the Hague Service Convention during the pandemic in the case Australian Information Commission v Facebook Inc ([2020] FCA 531).

A US project guided by Richard Suskind collects cases of so-called “remote courts” worldwide.

The EU gives information about the “impact of the COVID-19 virus on the justice field” concerning various means of dispute resolution.

Gilberto A. Guerrero-Rocca analyses the impacts of COVID-19 on international arbitration in relation to the CISG.

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Supreme Court of California (ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) v. CHANGZHOU SINOTYPE

TECHNOLOGY CO., LTD). A European reading of the ruling

A bit more than a month ago, the Supreme Court of California rendered its decision on a case concerning the (non-)application of the 1965 Hague Service Convention. The case has been thoroughly reported and commented before and after the ruling of the Supreme Court. I will refrain from giving the full picture of the facts; I will focus on the central question of the dispute.

THE FACTS

The parties are U.S. and Chinese business entities. They entered into a contract wherein they agreed to submit to the jurisdiction of California courts and to resolve disputes between them through California arbitration. They also agreed to provide notice and "service of process" to each other through Federal Express or similar courier. The exact wording of the clause in the MOU reads as follows:

"6. The Parties shall provide notice in the English language to each other at the addresses set forth in the Agreement via Federal Express or similar courier, with copies via facsimile or email, and shall be deemed received 3 business days after deposit with the courier.

"7. The Parties hereby submit to the jurisdiction of the Federal and State Courts in California and consent to service of process in accord with the notice provisions above".

ARBITRATION PROCEEDINGS

An agreement between the companies was eventually not reached, which was reason for Rockefeller to initiate arbitration proceedings. All materials were sent both by email and Federal Express to the Chinese's company address listed in the MOU. The latter did not appear. The arbitrator awarded Rockefeller the amount of nearly 415 million $. The decision was sent to Sinotype by e-mail and Federal Express.

COURT PROCEEDINGS

In accordance with the Civil Procedure Code of the State of California [*§ 1285.*

Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award…], Rockefeller petitioned the award to be confirmed. The same 'service' method was used by the petitioner, i.e. e-mail and Federal Express. Again, Sinotype did not take part in the proceedings.

At a later stage, Sinotype became active, and filed a motion to set aside the default judgment for insufficiency of service of process. In particular, it asserted that it did not receive actual notice of any proceedings until March 2015 and argued that Rockefeller's failure to comply with the Hague Service Convention rendered the judgment confirming the arbitration award void. The motion was denied by the Los Angeles County Superior Court; the Court of Appeal reversed; finally, the Supreme Court reversed the appellate decision.

THE RULINGS

The first instance court confirmed that the Service Convention was in principle applicable, however, the agreement between the parties to accept service by mail was valid and superseded the Convention. The Court of Appeal reversed the judgment, stating exactly the opposite, namely that the Service Convention supersedes private agreements. In light of China's opposition to service by mail, the agreed method of communication was considered inadequate for the purposes of the Convention. The Supreme Court held yet again the opposite, because the parties' agreement constituted a waiver of formal service of process under California law in favor of an alternative form of notification; hence, the Convention does not apply.

COMMENT

I place myself next to the commentators of the case: It is true that the Service Convention does not apply in the course of *arbitration proceedings*. There is convincing case law to support this view from different jurisdictions in different continents (example here). However, in the case at hand, the issue at stake was the use of a method not permitted by the Convention in *court proceedings*. It was lawfully agreed to send all documents by e-mail or FedEx during arbitration. Nowadays, this has become standard procedure in international commercial arbitration. However, a multilateral convention may not succumb to the will of the parties. If a contracting state refuses to accept postal service within the realm of litigation, the parties have no powers to decide otherwise. The best option would

be, as already suggested, to oblige a party to appoint a service agent. This enables service within the jurisdiction, as already decided by the U.S. Supreme Court in the *Volkswagen Aktiengesellschaft v. Schlunk* case. In a similar fashion, the CJEU consolidated the same position in the *Corporis Sp. z o.o. v Gefion Insurance A/S* case, following its ruling in the case *Spedition Welter GmbH v Avanssur SA*.

Finally, returning to the EU, postal service would not require any agreement between the parties; Article 14 of the Service Regulation stipulates service by mail as an equivalent means of service between Member States. In addition, service by e-mail is scheduled to be embedded into the forthcoming Recast of the Regulation under certain requirements which are not yet solidified.

Private international law requirements for the effective enforcement of human rights

Written by Tanja Domej, University of Zurich

Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. It is essential for the effective enforcement of human and workers' rights to create effective local institutions and procedures. This encompasses functioning, trustworthy and accessible civil courts, but also other public, private and criminal institutions and mechanisms (e.g. permission, licencing or inspection procedures to ensure safety in the workplace; accident insurance; trade unions). Civil litigation cannot be a substitute for such mechanisms – particularly if it takes place far away from the place where the relevant events occurred.

2. This, however, is not a reason against ensuring effective enforcement mechanisms, including judicial mechanisms, for private law claims arising from violations of human rights or claims aiming to prevent or to terminate such violations. Such judicial proceedings can also help to promote the establishment of effective local mechanisms for preventing and remedying violations.

3. The usual difficulties arising in cross-border litigation tend to be aggravated in cases concerning human rights violations in developing countries. In addition to issues of jurisdiction and choice of law, there are often considerable challenges particularly with respect to litigation funding, fact-finding and establishing the content of foreign law, if required.

4. Legal aid alone usually is not a viable financial basis for corporate human rights litigation. The funding of such claims largely depends on market mechanisms, particularly on success-based lawyers' fees or commercial litigation funding. Because of the moral hazard that may arise in this context, it is desirable to promote the establishment of public-interest litigation funders. Nevertheless, "entrepreneurial litigating" in the field of corporate human rights cases cannot be considered as per se abusive. There seems to be a need, however, to monitor practices in this field closely to assess whether further regulation is required.

5. Where cross-border judicial cooperation is not functioning, taking of evidence located in a foreign state without involving authorities of the state where such evidence is located becomes increasingly important. A generous approach should be adopted in cases where "direct" taking of evidence neither violates legitimate third-party interests nor involves the use or threat of compulsion in the territory of a foreign state.

6. In cases where liability for damage inflicted by the violation of human rights standards depends on a business's internal operations, it is essential for an effective access to remedy that either the burden of proof with respect to the relevant facts is on the business or that there is a disclosure obligation that ensures access to relevant information. Where such disclosure could endanger legitimate confidentiality interests (particularly with respect to trade secrets), appropriate mechanisms to protect such interests should be put in place.

7. Collective redress mechanisms can improve access to justice with respect to corporate human rights claims. Meanwhile, reducing an excessive burden on the

courts that could result from a large number of parallel proceedings currently does not seem to be as important a consideration in practice in the field of corporate human rights litigation as it can be in other fields of mass tort litigation. Appropriate safeguards have to be put in place to protect both the legitimate interests of defendants and those of the members of the claimant group. When designing such safeguards, it is important to ensure that they do not lead to the obstruction of legitimate claims. Particularly in collective redress proceedings, the court should have strong case management and control powers, both during the proceedings and in the case of a settlement.

8. In addition to claims aiming at remedies for victims of violations, private law claims brought by non-government organisations, by public bodies or by individuals can at least indirectly contribute to the enforcement of human rights standards. Possible examples are claims on the basis of unfair competition, and possibly also contractual claims, because of false statements about production standards. Actions by associations or popular actions for injunctive or declaratory relief could also contribute to private enforcement of human rights standards. It remains to be seen whether litigation among businesses concerning contractual obligations to comply with human rights standards will play a meaningful role in this field in the future as well.

9. Soft law mechanisms and alternative dispute resolution can supplement judicial law enforcement mechanisms, but they are not a substitute for judicial mechanisms. In particular, human rights arbitration depends on a voluntary submission. Its practical effectiveness therefore requires the cooperation of the parties to the dispute. It would, however, be possible to create incentives for such cooperation.

Full (German) version: *Tanja Domej,* Zivilrechtliche Rechtsdurchsetzungsmechanismen, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 229 et seq.

Just released: Issue 38/1 2020 of the Netherlands Journal of Private International Law, with a special focus on the new HCCH Judgments Convention

The issue 38/1 2020 of the Netherlands Journal of Private International Law (NIPR – *Nederlands Internationaal Privaatrecht*) has just been published. This issue of the NIPR is available here. It includes an Editorial and the following three articles (with abstracts) devoted to the new *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, concluded on 2 July 2019 (not yet in force see here):

1. Towards a global Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, by Hans van Loon

"This article describes the background and context of the 'Hague Judgments Project'. Apart from earlier attempts, three stages may be distinguished in the history of this project: a first stage, dominated by the dynamics of the early European integration process, with the result that the 1965 and 1971 Hague Conventions on choice of court and recognition and enforcement of judgments, although providing inspiration for the 1968 Brussels Convention, remained unsuccessful; a second stage, very much determined by the transatlantic dimension, with differing strategic objectives of the EU and the USA notably regarding judicial jurisdiction, resulting in the lack of success of the 'mixed' convention proposal; and a third stage, where negotiations took on a more global character, resulting in the 2015 Choice of Court Convention and the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

"The article discusses the interaction between the global Hague and the regional EU negotiations on jurisdiction and enforcement of judgments, the impact of domestic judicial jurisdiction rules (the claim/forum relationship versus the defendant/forum link) on the Hague negotiations and other (in some cases:

recurrent) core issues characterizing each of the aforementioned three stages, and their influence on the type (single, double, 'mixed') and form of convention that resulted from the negotiations."

2. Comment on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Is the Hague Convention of 2 July 2019 a useful tool for companies who are conducting international activities? By Catherine Kessedjian

"The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, adopted on 2 July 2019, gives some certainty to worldwide trade relations outside regional systems such as the EU, when disputes are submitted to national courts instead of arbitration or mediation. The Convention avoids the difficult issue of 'direct' jurisdictional bases and limits itself to 'indirect' jurisdictional bases. This choice of policy was one of the keys to its adoption. Another one was the exclusion of many problematic areas of the law where differences in legal systems are too deep to allow consensus. A third one was to allow States becoming Parties to the Convention to make a number of declarations including some to protect their own acts, which may have been considered as acta jure gestionis under international law. Consequently, the Convention has a fairly narrow scope of application. This may induce more States to become a Party, without which the Convention would not have any more success than the old Hague Convention of 1971 which is still on the books, particularly because it still includes a bilateralisation system, albeit an easier one than that included in the 1971 Convention."

3. The 2019 Hague Judgments Convention through European lenses, by Michael Wilderspin and Lenka Vysoka

"The European Union is an important actor in the field of international judicial cooperation and in the Hague Conference on Private International Law. It is itself a member of the Conference, and at the same time represents 27 States that are also members. Because of the EU's own internal rules, where the matters being negotiated at international level are already the subject of EU rules, the EU speaks on behalf of its Member States. Furthermore, if the EU accedes to an international convention in such circumstances, the all or nothing principle applies. Either the EU accedes as a bloc or not at all.

“The 2019 Judgments Convention has the potential to facilitate the worldwide recognition and enforcement of judgments in civil and commercial matters. The approach taken by the negotiators has, particularly in the light of the failure of earlier, more ambitious projects, been to aim for a more modest convention, with the objective of encouraging as many States as possible to become Contracting Parties to the Convention.”

Moreover, the issue contains an article written in Dutch on preliminary questions submitted to the CJEU by the Supreme Court of the Netherlands in SHAPE/Supreme: on garnishment and immunity (HR 21 December 2018, ECLI:NL:HR:2018:2361 and HR 22 February 2019, ECLI:NL:HR:2019:292, NIPR 2019, 64), by A. F. Veldhuis

“The Supreme Group initiated proceedings in the Netherlands against two NATO bodies (SHAPE and JFCB) with regard to the alleged non-fulfilment of payment obligations under a contract relating to the supply of fuel to SHAPE for NATO’s mission in Afghanistan. On the basis of a Dutch order for garnishment, Supreme levied a garnishment on an escrow account in Belgium. SHAPE then initiated proceedings for interim relief before the Dutch courts, invoked immunity from enforcement and sought (i) to lift the garnishment and (ii) to prohibit Supreme from attaching the escrow account in the future. Both the court at first instance and the appellate court ruled that the seizure could be lifted. However, the Supreme Court questioned whether the Dutch courts had jurisdiction to adjudicate this dispute. Article 24(5) Brussels I-bis provides that the courts of the Member State in which the judgment has been or is to be enforced have exclusive jurisdiction regarding procedures concerning the enforcement of that judgment. As the garnishment was levied on the basis of an order for garnishment by a Dutch court on an account in Belgium, the question here is whether Article 24(5) Brussel I-bis also covers SHAPE’s application to the Dutch court to have the attachment lifted. Since there may be reasonable doubt as to the interpretation of Article 24(5) Brussels I-bis, the Supreme Court decided to refer the matter to the Court of Justice for a preliminary ruling. Before going into this question, the Supreme Court must first examine whether the claims fall within the material scope of Brussels Ibis. The fact that SHAPE has based its requests on immunity from enforcement raises the question of whether, and if so to what extent, this case is a civil or commercial matter within the meaning of Article 1(1) Brussels Ibis. In this respect, too, the Supreme Court saw sufficient grounds for submitting

preliminary questions. This case has raised thought-provoking questions which navigate along the thin line between private international law and public international law."

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2020: Abstracts

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

A. Stein: **The 2019 Hague Judgments Convention – All's Well that Ends Well?**

The Hague Convention on the Recognition and Enforcement of Foreign Judgments, which was concluded in July 2019, holds the potential of facilitating the resolution of cross-border conflicts by enabling, accelerating and reducing the cost of the recognition and enforcement of judgments abroad although a number of areas have been excluded from scope. As the academic discussion on the merits of this instrument unfolds and the EU considers the benefits of ratification, this contribution by the EU's lead negotiator at the Diplomatic Conference presents an overview of the general architecture of the Convention and sheds some light on the individual issues that gave rise to the most intense discussion at the Diplomatic Conference.

C. North: **The 2019 HCCH Judgments Convention: A Common Law Perspective**

The recent conclusion of the long-awaited 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "Judgments Convention") provides an opportunity for States to reconsider existing regimes for the recognition and enforcement of foreign

judgments under national law. This paper considers the potential benefits of the Judgments Convention from a common law perspective. It does so by considering the existing regime for recognition and enforcement at common law, and providing an overview of the objectives, structure and a number of key provisions of the Judgments Convention. It then highlights some of the potential benefits of the Convention for certain common law (and other) jurisdictions.

P.-A. Brand: **Recognition and enforcement of decisions in administrative law matters**

Whereas for civil and commercial matters there are extensive rules of international and European civil procedural law on mutual legal assistance and in particular on the recognition and enforcement of civil court decisions, there is no similar number of regulations on legal assistance and for the international enforcement of administrative court decisions. The same applies to the recognition of foreign administrative acts. This article deals with the existing rules, in particular with regard to decisions in administrative matters, and concludes that the current system of enforcement assistance in the enforcement of administrative decisions should be adapted to the existing systems of recognition and enforcement of judgments in civil and commercial matters.

B. Hess: **About missing legal knowledge of German lawyers and courts**

This article addresses a decision rendered by the Landgericht Düsseldorf in which the court declined to enforce, under the Brussels Ibis Regulation, a provisional measure issued by a Greek court. Erroneously, in its decision the Landgericht held that applications for refusal of enforcement of foreign decisions (article 49 Brussels Ibis Regulation) are to be lodged with the Landgericht itself. Since the party lodged its application with the Landgericht on the last day of

the time limit, the Oberlandesgericht Düsseldorf eventually held that the application was untimely as it was not lodged with the Oberlandesgericht, instead. The Oberlandesgericht refused to restore the status quo ante because the information about the competent court had been manifestly erroneous, whereas the lawyer is expected to be familiar with articles 49 (2) and 75 lit b) of the Brussels Ibis Regulation. This article argues that jurisdiction over applications for refusal of enforcement is not easily apparent from the European and German legal provisions and that the legal literature addresses the issue inconsistently.

This results in a certain degree of uncertainty as concerns jurisdiction over such applications, making it difficult to establish cases of possibly manifestly incorrect applications.

C.F. Nordmeier: **Abuse of a power of attorney granted by a spouse – The exclusion of matrimonial property regimes, the place of occurrence of the damage under Brussels Ibis and the escape clause of art. 4 (3) Rome II**

The article deals with the abuse of power of attorney by spouses on the basis of a decision of the Higher Regional Court of Nuremberg. The spouses were both German citizens, the last common habitual residence was in France. After the failure of the marriage, the wife had transferred money from a German bank account of the husband under abusive use of a power of attorney granted to her. The husband sues for repayment. Such an action does not fall within the scope of the exception of matrimonial property regimes under art. 1 (2) (a) Brussels Ibis Regulation. For the purpose of determining the place where the damage occurred (Art. 7 No. 2 Brussels Ibis Regulation), a distinction can be made between cases of manipulation and cases of error. In the event of manipulation, the bank account will give jurisdiction under Art. 7 No. 2 Brussels Ibis Regulation. Determining the law applicable by Art. 4 (3) (2) Rome II Regulation, consideration must be given not only to the statute of marriage effect, but also to the statute of power of attorney. Particular restraint in the application of Art. 4 (3) (2) Rome II Regulation is indicated if the legal relationship to which the non-contractual obligation is to be accessory is not determined by conflict-of-law rules unified on European Union level.

P.F. Schlosser: **Governing law provision in the main contract – valid also for the arbitration provision therein?**

Both rulings are shortsighted by extending the law, chosen by the parties for the main contract, to the arbitration provision therein. The New York Convention had good reasons for favoring, in the absence of a contractual provision specifically directed to the arbitration provision, the law governing the arbitration at the arbitrators' seat. For that law the interests of the parties are much more predominant than for their substantive agreements.

F. Rieländer: **Choice-of-law clauses in pre-formulated fiduciary contracts for holding shares: Consolidation of the test of unfairness regarding**

choice-of-law clauses under Art. 3(1) Directive 93/13/EEC

In its judgment, C-272/18, the European Court of Justice dealt with three conflict-of-laws issues. Firstly, it held that the contractual issues arising from fiduciary relationships concerning limited partnership interests are included within the scope of the Rome I Regulation. While these contracts are not covered by the exemption set forth in Art. 1(2)(f) Rome I Regulation, the Court, unfortunately, missed an opportunity to lay down well-defined criteria for determining the types of civil law fiduciary relationships which may be considered functionally equivalent to common law trusts for the purposes of Art. 1(2)(h) Rome I Regulation. Secondly, the Court established that Art. 6(4)(a) Rome I Regulation must be given a strict interpretation in light of its wording and purpose in relation to the requirement "to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence". Accordingly, this exception is applicable only if the consumer needs to leave the country in which he has his habitual residence for the purpose of enjoying the benefits of the services. Thirdly, the Court re-affirmed that choice-of-law clauses in pre-formulated consumer contracts are subject to a test of unfairness under Art. 3(1) Directive 93/13/EEC. Since the material scope of this Directive is held to apply to choice-of-law clauses, such a clause may be considered as unfair if it misleads the consumer as far as the laws applicable to the contract is concerned.

U. Bergquist: **Does a European Certificate of Succession have to be valid not only at the point of application to the Land Registry, but also at the point of completion of the registration in the Land Register?**

When it comes to the evidentiary effect of European Certificates of Successions, there are different opinions on whether a certified copy of the certificate has to be valid at the time of the completion of a registration in the Land register. The Kammergericht of Berlin recently ruled that a certified copy loses its evidentiary effect in accordance with art. 69 (2) and (5) of the European Succession Regulation (No. 650/2012) after expiry of the (six-month) validity period, even if the applicant has no influence on the duration of the registration procedure. This contribution presents the different arguments and concludes – in accordance with the Kammergericht – that not the date of submission of the application but the date of completion of the registration has to be decisive for the required proof.

D. Looschelders: **International and Local Jurisdiction for Claims under**

Prospectus Liability

The judgment by the Austrian Supreme Court of Justice (Oberster Gerichtshof, OGH) deals with international and local jurisdiction for a claim under prospectus liability. It is mainly concerned with the determination of the place in which the harmful event occurred, as stated in Art. 5(3) of Regulation No 44/2001. Specifying the damage location can pose significant problems due to the fact that prospectus liability compensates pure economic loss. The OGH had stayed the proceedings in order to make a reference to the European Court of Justice (ECJ) for a preliminary ruling on several questions related to this issue. However, the decision by the ECJ left many details unsettled. This article identifies the criteria developed by the OGH in light of the case. The author agrees with the OGH to designate the damage location in this particular case as the injured party's place of residence. Nevertheless, he points out the difficulties of this approach in cases where not all investment and damage specific circumstances point to the investor's country of residence.

W.Voß: **U.S.-style Judicial Assistance – Discovery of Foreign Evidence from Foreign Respondents for Use in Foreign Proceedings**

In the future, will German litigants in German court proceedings have to hand over to the opposing party evidence located on German territory based on American court orders? In general, under German law, the responsibility to gather information and to clarify the facts of the case lies with the party alleging the respective facts, while third parties can only be forced to produce documents in exceptional circumstances. However, the possibility to obtain judicial assistance under the American Rule 28 U.S.C. § 1782(a) increasingly threatens to circumvent these narrow provisions on document production in transatlantic relations. For judicial assistance under this Federal statute provides parties to foreign or international proceedings with access to pre-trial discovery under U.S. law, if the person from whom discovery is sought "resides or is found" in the American court district. Over the years, the statute has been given increasingly broad applicability – a trend that is now being continued by the recent ruling of the Second Circuit Court of Appeals discussed in this article. In this decision, the Court addressed two long-disputed issues: First, it had to decide on whether the application of 28 U.S.C. § 1782(a) is limited to a person who actually "resides or is found" in the relevant district or whether the statute could be read more broadly to include all those cases in which a court has personal jurisdiction over a person.

Second, the case raised the controversial question of whether 28 U.S.C. § 1782 allows for extraterritorial discovery.

M. Jänterä-Jareborg: **Sweden: Non-recognition of child marriages concluded abroad**

Combatting child marriages has been on the Swedish legislative agenda since the early 2000s. Sweden's previously liberal rules on the recognition of foreign marriages have been revisited in law amendments carried out in 2004, 2014 and 2019, each reform adding new restrictions. The 2019 amendment forbids recognition of any marriage concluded abroad as of 1/1/2019 by a person under the age of 18. (Recognition of marriages concluded before 1/1/2019 follows the previously adopted rules.) The marriage is invalid in Sweden directly by force of the new Swedish rules on non-recognition. It is irrelevant whether the parties had any ties to Sweden at the time of the marriage or the lapse of time. The aim is to signal to the world community total dissociation with the harmful practice of child marriages. Exceptionally, however, once both parties are of age, the rule of nonrecognition may be set aside, if called upon for "extraordinary reasons". No special procedure applies. It is up to each competent authority to decide on the validity of the marriage, independently of any other authority's previous decision. While access to this "escape clause" from the rule of non-recognition mitigates the harshness of the system, it makes the outcome unpredictable. As a result, the parties' relationship may come to qualify as marriage in one context but not in another. Sweden's Legislative Council advised strongly against the reform, as contrary to the aim of protecting the vulnerable, and in conflict with the European Convention on Human Rights, as well as European Union law. Regrettably, the government and Parliament took no notice of this criticism in substance.

I. Tekdogan-Bahçivanci: **Recent Turkish Cases on Recognition and Enforcement of Foreign Family Law Judgements: An Analysis within the Context of the ECHR**

In a number of recent cases, the Turkish Supreme Court changed its previous jurisprudence, rediscovered the ECHR in the meaning of private international law and adopted a fundamental-rights oriented approach on the recognition and enforcement of foreign judgements in family matters, i.e. custody and guardianship. This article aims to examine this shift together with the jurisprudence of the European Court of Human Rights, to find a basis for this shift

by analysing Turkey's obligation to comply with the ECHR and to identify one of the problematic issues of Turkish private international law where the same approach should be adopted: namely recognition and/or enforcement of foreign judgements relating to non-marital forms of cohabitation.

Israeli Requirement of Good Faith Conduct in Enforcement of Foreign Judgments

Written by Haggai Carmon, Carmon & Carmon, an international law firm with offices in Tel Aviv and a front office in New York.

The requirement of parties' good faith conduct is fundamental in Israeli law and jurisprudence. However, only recently the Supreme Court has applied that doctrine to enforcement of foreign judgments as thus far, only lower courts have followed that doctrine.

In **Civil Appeal X [Name removed upon request of Claimant, General Editors of CoL, 26 October 2022] v. Bankruptcy Office Geneva**, the Supreme Court (per Esther Hayut, Chief Justice,) on August 27, 2019, unanimously denied an appeal over a District Court's earlier finding that procedural bad faith is independently sufficient grounds to rule against a party whose conduct during proceedings to enforce a Swiss judgment, was so egregious that it warranted such extreme measure.

"In the course of the proceedings in the case, the appellant demonstrated contempt for the court's proceedings, the counterclaimant's rights and the duties imposed on him under the Rules of Civil Procedure and the judicial decisions given in his case. In doing so, the appellant violated his duty to act fairly and reasonably to enable proper judicial proceeding. In light of all the foregoing,

there is no escaping of the conclusion that the appeal before us is one of those rare instances where the appellant's bad faith conduct, who has taken practical measures to thwart the enforcement of the judgment rises to an abuse of court proceedings. Under these exceptional circumstances, in my opinion, it is justified to use the authority given to us and order the appeal be denied in limine."

Although lack of good faith or unacceptable conduct do not, pursuant to the Israeli Foreign Judgments Enforcement Law, provide independent cause to refuse recognition or enforcement of a foreign judgment, "however certainly this carries weight in the court's considerations together with all other conditions"[1] for such recognition or enforcement. [Judge Keret-Meir's ruling in **Bankruptcy File (T.A.) 2193/08 First International Bank of Israel Ltd. v. Gold & Honey (1995) L.P. et al.**

Earlier, the Jerusalem District Court's judgment in D.C.C. (Jm.) 3137/04 **Ahava (USA) Inc. v. J.W.G. Ltd (Ahava)**[2]concerned whether a U.S. judgment precluding an Israeli company from marketing Israeli products in the United States through a website was a foreign judgment enforceable pursuant to the Enforcement Law. The court held that "the filter of 'public policy' allows us to uproot unjust outcomes that may arise from the application of a foreign law,"[3] and addressed at length the essence of public policy:[4]

What is public policy? It is a broad term, "flexible and not entirely definable" …. Some will emphasize the local nature of public policy… but it seems that the basic requirements of law, including good faith, equity, and human rights, do not carry national identities, nor do they evaporate at international borders. Recognition of this approach grew with the erosion of "the archaic definition of the sovereignty doctrine, and as territorial sovereignty boundaries between legal systems blurred" (I. Canor, *Private International Law and the Decay of Sovereignty in the Globalization Age: The Application of Foreign Public Law on International Contracts*… p. 491). This process expanded the definition of public policy and imparted it with a quality of *tikkun olam* (bettering society) in its literal sense, such that appropriate applications are made from the public and private law of foreign legal systems to a domestic forum. In this context, we can even identify certain international rules which obligate even the parties of a **purely domestic** contract (Canor, id. 513). The inclination to apply rules of **global** public policy will increase as the link between the contract and local law weakens. A component of this global public policy is the very need to enforce foreign

judgments.

The District Court held essentially that the protection of intellectual property does not in and of itself violate public policy in Israel, as this includes as well the principle that prohibits taking another's work or basing one's work on it, and this principle also applies to trademark law and other protections related to the appearance of the product. In these circumstances, the court ruled that the prohibition placed by the U.S. court, on the basis of internal U.S. trademark law, did not conflict with public policy in Israel.

In D.C.C. (T.A.) 22673-07-10 **Nader & Sons LLC et al v. Homayon Antony Namvar (Nader)**,[5] the District Court rejected arguments that a summary judgment by the Supreme Court of the state of New York was unenforceable in Israel as having been rendered in unjust and improper proceedings, so that it conflicted with the public policy of Israel. The respondent argued that the choice of such proceedings in a suit of such broad scope constituted lack of good faith and an attempt to evade thorough investigation of the claims, as well as that significant details and facts withheld from the New York court might have affected the outcome of the proceedings.

The court dismissed these arguments:[6]

As stated, external public policy, in the sense of Article 3(3) of the Foreign Judgments Enforcement Law, refers to conformance with the basic principles of Israeli law, and the argument of the respondent regarding the flaws that, in his opinion, characterize the proceedings in New York, as decisive as they may be, do not testify to any conflict with these basic principles (regardless of the validity of these claims) and are not directly connected to the content of the judgment.

In Justice Procaccia commented in C.A. 5793/05 **The Great Synagogue Shone Halachot Association v. Netanya Municipality**:[7]

It is true that the Arbitration Law, 5728-1968 does not set a binding deadline on the prevailing party in an arbitration award to file a motion for its confirmation.… Nevertheless, this does not signify that there exists no limit whatsoever for filing a motion for the confirmation of an arbitration award and that the procedural rights of the holder of such an award are everlasting. A party who prevailed in arbitration is required by procedural good faith to submit the award for confirmation within a reasonable time period, given the special circumstances of

the relevant incident. A party who for years ignored the award, did not act on it, and appeared to no longer have any intention of enforcing it, is liable to face a procedural estoppel claim (Ottolenghi, *Arbitration: Law and Procedure*, 4th ed., 2005, 914-916). Like any other complaint filed with a court, a motion for confirmation of an arbitration award is also subject to the rules of procedural good faith and reasonability regarding the timing, form, and content of the filing. The civil rules of laches apply to the timing of filing, as they apply to civil suits in the framework of statutory periods of limitations.

The question of whether this judgment, which deals with a 30-year delay in filing a motion for the confirmation of an Israeli arbitration award, will also apply to an arbitral award issued abroad under the New York Convention, remains open and has not been addressed. Because the New York Convention and the regulations for its execution make no mention of laches, it is unclear if the application of the Convention should be restricted and subjected to those principles, thus bypassing the absence of deadline for filing for confirmation under the Convention. In general, foreign arbitration takes place between commercial entities or countries, and at times, the difficulty in enforcing arbitration awards for various reasons is universal. There are many cases in which enforcement in one country encounters protracted difficulties, and then, upon locating debtor's assets in another country, the award holder applies for enforcement of the award in that country. This may be many years after the award was issued. Blocking the procedural path of the holder through laches is unjust, at least under such circumstances, and it appears that the New York Convention's silence in this context is not for naught. Presumably for the same reason, the Convention does not list laches among the grounds for refusal to recognize or enforce an award, nor does it impose a time limit for filing a motion for the confirmation of an arbitration award under the Convention.

For more informaiton, see Haggai, *Foreign Judgements in Israel — Recognition and Enforcement*, published in Hebrew by the Israeli Bar Association. Springer published an English translation.

[1] See Judge Keret-Meir's ruling in Bankruptcy File (T.A.) 2193/08 First International Bank of Israel Ltd. v. Gold & Honey (1995) L.P. et al.

[2]P.M. 5763 (2) 337 (2004).

[3] Id. at 343.

[4] Id. at 344.

[5]Nevo (May 5, 2011).

[6]Id. at 9.

[7]Nevo (Sep. 11, 2007).

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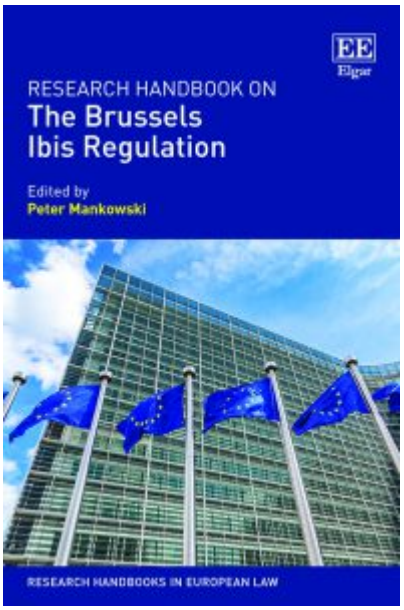

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