Anti-Semitism – Responses of Private International Law

Prof. Dr. Marc-Philippe Weller and Markus Lieberknecht, Heidelberg University, *have kindly provided us with the following blog post which is a condensed abstract of the authors' article in the Juristenzeitung (JZ) 2019, p. 317 et seqq. which explores the topic in greater detail and includes comprehensive references to the relevant case law and literature.*

In one of the most controversial German judgments of 2018, the Higher Regional Court of Frankfurt held that the air carrier *Kuwait Airways* could refuse transportation to an Israeli citizen living in Germany because fulfilling the contract would violate an anti-Israel boycott statute enacted by Kuwait in 1964. The Israeli citizen had validly booked a flight from Frankfurt to Bangkok with a layover in Kuwait City. However, Kuwait Airways hindered the Israeli passenger from boarding the aircraft in Frankfurt. According to the judgment of the Frankfurt Court, Kuwait Airways acted in line with the German legal framework: specific performance of the contract of carriage was deemed to be impossible because of the Kuwait boycott statute.

This judgment is wrong. Hence, it is not surprising that the decision sparked reactions in German media outlets which ranged from mere disbelief to sheer outrage.

The case demonstrates that the seemingly 'neutral' domain of Private International Law is not exempt from having to deal with delicate political matters such as the current global rise in anti-Israel and anti-Semitic sentiments. However, Private International Law is not as ill-equipped as the Frankfurt judgment seems to suggest. In fact, both Private International Law and (German) substantive law offer a wide range of instruments to respond to anti-Semitic discrimination.

First, the article explores the term anti-Semitism in order to carve out a workable definition for legal purposes. Based on this concept and on the available empirical data, we identify three scenarios which appear particularly relevant from a private law perspective: these include, first, encroachment on the personal honor

and dignity of Jewish persons; second, attempts to alienate Jewish persons economically, one example being the *Kuwait Airways* case; third, physical attacks on Jewish persons or their property.

When addressing such behavior, private law operates under the influence of a superseding framework of anti-discriminatory provisions contained in international Law, European Law and constitutional law. We attempt to show that the protection of Jewish identity constitutes an overarching paradigm of Germany's post-war legal order, a notion which finds support in the Jurisprudence of the German Federal Constitutional Court.

On a Private International Law level, this basic value of Germany's post-war legal order shapes the domestic public policy (*ordre public*). Moreover, it translates into a twofold use of overriding mandatory provisions. First, under Art. 9(3) Rome I Regulation German courts are precluded from applying foreign overriding mandatory provisions with an anti-Semitic objective, such as Kuwait's boycott statute. Although the ECJ's reading of Art. 9(3) Rome I Regulation in *Nikiforidis* does leave room to take such provisions, or their effects, into account within the applicable substantive law as purely factual circumstances or as foreign data, we argue that the result of this process must not be that provisions which violate the *ordre public* are inadvertently given effect through the 'back door' of substantive law.

Applying our findings to the case, we conclude that *Kuwait Airways* lacked grounds to invoke both legal and factual impossibility. Whereas the former is precluded under Art. 9(3) Rome I Regulation for constituting a normative application of the Kuwaiti law, the latter requires a more intricate reasoning: We argue that the passenger's right to specific performance had to be upheld under German contract law, while any purported intrusion of the Kuwaiti authorities into the performance is best dealt with at the enforcement stage. This approach is in line both with the result-driven desire to avoid granting the Kuwaiti law any effect within the German legal order and with the doctrinal structures of German law. One could reach the same conclusion by relying on a fact pointed out by *Jan von Hein* (Freiburg University): *Kuwait Airways* is a *state* enterprise owned by Kuwait, *i.e.* the very creator of the legal impediment (the boycott statute). Hence, it should not be allowed to rely on a self-created obstacle to refuse performance.

Conversely, overriding mandatory provisions contained in German law, *e.g.* anti-

discrimination statutes, can be used to ward off or modify anti-Semitic effects of a foreign *lex causae* governing the legal relation in question. We then go on to discuss the necessity, or lack thereof, of adopting a Blocking Statute specifically designed to subvert the effectiveness of foreign legislation with an anti-Semitic agenda.

Lastly, we demonstrate that, in addition to securing the right to specific performance of Israeli citizens, the substantive law provides a host of legal grounds which can serve to empower victims of anti-Semitic discrimination. These instruments range from contractual damages to possible claims based on anti-discrimination law and the law of torts, addressing all of the relevant scenarios outlined above.

Regulating International Organisations: What Role for Private International Law?

Written by Dr Rishi Gulati, LSE Fellow in Law, London School of Economics; Barrister, Victorian Bar, Australia

The regulation of public international organisations (IOs) has been brought into sharp focus following the landmark US Supreme Court ruling in *Jam v International Finance Corporation586 US (2019)* (Jam). Jam is remarkable because the virtually absolute immunities enjoyed by some important IOs have now been limited in the US (where several IOs are based), giving some hope that access to justice for the victims of institutional action may finally become a reality. Jam has no doubt reinvigorated the debate about the regulation of IOs. This post calls for private international law to play its part in that broader debate. After briefly setting out the decision in Jam, a call for a greater role for private international law in the governance of IOs is made.

The Jam decision

The facts giving rise to the Jam litigation and the subsequent decision by the US Supreme Court has already attracted much discussion by public international lawyers, including by this author here. Only a brief summary is presently necessary. The International Finance Corporation (IFC), the private lending arm of the World Bank which is headquartered in the US entered into a loan agreement with Coastal Gujarat Power Limited, a company based in India, to finance the construction of a coal-fired power plant in Gujarat. The plaintiffs sued the IFC (including in tort) in a US Federal District Court asserting that pollution from the plant harmed the surrounding air, land, and water. The District Court found that the IFC was absolutely immune under the *US International Organisations Immunities Act 1945* (IOIA). The DC Circuit affirmed that decision. For an analysis of those decisions, see previous posts by this author here and here.

However, in its landmark ruling in Jam, the US Supreme Court reversed the decision of the court below, significantly affecting the potential scope of IO immunities. The IOIA, which applies to the IFC, grants international organizations the 'same immunity from suit…as is enjoyed by foreign governments' (22 U. S. C. §288a(b). The main issue in Jam concerned how the IOIA standard of immunity is to be interpreted. Should it be equated with the virtually absolute immunity that states enjoyed when the IOIA was enacted? Or should the IOIA standard of immunity be interpreted by reference to the restrictive immunity standard (immunity exists only with respect to non-commercial or public acts)? This latter standard is now enshrined in the *US Foreign Sovereign Immunities Act 1976* (s 1605(a)(2), FSIA). By seven votes to one (with Breyer J dissenting) the US Supreme Court has now given a definitive answer. The majority of the court concluded that the IOIA grants immunity with reference to the FSIA standard of immunity, stating:

In granting international organizations the "same immunity" from suit "as is enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The statute could otherwise have simply stated that international organizations "shall enjoy absolute immunity from suit," or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of international organizations "immune from search," use such noncomparative language to define immunities in a static

way…Or the statute could have specified that it was incorporating the law of foreign sovereign immunity as it existed on a particular date…Because the IOIA does neither of those things, we think the "same as" formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent (Jam, pp. 9-10).

The result is that the IFC (and similarly situated organisations) only possess immunities in respect of their non-commercial or public transactions. While the limiting of IO immunities is to be welcomed for it can only go towards enhancing access to justice for the victims of institutional conduct, the decision in Jam raises more questions than it perhaps answers.

Firstly, how can the decision in Jam be accommodated with the international law notion of IO immunities that finds its basis in the theory of 'functionalism'? The idea being that IOs need immunities to avoid an intrusion into their independence by host states/national courts. Instead of clarifying what this functional standard actually means and how it interacts with the commercial v non-commercial distinction, in Jam, the Supreme Court chose to simply engage in an exercise of statutory interpretation taking a parochial approach (Jam, p. 12). So, there now exists a schism in the international and national (at least in the US) law on IO immunities (see here). Other commentators have tried to provide some indications on how functionalism can be translated to the commercial v non-commercial distinction for the purposes of determining IO immunities, without however providing an answer that will generate any certainty. For the moment, it is simply noted that a transaction that may be within the scope of functional immunities may also be a classically commercial transaction making it difficult to precisely determine what ought to be immune.

Secondly, leaving to one side the schism between the international and national understanding of IO immunities now created, the difficulty in distinguishing between commercial and non-commercial activity itself must not be understated. Webb and Milneshave stated that 'IOs with links to the US like the World Bank face the daunting prospect of litigation in the US Courts exploring the extent and limits of what is "commercial". In state immunity law, this exception has been broadly defined, essentially as comprising the type of activity in which private actors can engage (in contradistinction to the exercise of public power), and its outer boundaries remain unmarked.' Just like the distinction has given significant challenges in the state immunity context (whether the focus should be on the

nature of the transaction or its purpose), the difficulty will be even greater in the IO context only creating further uncertainties. As Breyer J pointed out in his dissent:

> *As a result of the majority's interpretation, many of the international organizations to which the United States belongs will discover that they are now exposed to civil lawsuits based on their (U. S.-law-defined) commercial activity. And because "commercial activity" may well have a broad definition, today's holding will at the very least create uncertainty for organizations involved in finance, such as the World Bank, the Inter-American Development Bank, and the Multilateral Investment Guarantee Agency. The core functions of these organizations are at least arguably "commercial" in nature; the organizations exist to promote international development by investing in foreign companies and projects across the world…The World Bank, for example, encourages development either by guaranteeing private loans or by providing financing from its own funds if private capital is not available (Jam, p. 29).*

The justifiable concerns pointed to by Breyer J require a comprehensive response falling nothing short of treaty reform. In fact, the majority of the Supreme Court in Jam observed that treaty amendment was one method to resolve any real or perceived difficulties for IOs in so far as the scope of their immunities is concerned. In rejecting IFC's argument that most of its work of entering into loan agreements with private corporations was likely commercial activity; and the very grant of immunities becomes meaningless if it can be sued in respect of claims arising out of its core lending activities (Jam, p. 15), the court said:

The IFC's concerns are inflated. To begin, the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization's charter can always specify a different level of immunity. The charters of many international organizations do just that…Notably, the IFC's own charter does not state that the IFC is absolutely immune from suit (Jam, pp. 17-8).

Treaty reform is obviously demanding and time-consuming. Jam nevertheless provides the impetus to pursue it with vigour. Such reform is required not only for organisations such as the IFC, but also IOs more generally.

The need for real and meaningful reform: a role for private international law

Clearly, Jam demonstrates the particular difficulties in assessing the scope of the IFC's immunities. In answering questions of IO immunities, the tension is between two values: maintaining an IO's functional independence and securing access to justice for the victims of IO action. This tension is not only manifest vis-à-vis the IFC in particular, but exists for all IOs in general. As this author discussed in another work, regardless of the subject matter of a dispute or the gravity of harm, the location of the affected party or the identity of the IO, the public visibility of a dispute or its inconspicuousness, we live in a 'denial of justice age' when it comes to the pursuit of justice against IOs. The victims (including families of the more than 9000 individuals who lost their lives) of cholera introduced in Haiti by UN peacekeepers in 2010 are still awaiting effective justice. The victims of the Srebrenica genocide of 1995 for which the UN assumed moral responsibility have not yet been compensated, with no such compensation in sight. When hundreds of Roma suffered serious harm due to lead poisoning caused by the apparent negligence of the UN Mission in Kosovo in placing vulnerable communities next to toxic mines, the UN belatedly set up a Human Rights Advisory Panel; its adverse findings have gone unenforced to this day. There are countless other disputes, including, contractual, tortious, employment and administrative, where a denial of justice is much too common.

If the balance between IO independence and access to justice is to be better and properly struck, fresh thinking is needed that underpins any reform process. Of course, each IO is different from one another, and the shape that any reforms that may take will need to be particularised to the circumstances of the concerned organisation. Nevertheless, IOs constitute international legal persons with significant commonalities, and there ought to be certain foundational reforms that are equally applicable to most if not all organisations. Private international law can play a major role in any such foundational reform process.

Specifically, as I showed elsewhere, there exists a 'regulatory arbitrage' in the governance of IOs. This arbitrage results in victims of IO conduct slipping through legal loopholes when seeking to access justice. One manifestation of the regulatory arbitrage is provided by the law on IO immunities, including how it is interpreted and/or applied. As is much too common (see for example the Haiti Cholera Litigation), despite lack of access to justice within the institutional legal

order which IOs are required to provide under international law, by and large national courts refuse to limit IO immunities interpreting functional immunities as de facto absolute. Therefore, (a) immunities that were always intended to be limited by functionalism are overextended; and (b) immunities are not made contingent on the provision of access to justice at the institutional level. The balance between perceived institutional independence and access to justice has leaned towards the former. The result is a denial of justice at multiple levels.

For some victims, Jam may ultimately correct the exploitation of this arbitrage in respect of claims pursued against organisations such as the IFC for lending by that organisation is likely to constitute commercial and therefore non-immune. However, other victims will continue to be denied justice due to ambiguous and broad wording used in constituent instruments providing for IO immunities (such as the immunities of the UN). IOs will continue to exploit the prevailing regulatory arbitrage to avoid liability. Unless the exploitation of the regulatory arbitrage is tackled, the denial of justice age cannot be brought to an end. To address this arbitrage, private international law techniques can be used to balance often competing but legitimate values. For example, conceptualising question of IO immunities in terms of 'appropriate' forum can be a useful method to coordinate the exercise of jurisdiction between the IO and national legal orders that co-exist in a pluralist legal space. Here, what should determine whether a national court ought to take jurisdiction over an IO is whether access to justice consistently with fair trial standards is available or can be adequately provided within the IO legal order? This must be determined following a specific and nuanced inquiry as opposed to a tick the box exercise (for employment claims, see a detailed study here).

Further, focusing on the rules on jurisdiction, choice of law and the recognition and enforcement of foreign judgments (the three aspects of private international law), the individual right to access justice can be secured without compromising IO independence for private international law is perfectly suited to slice regulatory authority across legal orders with much precision. This author has called for the Hague Conference on Private International Law to initiate discussions about the negotiation of a global treaty that enshrines the private international law rules applicable between states and IOs. The regulatory framework that must govern IOs is one which involves public, institutional and private international law benefiting from each other's strengths.

Viewing the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region" as a Window onto the New Legal Hubs

Written by Matthew S. Erie, Associate Professor of Modern Chinese Studies and Fellow at St. Cross College, University of Oxford

On April 2, 2019, the Government of the Hong Kong Special Administrative Region ("HKSAR") and the Supreme People's Court of the People's Republic of China" ("Supreme People's Court") signed an Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR (hereinafter, "the Arrangement Concerning Mutual Assistance," see English translation here). This is a momentous development in the growth of international commercial arbitration in both mainland China (also, the "PRC") and Hong Kong as it is the first time that such a mechanism has been put in place to allow Chinese courts to render interim relief to support arbitrations seated outside of the PRC.

Historically, non-Chinese parties have been concerned about doing business with Chinese parties given the lack of the ability to ensure that the status quo of the assets of the Chinese party in question is not altered pending the outcome of the arbitration and the tribunal's issuance of the final award. As a result of the Arrangement Concerning Mutual Assistance, foreign parties will have more

comfort in entering into such agreements with Chinese parties; further, the attractiveness of both Hong Kong as a seat of arbitration and the PRC will be enhanced. More generally, the Arrangement Concerning Mutual Assistance demonstrates the close cooperation between legal, judicial, and arbitral authorities in the PRC and Hong Kong. The Arrangement Concerning Mutual Assistance builds on such soft law sources as the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR Pursuant to the Choice of Court Agreements Between Parties Concerned, signed on July 14, 2006, and the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR, signed on June 21, 1999. These sources of soft law position Hong Kong as a major legal hub for Chinese companies investing outside of mainland China. This is particularly so in the context of the Belt and Road Initiative, a multi-trillion dollar project affecting some two-thirds of the world's population, announced by PRC President Xi Jinping in 2013, to connect mainland China's economy with those of states throughout Eurasia.

Mainland China's soft law agreements with Hong Kong are not surprising given that Hong Kong is a "special administrative region" of the PRC, a relationship often summarized as "one country two systems." Nor is it surprising that Hong Kong should function as a legal hub for Chinese companies. Yet Hong Kong is just one of many such hubs emerging throughout a number of jurisdictions across the Eurasian landmass that are jockeying to provide legal services, and particularly dispute resolution services, to not just Chinese companies but also Japanese, Indian, and those of GCC and ASEAN states. The diversity of parties notwithstanding, with some of the largest multi-national companies in the world backed by strong central government support, China is the dominant economy of the region. China is not only creating soft law with other jurisdictions but also onshoring disputes by building its own NLHs in Shanghai and Shenzhen. As a consequence, emergent economies in Asia are accounting for an ever-larger number of cross-border commercial disputes, and jurisdictions in Asia are building capacity to handle those disputes. Soft law, international arbitration houses, international commercial courts, business mediation, transplanted English common law procedural rules, English language, and lawtech—these are all constitutive elements of what I call "new legal hubs" ("NLHs"), one-stop shops for cross-border commercial dispute resolution, in financial centers, promoted as an official policy by nondemocratic or hybrid regimes.

Over the course of two years, I conducted ethnographic fieldwork on six NLHs in four countries, including in Hong Kong, Singapore, Dubai, Kazakhstan, and China. The result of my research, "The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution" (see here), is forthcoming in the *Virginia Journal of International Law*. The article analyses NLHs at two levels: their impact on the host states in which they are embedded and interhub connections as a form of transnational ordering. This article finds that, first, legal hubs are engines of doctrinal, procedural, and technological experimentation, but they have had limited impact on the reform of the wider jurisdictions within which they are embedded. Second, through relationships of competition and complementarity, legal hubs function to enhance normative settlement. However, many of the innovations (e.g., intrahub cross-institutional mechanisms between courts and arbitration institutions and interhub soft law such as memoranda of understanding) are untested, vulnerable to state politics, or even unlawful. Consequently, NLHs demonstrate the potential and fragility of "rule of law" in nondemocratic states that promote globalization against trends in the West.

The article begins with an introduction that defines NLHs, identifies their significance as jurisdictional carve-outs to otherwise weak legal systems of host states, and proposes an anthropology of legal hubs. Part I sets the analysis of NLHs against the backdrop of a partially deglobalizing Euro-American liberal legal order and a globalizing "Inter-Asian" one. Part II describes the methodology of "para-ethnography." Part III provides a theory of NLHs. Part IV builds on this theory to generate a continuum of NLHs. Part V assesses how NLHs and their host states affect each other, including hubs' positive spillover effects and host state pushback. Part VI examines the possibilities for interhub ordering.

Interpreting Forum Selection Clauses

Written by John Coyle, the Reef C. Ivey II Term Professor of Law, Associate Professor of Law at the University of North Carolina School of Law

Last week, I wrote about the interpretive rules that U.S. courts use to construe ambiguous choice-of-law clauses. Choice-of-law clauses are not, however, the only means by which contracting parties may exercise their autonomy under the rules of private international law. Parties may also select via contract the *forum* in which their disputes will be resolved. In the United States, these contractual provisions are generally known as forum selection clauses. Elsewhere in the world, such provisions are generally known as choice-of-court clauses. Since this post is largely focused on U.S. practice, I utilize the former term.

The question of whether and to what extent forum selection clauses should be enforceable is contested. It is also well beyond the scope of this post. Instead, I want to call attention to a related issue that has attracted considerably less scholarly attention. This is the issue of how to *interpret* the contractual language by which private actors exercise their autonomy to choose a forum. I explore this issue at some length in a forthcoming article. Over the past several decades, the courts in the United States have developed several interpretive rules of thumb—canons of construction, to use a fancy term—that assign meaning to ambiguous words and phrases that frequently appear in forum selection clauses. I discuss several of these interpretive rules below.

The first and most important of these interpretive rules help a court determine whether a forum selection clause is *exclusive* or *non-exclusive*. An exclusive forum selection clause requires that any litigation proceed in the named forum to the exclusion of all others. In a non-exclusive forum selection clause, by contrast, the parties merely consent to personal jurisdiction in the chosen forum or agree not to object to venue if the other party files suit in the chosen forum. Over the past few decades, U.S. courts have heard thousands of cases in which they were called upon to distinguish exclusive clauses (sometimes described as mandatory clauses) from non-exclusive clauses (sometimes described as permissive clauses). To assist them in this task, they have developed a set of rules that I describe as the *canons relating to exclusivity*.

At the outset, it is important to emphasize that, under prevailing U.S. legal doctrine, forum selection clauses are presumptively *non-exclusive*. This rule is different from the one stated in Article 3(b) of the Hague Convention on Choice-of-Court Agreements, which provides that forum selection clauses are presumptively *exclusive*. In the United States, therefore, the presumption of non-exclusivity must be rebutted by so-called "language of exclusivity," i.e. language

that signals the intent of the parties to litigate in the chosen forum and no other. If a clause states that litigation "must" proceed in the chosen forum or that the chosen forum shall have "exclusive jurisdiction" to hear the case, then the clause is exclusive. If a clause merely states that the parties "consent to jurisdiction" in the chosen forum or that they "agree not to object to venue" in the chosen forum, by comparison, the clause is non-exclusive.

Foreign actors should be aware that U.S. courts will frequently apply the canons relating to exclusivity to construe forum selection clauses selecting a foreign jurisdiction *even when* the contract contains a choice-of-law clause selecting foreign law. In one recent case, a Florida court was called upon to determine whether the following forum selection clause was exclusive or non-exclusive:

> *This Agreement shall be governed by and construed in accordance with the Laws of Malta and each party hereby submits to the jurisdiction of the Courts of Malta as regards any claim, dispute or matter arising out of or in connection with this Agreement, its implementation and effect.*

Notwithstanding the fact that the clause expressly stated that it was to be governed by the Laws of Malta, the Florida court looked exclusively to U.S. precedent to conclude that the clause was, in fact, non-exclusive, and that the suit could proceed in Florida state court. When dealing with U.S. counterparties, therefore, foreign companies are well advised to draft their forum selection clauses with an eye to U.S. interpretive rules *even when* the contract contains a choice-of-law clause selecting the law of their home jurisdiction.

The second set of interpretive rules are the *canons relating to scope*. These canons are used to determine whether a forum selection clause applies exclusively to *contract* claims or whether it also applies to related *tort and statutory* claims. To date, U.S. courts have developed at least five different interpretive rules that purport to resolve this question and no one test has attracted majority support. The courts have, however, consistently held that forum selection clauses which state that the chosen forum shall hear all claims "relating to" the contract are broad enough to encompass tort and statutory claims with some connection to the agreement. To the extent that contracting parties want their forum selection clause to sweep broadly, therefore, they are well advised to include "relating to" language in their agreements. For readers

interested in exactly how many angels can dance on the head of this particular pin, a detailed analysis of the various canons relating to scope is available here.

The third set of interpretive rules are the *canons relating to non-signatories*. These canons help the courts determine when a forum selection clause binds parties who did not actually sign the contract. Ordinarily, of course, individuals who have not signed an agreement cannot be bound by it unless they are third-party beneficiaries. In the context of forum selection clauses, however, U.S. courts have crafted a more lenient rule. Specifically, these courts have held that a non-signatory may be covered by a forum selection clause if that non-signatory is "closely related" to a signatory and it is "foreseeable" that the non-signatory would be bound. In practice, this means that parent companies, subsidiary companies, corporate directors, and agents, among others, are frequently permitted to invoke forum selection clauses set forth in *contracts they did not sign* to obtain the dismissal of cases filed outside the forum named in those clauses. Although this rule is difficult to justify under existing third-party beneficiary doctrine, U.S. courts have reasoned that it is necessary to avoid fragmented litigation proceedings and, at the end of the day, generally consistent with party expectations.

The fourth and final set of interpretive rules are the *canons relating to federal court*. In the United States, one may file a lawsuit in either state court or federal court. A recurring question in the interpretation of forum selection clauses is whether the parties wanted to litigate their disputes in state court *to the exclusion* of federal court or whether they wanted to litigate their disputes in *either* state or federal court. In order to distinguish one type of clause from the other, U.S. courts have drawn a sharp distinction between the word "of" and the word "in." When the parties select the "courts *of* New York," they are deemed to have selected the state courts of New York to the exclusion of the federal courts because only state courts are "of" New York. When the parties select the "courts *in* New York," by comparison, they are deemed to have selected either the state courts *or* the federal courts in New York because both sets of courts are physically located "in" New York.

Sophisticated parties may, of course, contract around each of the interpretive default rules discussed above by stating clearly that they want their clause to (a) be exclusive or non-exclusive, (b) apply or not apply to specific types of claims, (c) apply or not apply to non-signatories, or (d) select state courts, federal courts, or

both. To date, however, many U.S. parties have failed to update their forum selection clauses to account for these rules. Chris Drahozal and I recently reviewed the forum selection clauses in 157 international supply agreements filed with the SEC between 2011 and 2015. We discovered that (i) approximately 30% of these clauses were ambiguous as to their intended scope, and (ii) none of these clauses specifically addressed the status of non-signatories. These findings—along with the results of a lawyer survey that I conducted in the summer of 2017—suggest that the feedback loop between judicial decisions *interpreting* contract language and the lawyers tasked with *drafting* contract language does not always function effectively.

Going forward, it would be fascinating to know whether any *non-U.S. courts* have developed their own interpretive rules that assign meaning to ambiguous words and phrases contained in forum selection clauses. If anyone is aware of any academic papers that have explored this issue from a non-U.S. perspective, I would be very grateful if you could bring it to my attention.

Deadline Extended! The Private Side of Transforming the World – UN Sustainable Development Goals 2030 and the Role of Private International Law

Outline and Call for Papers

Update!

The planned public conference has to be postponed due to the Covid-19 pandemic and will now take place at the Max Planck Institute in Hamburg on **September 9-11 2021**, one year later than originally announced.

On September 10-11 2020, we will instead hold a closed online workshop among the project participants in order to feedback on the draft papers.

Deadline extended: May 17!

On 25 September 2015 the UN General Assembly unanimously adopted the Resolution Transforming our world: the 2030 Agenda for Sustainable Development. The core of the Resolution consists of 17 Sustainable Development Goals (SDGs) with 169 associated targets, and many more indicators. The SDGs build on the earlier UN Millennium Development Goals, "continuing development priorities such as poverty eradication, health, education and food security and nutrition". Yet, going "far beyond" the MDGs, they "[set] out a wide range of economic, social and environmental objectives". The SDGs add new targets, such as migration (8.8; 10.7), the rule of law and access to justice (16.3), legal identity and birth registration (16.9), and multiple "green" goals. And, more than the MDGs, they emphasize sustainability.

The SDGs have attracted significant attention. Although not undisputed – for example, regarding their assumption that economic growth may be decoupled from environmental degradation, and their lack of attention to the concerns of indigenous people – the SDGs have become a focal point for comprehensive thinking about the future of the world. This is so at least in the area of public law and public international law. With regard to private law, by contrast, there has been less attention, although the SDGs are directed not only to governments and parliaments, the UN and other international institutions, but also to "local authorities, indigenous peoples, civil society, business and the private sector, the scientific and academic community – and all people".

Certainly, public action and public law will not be enough if the goals are to be achieved. Even a spurious stroll through the SDGs demonstrates interplay with private international law (PIL). The SDGs name goals regarding **personal status**

and family relations: “By 2030, provide legal identity for all, including birth registration” (16.9), or “Eliminate… forced marriage…”(5.3), both well-known themes of PIL. The SDGs focus on trade and thereby invoke **contract law** in multiple ways. On the one hand, they encourage freedom of contract when they call to “correct and prevent trade restrictions and distortions in world agricultural markets”… (2.b) or “promote the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms… as mutually agreed” (17.7). On the other hand, they insist on restrictions, for example, the “immediate and effective” eradication of forced labour, “modern slavery” and child trafficking ((8.7, 16.2); “by 2030 significantly reduce illicit financial and arms flows”…(16.4); “substantially reduce corruption and bribery in all their forms” (16.5). There is clearly also a role for **tort law**, including its application to cross-border situations, for example in order to fulfill goals regarding environmental protection and climate change.

Other targets concern not substantive private law, but **civil procedure**. Thus, the call to “ensure equal access to justice for all” (16.3) has traditionally been confined to equal treatment within one legal system. But as a global goal it invokes global equality: for instance, the ability for European victims of the Volkswagen Diesel scandal to access courts like US victims, the access to court of Latin American victims of oil pollution on a similar level to those in Alaska, and so forth. All of this has multiple implications in the sphere of cross-border civil procedure: the admissibility of global class actions and public interest actions, judicial jurisdiction and recognition and enforcement of judgments concerning corporate social and environmental responsibility, and so on.

Finally, the SDGs have an institutional component. SDG 16 calls, among others, for “strong institutions,” and it encourages cooperation. What comes into focus here, from a private international law perspective, are institutions like the Hague Conference and treaties like the Hague Conventions, but also other possible instruments of cooperation and institutionalization in the private international law realm.

All this suggests that there are plenty of reasons to examine the relationship between the SDGs and PIL. And since the 2030 Agenda explicitly calls on the private sector and the academic world to cooperate for its implementation, and time is running fast, such an examination is also timely, indeed urgent. With this in mind, Ralf Michaels**,** Verónica Ruiz Abou-Nigm and Hans van Loon are

organizing a conference at the Max Planck Institute in Hamburg on **10-12 September 2020.** Speakers will systematically analyze the actual and potential role of Private International Law for each of the seventeen SDGs. The overall purpose is twofold:

(1) to raise awareness of the relations between the SDGs and private international law as it already exists around the world. Private international law is sometimes thought to deal with small, marginal issues. It will be important, for those inside and outside the discipline alike, to generate further awareness of how closely its tools and instruments, its methods and institutions, and its methodologies and techniques, are linked to the greatest challenges of our time.

(2) to explore the potential need and possibilities for private international law to respond to these challenges and to come up with concrete suggestions for adjustments, new orientations and regional or global projects. This exploration can aim to identify the need for further and/or new research agendas in specific fields; the development of new mechanisms and approaches, the usefulness of new international cooperation instruments, be it new Conventions at the Hague Conference or elsewhere, or be it new institutions.

Call for Papers

Submission deadline: May 17, 2019.

We are inviting contributions to this project. Interested applicants should submit the application by **May 17, 2019.** We ask you to **identify which of the 17 development goals you want to address**, which (if any) work you have already done in that area, and, in a few paragraphs (up to a **maximum of 500 words**), what you intend to focus on. **We plan to select participants and invite them by the end of May 2019.** Selected participants would be expected to come to Hamburg to present research findings in the conference, and to provide a **full draft paper by the end of June 2020** (in advance of the conference), for discussion and subsequent publication as part of an edited collection to be published after the conference. We expect to be able to fund all travel and accommodation costs. If you are interested, please send your brief application to Britta Arp (@sekretariat-michaels@mpipriv.de) in Hamburg. Please title your email “SDG2030 and PIL,” and your document “SDG2030 and PIL_lastname”. We look forward to hearing from you.

Ralf Michaels, Director, Max Planck Institute for Comparative and International Private Law, Hamburg;

Verónica Ruiz Abou-Nigm, Senior Lecturer in International Private Law, University of Edinburgh;

Hans van Loon, former Secretary General of the Hague Conference.

Resistance is Futile – How Private International Law Will Undermine National Attempts to Avoid 'Upload Filters' when Implementing the DSM Copyright Directive

Last week, the European Parliament adopted the highly controversial proposal for a new Copyright Directive (which is part of the EU Commission's Digital Single Market Strategy). The proposal had been criticized by academics, NGOs, and stakeholders, culminating in an online petition with more than 5 million signatures (a world record just broken by last week's Brexit petition) and public protests with more than 150,000 participants in more than 50 European (although mainly German) cities.

Under the impression of this opposition, one of the strongest proponents of the reform in the European Parliament, Germany's *CDU*, has pledged to aim for a national implementation that would sidestep one of its most controversial elements, the requirement for online platforms to proactively filter uploads and

block unlicensed content. The leader of Poland's ruling party *PiS* appears to have recently made similar remarks.

But even if such national implementations were permissible under EU law, private international law seems to render their purported aim of making upload filters 'unnecessary' virtually impossible.

Background: Article 17 of the DSM Copyright Directive

Article 17 (formerly Article 13) can safely be qualified as one of the most significant elements of an otherwise rather underwhelming reform. It aims to address the so-called platform economy's 'value gap', i.e. the observation that few technology giants like 'GAFA' (Google, Apple, Facebook, Amazon) keep the vast majority of the profits that are ultimately created by right holders. To this end, it carves out an exception from Art 14(1) of the e-Commerce Directive (Directive 2000/31/EC) and makes certain 'online content-sharing service providers' directly liable for copyright infringements by users.

Under Art 17(4) of the Directive, platforms will however be able to escape this liability by showing that they have

> *(a) made best efforts to obtain an authorisation, and*
>
> *(b) made, in accordance with high industry standards of professional diligence,* ***best efforts to ensure the unavailability of specific works and other subject matter*** *for which the rightholders have provided the service providers with the relevant and necessary information; and in any event*
>
> *(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from, their websites the notified works or other subject matter, and made* ***best efforts to prevent their future uploads*** *in accordance with point (b).*

This mechanism has been heavily criticised for *de-facto* requiring platform hosts to proactively filter all uploads and automatically block unlicensed content. The ability of the necessary 'upload filters' to distinguish with sufficient certainty between unlawful uploads and permitted forms of use of protected content (eg for the purposes of criticism or parody) is very much open to debate – and so is their potential for abuse. In any case, it does not seem far-fetched to assume that

platforms will err on the side of caution when filtering content this way, with potentially detrimental effects for freedom of expression.

In light of these risks, and of the resulting opposition from stakeholders, the German *CDU* has put forward ideas for a national implementation that aims to make upload filters 'unnecessary'. In essence, they propose to require platform hosts to conclude mandatory license agreements that cover unauthorised uploads (presumably through lump-sum payments to copyright collectives), thus replacing the requirement of making 'best efforts to ensure the unavailability of unlicensed content' according to Art 17(4) of the Directive.

Leaving all practical problems of the proposal aside, it is far from clear whether such a transposition would be permissible under EU law. First, because it is not easily reconcilable with the wording and purpose of Art 17. And second, because it would introduce a new exception to the authors' rights of communication and making available to the public under Art 3 of the Information Society Directive (Directive 2001/29/EC) without being mentioned in the exhaustive list of exceptions in Art 5(3) of this Directive.

Private International Law and the Territorial Scope of Copyright

But even if EU law would not prevent individual member states from transposing Art 17 of the Directive in a way that platforms were required to conclude mandatory license agreements instead of filtering content, private international law seems to severely reduce the practical effects of any such attempt.

According to Art 8(1) Rome II, the law applicable to copyright infringements is 'the law of the country for which protection is claimed' (colloquially known as the *lex loci protectionis*). This gives copyright holders the option to invoke any national law, provided that the alleged infringement falls under its (territorial and material) scope of application. With regard to copyright infringements on the internet, national courts (as well as the CJEU – see its decision in Case C-441/13 *Hejduk* on Art 5(3) Brussels I) tend to consider every country in which the content can be accessed as a separate place of infringement.

Accordingly, a right holder who seeks compensation for an unlicensed upload of their content to an online platform will regularly be able to invoke the national laws of every member state – most of which are unlikely to opt for a transposition that does not require upload filters. Thus, even if the German implementation

would allow the upload in question by virtue of a mandatory license agreement, the platform would still be liable under other national implementations – unless it has *also* complied with the respective filtering requirements.

Now, considering the case law of the Court of Justice regarding other instruments of IP law (see, eg, Case C-5/11 *Donner*; Case C-173/11 *Football Dataco*), there may be room for a substantive requirement of targeting that could potentially reduce the number of applicable laws. But for the type of online platforms for which Art 17 is very clearly designed (most importantly, *YouTube*), it will rarely be possible to show that only audiences in certain member states have been targeted by content that has not been geographically restricted.

So either way, if a platform actually wanted to avail itself of the option not to proactively filter all uploads and, instead, pay for mandatory license agreements, its only option would be to geographically limit the availability of all content for which it has not obtained a (non-mandatory) license to users in countries that follow the German model. It is difficult to see how this would be possible… without filtering all uploaded content.

Recognition and Enforcement: 30 years from the entry into force of the Brussels Convention in Greece – A practitioner's account –

I. Introduction

It was the 3rd of March 1989, when an announcement was published in the Official Gazette of the Hellenic Republic, stating that the Brussels Convention would finally enter into force on April 1, 1989. Why finally? Because it took the state nearly a decade after the accession to the EC [1.1.1981] to activate the Brussels Convention in the country. After a long hibernation time, Law Nr. 1814/1988 was

published in November 11, 1988, marking the official ratification of the Convention. In less than a year, the Convention became operative in the Greek legal order. Since that time, a great number of judgments were published in the legal press, some of them with elucidating notes and comments. Commentaries and monographs paved the path for widespread knowledge and ease of access to the new means of handling cross border cases within the EC.

Almost 12 years later, Regulation 44/2001 replaced the Brussels Convention. On the whole, the application of the Regulation in the country can be described as satisfactory. Courts proved to be open minded in exequatur proceedings, thus fulfilling the mandate for a free circulation of judgments dictated by the EU. Only minor issues cause some skepticism, the majority of which could have been solved by means of an implementing act to the Regulation. Regrettably enough, Greek governments persistently omit to issue any such acts in the course of communitarization in civil and commercial matters. Consequently, primarily academics, and later courts, were called to find viable solutions to problems faced or potentially confronted in the future.

II. Problems faced / solutions given

A problem causing doubts and confusion in Greece was the exact definition of the term used under Art. 36 Brussels Convention. Unlike the English version, where the same terminology is used ["may be appealed"], the Greek text showed a discrepancy, causing contradictory rulings. The issue reached the Supreme Court, which finally clarified the problem in 2001. In particular, the wording used in Articles 36.1, 37-40 Brussels Convention did not make specific reference to an *appeal*. Instead, the terminus used was the equivalent of "*recourse*". For the purposes of Art. 37 Brussels Convention, the Hellenic Government declared that the "*recourse*" shall be filed at the Court of Appeal. It is an elementary rule in Greek civil practice, that all remedies against first instance decisions are filed with the secretariat of the court rendering the decision challenged. In light of this fact, several lawyers lodged the "*recourse*" there, i.e. at the competent 1st instance court. In the ensuing process before the CoA however, they were in for a surprise: Many appellate courts in the country repeatedly dismissed the "*recourse*" as inadmissible, because it was not filed properly. As a result, courts followed different directions which can be summarized as follows: The first view considered the "recourse" as a blend of 1st and 2nd instance legal remedies;

consequently it reached the conclusion that ordinary rules of appeal proceedings are to be used in the process at hand, with the exception that the "*recourse*" shall be filed with the secretariat of the CoA, which was the competent one according to Art. 37 Brussels Convention. Furthermore, given the fact that the appellant is not obliged to serve the appeal under Greek law, the terms set under Art. 36.2 Brussels Convention & 43.5 Brussels I Reg. relate to the act of filing, not serving the document. The opposite view however confers to the recourse the nature of third party proceedings, thus changing the procedural requirements. In particular, by adopting this position, the appellant is burdened with the duty to serve the document within the term of one or two months respectively. The latter view has finally prevailed.

Following the entry into force of the Brussels I Regulation, the above issue has been made redundant, given that the Greek wording was streamlined to that of the English text. The Greek version of the Brussels I bis Regulation follows suit. However, it still affects the adjacent area of the Lugano Convention. A recent ruling of the Supreme Court bears witness to this assumption [SC 2078/2017, confirming Thessaloniki CoA 1042/2015, published in: Civil Procedure Law Review 2015, 351, note *Anthimos*: Filing does not suffice; service of the appeal to the appellee is imperative, otherwise the remedy is dismissed as inadmissible].

III. The Brussels I bis Regulation

Entering into the era of the Brussels I bis Regulation, we see however a remarkable absence of case law in regards to Chapter III on recognition and enforcement: For more than 4 years after the Regulation entered into force, there isn't a single judgment reported in the country, most notably on Section 3, which established the new system of the application for refusal of recognition and enforcement [Articles 45 et seq.]. In the sole case found, the creditor followed erroneously the previous system of exequatur, which led the court to dismiss the application as inadmissible [lack of locus standi].

Hence, the question: Is Greece the sole exception to other Member States' practice? I could associate the lack of case law with the devastating situation my country suffered over the last years: The Grexit-nightmare, financial instability and capital restrictions could serve as an explanation for this plunge.

However, to the extent of my ability to follow the German literature, I do not see

any application of Chapter III in Germany either. It would be very interesting to find out by the readers of this blog, whether there's already some 'action' in other Member States.

The Council of the HCCH has spoken – the Conclusions & Recommendations are available

The Conclusions & Recommendations (C&R) of the governance body of the Hague Conference on Private International Law (HCCH) (*i.e.* the Council on General Affairs and Policy) are available in both English and French.

The conclusions that are worthy of note are the following:

The Parentage/Surrogacy Project is going ahead. The Council endorsed the continuation of the work in line with the latest report of the Experts' Group (see my previous post here). See C&R 7-12.

The Tourist and Visitors Project is also moving forward. See C&R 14-17.

A meeting of the Experts' Groups on these respective topics will take place in the near future.

As regards the HCCH publications, it should be noted that there were two Guides on family law, one Guide on the Evidence Convention and one WIPO-HCCH Guide on intellectual property that were submitted for approval to Council; the full titles of which are:

- The revised draft Practical Guide on the cross-border recognition and enforcement of agreements reached in the course of family matters involving children
- The revised draft Guide to Good Practice on Article 13(1)(b) of the 1980 Child Abduction Convention

- The draft Guide to Good Practice on the Use of Video-link under the Evidence Convention
- The WIPO-HCCH Guide on "When Private International Law meets Intellectual Property Law – A Guide for Judges"

See also my previous posts here (Child Abduction) and here (Evidence Convention).

The Council approved only one: the WIPO-HCCH Guide. With regard to the other three, the Council decided instead to put into place a procedure to obtain further comments from Members. Importantly, there were concerns expressed by Members regarding the two family law guides, which means that further work is needed. An important issue that might have played a role in these decisions is the massive amount of information that was submitted this year to Council.

Because of the complexity of the conclusions, I prefer to include some excerpts below:

"19. In light of concerns expressed, ***Council did not approve the revised draft Practical Guide [on the cross-border recognition and enforcement of agreements reached in the course of family law matters involving children]***. Council asked that the draft Practical Guide be re-circulated to Members to provide additional comments within a three-month period. All comments received will be made available to other Members on the Secure Portal of the HCCH website. ***The draft Practical Guide would then be revised by the Experts' Group with a view, in particular, to increasing its readability for a wider audience.*** The finalised draft Practical Guide would be circulated to Members for approval. In the absence of any objection within one month, the draft Practical Guide would be taken to be approved; in the case of one or more objections, the draft Practical Guide would be put to Council at its 2020 meeting, without any further work being undertaken. Council requested that the Permanent Bureau immediately notify the Members of any objections."

"24. Council thanked the Working Group and stressed the importance of the ***Guide to Good Practice on Article 13(1)(b)***. In light of concerns expressed, ***Council did not approve*** the revised draft Guide. Council asked that the draft Guide be re-circulated to Members to provide additional comments within a two-month period. All comments received will be made available to other Members on

the Secure Portal of the HCCH website. ***The draft Guide would then be revised by the Working Group.*** The finalised draft Guide would be circulated to Members for approval. In the absence of any objection within one month, the draft Guide would be taken to be approved; in the case of one or more objections, the draft Guide would be put to Council at its 2020 meeting, without any further work being undertaken. Council requested that the Permanent Bureau immediately notify the Members of any objections."

Council was more lenient with regard to the Video-link Guide:

"38. ***Council welcomed the preparation of the draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention*** and thanked the Experts' Group. Council asked that the draft Guide be re-circulated to Members to provide additional comments within a one-month period. All comments received will be made available to other Members on the Secure Portal of the HCCH website. ***The draft Guide would then be revised by the Experts' Group.*** The finalised draft Guide would be circulated to Members for approval. In the absence of any objection within one month, the draft Guide would be taken to be approved; in the case of one or more objections, the draft Guide would be put to Council at its 2020 meeting, without any further work being undertaken. Council requested that the Permanent Bureau immediately notify the Members of any objections."

All this means that these three Guides are not final and readers must await the revised versions, which might or might not need to be submitted to the next meeting of the Council in March 2020. I advise you then to be patient.

The International Business Courts saga continued: NCC First

Judgment – BIBC Proposal unplugged

Written by Georgia Antonopoulou and Xandra Kramer, Erasmus University Rotterdam (PhD candidate and PI ERC consolidator project Building EU Civil Justice)

1. Mushrooming International Business Courts on the Eve of Brexit

Readers of this blog will have followed the developments on the international business courts and international commercial chambers being established around Europe and elsewhere. While many of the initiatives to set up such a court or special chamber date from before the Brexit vote, it is clear that the UK leaving the EU has boosted these and is considered to be a big game changer. It remains to be seen whether it really is, but in any case the creation of courts and procedures designed to deal with international commercial disputes efficiently is very interesting!

The Netherlands was one of the countries where, after the Senate came close to torpedoing the proposal (see our earlier blogpost), such an international commercial court (chamber) was created. The Netherlands Commercial Court (NCC) opened its doors on 1 January 2019, and it gave its first judgment on 8 March 2019 (see 2). Meanwhile, in Belgium the proposal for the Brussels International Business Court (BIBC) seems to be effectively unplugged due to lack of political support (see 3).

2. The First NCC Judgment

As reported earlier on this blog, on 18 February 2019 the Netherlands Commercial Court (NCC) held its first hearing (see here). The NCC' s first case *Elavon Financial Services DAC* v. *IPS Holding B.V. and others* was held in summary proceedings and concerned an application for court permission to privately sell pledged shares under Article 3:251 (1) Dutch Civil Code. The NCC scheduled a second hearing on 25 February 2019, offering the interested parties that did not appear before court the opportunity to be heard. However, these notified the court about their intention not to attend the hearing and leave the application uncontested. As a result, the NCC cancelled the planned hearing and

gave its first judgment granting the requested permission on 8 March 2019 (see here). Our discussion will focus on the NCC's judgment regarding the four main jurisdictional requirements and aims at offering a sneak preview on the Court's future case law on the matter.

(a) Jurisdiction of the Amsterdam District Court

Unlike what the name suggests, the NCC is not a self-standing court but a chamber of the Amsterdam District Court (see the new Article 30r (1) Dutch Code of Civil Procedure (DCCP) and Article 1.1.1. NCC Rules). Therefore, the jurisdiction of the NCC depends on the jurisdiction of the Amsterdam District Court (Article 30r (1) DCCP and Article 1.3.1. (a) and (c) NCC Rules). The Court confirmed its international and territorial jurisdiction based on a contractual choice-of-court agreement in favour of the Amsterdam District Court (Article 25 (1) Brussels Regulation Recast). With regard to the interested parties that were not a party to the agreement, the Court based its jurisdiction on the fact that they either entered an appearance or sent a notice to the Court acknowledging its jurisdiction without raising any objections (Article 26 (1) Brussels Regulation Recast and Article 25 Lugano Convention). Regarding the subject-matter jurisdiction of the Amsterdam District Court, Article 3:251 (1) Dutch Civil Code explicitly places applications for the private sell of pledged assets under the jurisdiction of the provisional relief judge of the District Court.

(b) Civil or commercial matter within the parties' autonomy

Second, the dispute concerned a civil or commercial matter that lies within the parties' autonomy (Article 30r (1) Dutch Code of Civil Procedure and Article 1.3.1. (a) NCC Rules).

(c) Internationality

Third, the NCC solely deals with international, cross-border disputes. So as to define the notion of internationality, the Explanatory Notes to Article 1.3.1. (b) NCC Rules entail a list of alternative, broad criteria that gives the dispute the required internationality (see Annex I, Explanatory Notes). The application in question was filed by Elavon Financial Services DAC, a company established in Ireland, and some of the interested parties are Dutch subsidiaries of a Swiss parent company (Explanatory Notes to Article 1.3.1. (b)). Although, pursuant to the Explanatory Notes, these circumstances were sufficient to establish the

matter's international character, the court went on to address other cross-border elements present in the case. Based on a broad understanding of a dispute's international character, the court underlined that some of the interested parties are internationally active, operate or at least plan to operate business abroad (see also The Hague Court of Appeal, ECLI:NL:GHSGR:2011:BR1381). Similar to the rules of other countries' international commercial courts, the NCC Rules qualify a case as international when the dispute arises from an agreement prepared in a language other than Dutch. Since the documents related to the application were drafted in English, the NCC regarded the English language of the contract as another international element.

(d) NCC Agreement

The fourth requirement for the NCC's jurisdiction is that the parties should have expressly agreed in writing for the proceedings to be in English and according to the NCC Rules (Article 30r (1) Rv and Article 1.3.1. (d) NCC Rules). Since the NCC, unlike the rest of the Dutch courts, conducts proceedings entirely in English and applies its own rules of civil procedure the parties' agreement justifies such a deviation and ensures that the parties wilfully found themselves before the newly established chamber. In the present matter, the parties signed a pre-application agreement and expressly agreed on the NCC' s jurisdiction to hear their case. Although, two of the interested parties were not signatories to that agreement one of them appeared before the court leaving the NCC' s jurisdiction uncontested and the other did not raise any objections against the chamber' s jurisdiction in its communication with the court (see also Article 2.2.1 NCC Rules and the Explanatory Rules).

(3) The Fate of the Belgian BIBC Proposal

As reported on this blog, the proposal to create the Brussels International Business Court was brought before Parliament in May 2018. Interesting features of this proposal are that the rules of procedure are based on those of the UNCITRAL Model Law on International Commercial Arbitration and that cases are heard by three judges, including two lay judges. The proposal has been criticized from the outset (see for some interesting initial thoughts Geert Van Calster's blogpost). As in the Netherlands, many discussions evolved around the fear for a two-tiered justice system, giving big commercial parties bringing high value claims a preferential treatment over ordinary court cases (see for the

discussions in the Netherlands our earlier blogpost). The Belgian Ministry of Justice and Prime Minister presented the English language court as an asset in times of Brexit and efforts were made to adjust the proposal to get it through.

Over the last week it became clear that there is insufficient political backing for the proposal after one of the big parties withdrew its support (see De Standaard). Other – mostly left-wing parties – had expressed their concerns earlier and the proposed court has been referred to as a 'caviar court' and a 'court for the super rich'. But probably the most fierce opponent is the judiciary itself. Arguments range from principled two-tiered justice fears (including for instance by the First President of the Court of Cassation) to concerns about the feasibility to attract litigation in the Brussels courts and the costs involved in establishing this new 'vip court'. The message seems to be: we have enough problems as it is. Referring to the Dutch NCC and the French International Commercial Chamber, the Minister of Justice, Koen Geens, said that withdrawing the BIBC proposal would be a missed opportunity and that he can counter the arguments against the establishment of the BIBC. However, as it looks now it seems highly unlikely that Belgium will be among the countries that will have an international business court in the near future.

Brexit: Three modest proposals

After last Thursday's EU summit, which resulted in a double-barreled "flextension" of the date for Brexit, all cards are on the table again. Insofar, it is worth noticing that the German journalist *Harald Martenstein*, in his weekly column for the Berlin-based "Tagesspiegel", has recently offered three innovative solutions for the Brexit dilemma:

The first one may be called the "one island, two countries" proposal: Great Britain would be split into two parts, one leaving the EU, the other remaining. All Britons would then be granted double citizenship and be free to make up their minds according to their preferences.

The second solution that the columnist proposes takes up the frequently raised

demand for a second referendum that should overturn the first Brexit vote. Well, if there is going to be a second referendum, why not a third or even a fourth one? Thus, *Martenstein* suggests that, in the future, a referendum should be held every year on 2 January; for the remaining part of the year, the United Kingdom would then be either in or out of the EU.

Thirdly and finally, if all else fails, *Martenstein* argues that the UK might simply turn the tables and offer the other Member States the possibility of leaving the EU as well and joining the UK instead, which would then change its name to "Greatest Britain Ever".

Obviously, the proposals made by the columnist are meant as a satirical comment. Yet, there are some elements of reality contained in his mockery: who knows whether, in case of a hard Brexit, Scotland (or Northern Ireland) would stay a part of the UK or whether a new referendum on seceding from the UK – and re-joining the EU – would be organized? And already today, numerous Britons are applying for a double citizenship in order to keep a foothold in the EU. Who knows whether a second referendum on Brexit will take place and whether it will actually settle the matter once and for all? And wasn't the EU summit an attempt by the EU-27 to avoid the Brexit populist contagion from spreading to the continent via the impending EU parliamentary elections? In sum, the situation is increasingly reminiscent of a book title by *Paul Watzlawick*: hopeless, but not serious…