Singapore Court of Appeal Affirms Party Autonomy in Choice of Court Agreements

Professor Yeo Tiong Min, SC (honoris causa), Yong Pung How Professor of Law at Singapore Management University, has kindly provided the following report:

"The Singapore Court of Appeal has recently affirmed the significance of giving effect to party autonomy in the enforcement of choice of court agreements under the common law in three important decisions handed down in quick succession, on different aspects of the matter: the legal effect of exclusive choice of court agreements, the interpretation and effect of non-exclusive choice of court agreements, and the effect of exclusive choice of court agreements on anti-suit injunctions.

In *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65, proceedings were commenced in Singapore in respect of an alleged breach of a commercial sale contract containing an exclusive choice of English court agreement. The agreement was dated before the Hague Convention on Choice of Court Agreements took effect in English law, so the Convention was not engaged. Like many other common law countries, the Singapore courts would give effect to the agreement unless strong cause can be demonstrated by the party seeking to breach the agreement. A complication arose because there had been four previous decisions of the Court of Appeal in the shipping context where proceedings had been allowed to continue in Singapore in the face of an exclusive choice of foreign court agreement because the court had found that the defence was devoid of merits. The claimant's argument that based on these decisions the Singapore court should hear the case because there was no valid defence to its claim succeeded before the High Court.

Sitting as a coram of five on the basis of the significance of the issue, the Court of Appeal unanimously reversed the decision. It decided that the merits of the case were not a relevant consideration at the stage where the court was determining whether to exercise its jurisdiction, and departed from its previous decisions to the extent that they stood to the contrary. While affirming the continuing validity

of the strong cause test, the court placed considerable emphasis on the element of contractual enforcement. Thus, factors that were reasonably foreseeable at the time of contracting would generally carry little or no weight. In particular, the court recast one of the traditional factors in the strong cause test, "whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages", as an inquiry into whether the party seeking to enforce the choice of court agreement was acting abusively in the context of cross-border litigation. In the view of the court, the genuine desire for trial in the contractual forum has been adequately expressed in the choice of court agreement itself, and it is legitimate to seek the procedural advantages in the contractual forum. The court considered that strong cause would generally need to be established by either proof that the party seeking trial in the contractual forum was acting in an abusive manner (which is said to be a very high threshold), or that the party evading the contractual forum will be denied justice in that forum (ignoring the foreseeable factors), for example if war had broken out in that jurisdiction.

The court left open the question whether the same approach would be taken if the choice of court agreement had not been freely negotiated, taking cognisance of situations, especially in the shipping context, where contracting parties may find themselves bound by clauses the contents of which they have had no prior notice. The court expressed the tentative view that as a matter of consistency, the same approach should be adopted.

In *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] SGCA 11, the Court of Appeal was faced with an unusual clause: "This Agreement shall be governed by the laws of Singapore/or People's Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People's Republic of China." The High Court found the choice of law agreement to be meaningless as a purported floating choice of law, and that the choice of court agreement was invalid as it could not be severed from the choice of law agreement. The court then applied the natural forum test and declined to exercise jurisdiction on the basis that China was the clearly more appropriate forum for the dispute. On appeal, the Court of Appeal agreed with the finding that the choice of law agreement was invalid, but held that the choice of court agreement could be severed from the choice of law agreement.

In a prior decision, the Court of Appeal in *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] SGCA 16, had considered a non-exclusive choice of court

clause to be relevant at the very least as a factor in the natural forum test, and that the weight to be accorded to the factor depended on the circumstances of each case. It also considered that there was another possible approach to such clauses based on contractual enforcement principles, which it did not fully endorse as the parties had not raised arguments based on contractual intentions.

In *Shanghai Turbo*, the Court of Appeal had to face this issue squarely, and affirmed that if there is a contractual promise in the non-exclusive choice of court clause, the party seeking to breach the agreement had to demonstrate strong cause why it should be allowed to do so. The court went on to hold that, generally, where Singapore contract law is applicable, the "most commercially sensible and reasonable" construction of an agreement to submit, albeit non-exclusively, to a court is that the parties have agreed not to object to the exercise of jurisdiction by the chosen court. This inference does not depend on there being an independent basis for the chosen court to assume jurisdiction (eg, by way of choice of law agreement), or on the number of courts named in the clause. Conversely, there is generally no inference that the parties have agreed that the chosen court is the most appropriate forum to hear the case.

Thus, practically, where there is a non-exclusive choice of Singapore court clause, in general the Singapore will hear the case unless strong cause (the same test elucidated in *Vinmar*) is demonstrated by the party objecting to the exercise of jurisdiction by the Singapore court, but where there is a non-exclusive choice of foreign court clause, this is merely a factor in the natural forum test, as the party seeking trial in Singapore is not in breach of any agreement. On the facts, the court held that jurisdiction should be exercised because the defendant could not demonstrate strong cause.

It is to be noted these are canons of construction under Singapore law. Under Singapore private international law, the choice of court agreement is governed by the law that governs the main contract unless the parties have indicated otherwise. However, Singapore law will apply in default of proof of foreign law. Moreover, canons of construction may be displaced by evidence of contrary intention. The court left open the question – expressing no tentative view – whether the same approach would be taken for contracts which are not freely negotiated. However, as this is a question of interpretation, the context of negotiation could be a relevant indication of the true meaning of contractual terms.

The third case is on arbitration, but the Court of Appeal also made comments relevant to choice of court agreements. In *Sun Travels & Tours Pvt Ltd v Hilton International (Maldives) Pvt Ltd* [2019] SGCA 10, an injunction was sought to prevent reliance on a foreign judgment obtained in proceedings commenced in breach of an arbitration agreement. The court correctly identified the remedy sought as an anti-enforcement injunction, but nevertheless also discussed the anti-suit injunction because the case was argued on the basis that the injunction sought followed from an entitlement to an anti-suit injunction. The court clarified that an anti-suit injunction would generally be granted to enforce a choice of court agreement unless strong cause is demonstrated why it should be denied, and that there is no need to demonstrate vexatious or oppressive conduct independently. Thus, the law in this area is the mirror image of *Vinmar*. This case is particularly significant for Singapore because statements in the previous Court of Appeal decision in *John Reginald Stott Kirkham v Trane US Inc* [2009] SGCA 32 could be read as suggesting that the breach of contract is merely one factor to consider in determining whether the conduct of foreign proceedings abroad was vexatious.

These common law developments are highly significant in bringing greater consistency with developments elsewhere where party autonomy has come to assume tremendous significance. One is the Hague Convention on Choice of Court Agreements which took effect in Singapore law on 1 October 2016. Two critical aspects of this Convention are that a choice of the court of a Contracting State is deemed to be exclusive unless there are express provisions to the contrary, and that the chosen court should assume jurisdiction unless the choice of court clause is invalid. The second is the Singapore International Commercial Court (SICC) established in 2015. Where there is a choice (whether exclusive or not) of SICC clause, the SICC will assume jurisdiction unless the case is not an appropriate one having regard to the court's character as an international commercial court. In addition, under the Rules of Court, a choice of the Singapore High Court made on or after 1 October 2016 is presumed to include the SICC unless expressly indicated otherwise. In both situations, the common law is not relevant, and to that extent, the practical effects of *Vinmar* and *Shanghai Turbo* will be limited. However, the extent to which anti-suit injunctions will be consistent with the Hague Convention on Choice of Court Agreements remains an open question, and it is certainly an area for watch for further developments."

A more detailed discussion of the cases mentioned above can be found at: https://cebcla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2019.pdf

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Hotel contracts and jurisdiction clauses before Greek courts

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A recent judgment of the Mytilene Court of First Instance raised a very topical issue, related to the acceptance of international jurisdiction by Greek Courts in the case of hotel contracts, nothwistanding the prorogation clause in favour of the court of some other member state (in this case the courts of the Netherlands).

The guarantee contracts

The position of the court was that such a contract (a so-called guarantee) that essentially guarantees the payment of a certain number of hotel rooms by the tour operator, irrespective of the actual use of the reserved rooms, can be characterised as a lease contract for immovable property under the meaning of art. 24 of the Brussels Ia Regulation. The underlying idea is that such a contract is predominantly a lease contract regarding immovable property and the services aspect that coexists with the lease character of the same contract is diluted into the latter. Under this line of arguments, the court found that, nothwistanding the prorogation clause in favour of the courts of the Netherlands, the court of the place of the immovable property (Greece and in particular Mytilene) should be the only competent to hear the case (art. 24 of Brussels Ia Regulation).

The allotment contracts

Interestingly, similar judgments of other courts of touristic destinations in Greece (Dodecanese islands, like Kos and Rhodes or of the Ionian island of Corfu) have issued similar judgments in the past, also in relation to the so-called allotment hotel contracts. Under them, the tour operator reserves rooms spanning from a minimum to a maximum pre-agreed number and agrees to use as many of them as it can and at the same time to lift by an agreed d-day, the reservation for the ones that are not to be used. Therefore, under the allotment contract, the reservation is not "guaranteed" for the totality of the rooms in question, as is the case with the "guarantee" contract. This point is generally downplayed by Greek courts who seem to be in favour of the application of art. 24 par. 1 of the Brussels I Regulation in every hotel contract, by emphasising on the fact that the primary character of such contracts is the lease.

Critique

This approach, although it does generally make sense, it also merits some qualification. To start with, the prorogation clause is a clause to be preserved by the parties. As is well known, one of the two ways to depart from such a clause in the context of Brussels Ia Regulation (the other is the tacit prorogation), is the case of the so-called exclusive jurisdiction of art. 24, the case of immovable property being one of them: This is the case among others "in proceedings which have as their object …tenancies of immovable property". As explained, under Greek case law, it is admitted that this is the case and such contracts are predominantly lease of property contracts. Essentially, the question of pinpointing the legal nature of the guarantee and the allotment hotel contracts, is one of characterisation of private international law. It is generally submitted that characterisation should not be made *lege fori* and it should take into account the meaning of the relevant juridical categories in a wider/ international environment. This been said, it looks that Greek courts tend to do the characterisation *lege fori* in relation to hotel contracts, presumably in order to feel more comfortable with an argumentation made in the context of Greek law only. To be noted that this approach in relation to art. 24 of the Brussels Ia Regulation has a strong support

also by the doctrine, which at least partly, supports the *lege situs* interpretation,[1] which in our case coincides with the *lex fori*. Nevertheless, the suggestion of approaching the matter without a strict *lege situs* or *lege fori* approach, that is under the so-called autonomous interpretation, widely used under the various EU PIL Regulations, should not be underplayed. The Hacker case (C-280/90) is also relevant, to the extent that it excludes the application of art. 24 par. 1 in the case of package holidays. Therefore, the predominantly lease dimension of the hotel contracts under Greek law, should not always be taken for granted. The main question is whether the above described hotel contracts are contracts for lease of property under the above points. As a matter of fact, in hotel contracts, the counter signatory of the hotel owner is not the actual user of the property, but a tour operator who then "sells" a package to the end user. On the other hand, from the hotel owner point of view, the contract is predominantly a lease contract. Another critical point is that in real life, the imbalance of powers between a north European tour operator and a local 25 rooms family hotel can be enormous. Especially In the case that the tour operator simply reserves the totality of the hotel rooms and cancels the reservation without good cause, it puts the hotel owner in the extremely burdensome situation to have to file an action somewhere in Europe, usually in "unknown territory" and under generally uncomfortable conditions. If, therefore the totality of the hotel rooms (or almost the totality) is involved, it can be said that the lease dimension of the agreement should indeed always prevail, and this should generally be the case in guarantee hotel contracts. This should be so no matter if the autonomous or the *lege situs* characterisation is followed. This is not necessarily the case if a small number of the rooms of hotels are reserved or in the case of allotment. In the latter case, perhaps the reservation of the totality of the rooms should again direct us towards the application of art. 24 par. 1, but following a closer examination of the terms of the hotel agreement in order for us to be able to examine if *in casu* the lease dimension again prevails and if the cancellation of the agreement should end up to a damage to the owner, similar to the one it would suffer in the case of cancellation of a guarantee contract. In this context, the rest of the facts of the case, i.e percentage of the rooms in relation to overall number of rooms of the hotel in question, the degree of power imbalance of the parties, the rest of the services involved (see for example Pammer case C-585/08) cannot be ignored.

[1] De Lima Pinheiro, in Magnus/ Mankowski Brussels I Regulation 2nd ed. Seller 2012, art. 22 par. 25.

China’s innovative Internet Courts and their use of blockchain backed evidence

Written by Sophie Hunter

Since 2017, the Supreme People’s Court of China (SPC) has established three internet courts in Hangzhou, Beijing and Guangzhou which are major hubs for e-commerce, the internet industry and the headquarters of giant internet companies like Alibaba and Baidu. With an internet penetration of 54% and approximately 800 million internet users, the introduction of such courts helps to reduce the rising number of online disputes between citizens in a time and cost efficient way thanks to the admissibility of blockchain backed online data as evidence. China’s leading role in internet litigation comes at no surprise since regular courts favor documentary evidence over live testimony and already so much is done online.

This post sheds light on this new model and how it has potential to influence other jurisdictions.

China’s political strategy towards innovation and internet

Like many other countries, China views the Internet as key to its future growth and development opportunities. The Chinese government maintains the world’s most sophisticated internet censorship apparatus called the Great Firewall. After the 2017 cybersecurity law, the level of internet freedom in the country declined as a result of strengthened repressive restrictions on online activities and onerous financial burdens on technology companies, independent media, and bloggers. President Xi Jinping announced plans at the 19th Communist Party Congress in October 2017 to transform China into a “cyber superpower”. China’s Internet Plus strategy, which is part of this initiative, encompasses innovations such as internet courts, in order to actively promote the healthy development of e-commerce, industrial networks, and Internet banking, as well as facilitate the growth of new

industries and the expansion of its companies' international Internet footprint. Although China has recently clamped down on cryptocurrencies, it hailed blockchain development in its five-year plan to 2021.

The new model of specialized courts for internet-related disputes or Internet Courts

According to the Provisions published by the SPC (Provisions on Several Issues Concerning the Trial of Cases by the International Courts) the Internet Courts focus on disputes involving: the online sale of goods and services, lending, copyright and neighboring rights ownership and infringement, domains, infringement on personal rights or property rights via the Internet, product liability claims, and Internet public interest litigation brought by prosecutors. The litigation process is conducted solely online, including the service of legal documents, the presentation of evidence, and the actual trial itself which, to comply with principles of trial in person and direct speech principle, rely on the online video system.

A major advantage of such courts is that it addresses the increasing workload and burden on the judiciary. The average duration of these online trials in Hangzhou in 2017/18 was 28 minutes, and the average processing period from filing to trial and conclusion was 38 days. However, the Hangzhou Internet Court has also been criticized for its lack of impartiality, since it is technically supported by Alibaba and its subsidiaries which are related to most disputes in the region. Other courts have not faced such criticism.

Blockchain mechanisms as a new method to authenticate evidence

Blockchain-related innovations are increasingly becoming relevant to legally authenticate evidence. Since a blockchain generates immutable, time-stamped data which can then be used as an auditable trail, it seems likely that the legal sphere will get heavily influenced in the near future by the security of the blockchain (which is set before any transactions or documentation takes place). China is ahead of the game in this respect. At the 2019 Forum on China Intellectual Property Protection, the president of the Beijing Internet Court (established in September 2018, and has since processed 14,904 cases) reportedly said that the court employs technologies such as artificial intelligence (AI) and blockchain to render judgement.

Since most of the evidence in the cases heard by Internet Courts is electronic data and is stored on the Internet, the SPC outlined in its Provisions that the Internet court can rely on evidence provided by the parties that can be authenticated by electronic signatures, time stamps, hash value verification, blockchain and other tamper-proof verification methods. Before the implementation of the Provisions, the Internet Court in Hangzhou for the first time in China admitted evidence that was authenticated by blockchain technology in an online copyright infringement case, which confirmed that data uploaded to a blockchain platform reflected its source, generation and path of delivery, and were therefore reliable evidence. Since, China's Supreme Court ruled that evidence authenticated with blockchain technology is binding in legal disputes.

Internet courts rely on blockchain to deal with a range of cases such as disputes over liability for Internet tort and other types of Internet-related disputes in the areas of intellectual property rights and administrative litigation. An Internet judge in China's Hangzhou province relied on blockchain to defend Intellectual Property rights because such technology is paramount to safeguard authors' ownership over their work. In August 2018, the same court handed down a judgment on China's first case of unfair competitionin big data products. As Wang Jiangqiao, a judge at the Internet Court, sums up "since blockchain guarantees that data can not be tampered, all digital footprints stored in the judicial blockchain system have legal effect."

Can this model be exported to Western jurisdictions?

With the increasing reliance on internet for both private and business matters, the number of disputes is likely to increase in the near future. Internet Courts like the ones in China could provide a model to improve efficiency, significantly reduce costs and address infringements that may have been too cost-effective to pursue otherwise, while removing at the same time human interference as much as possible, which will make the information stored on blockchain more credible as noted by Qin Pengfei, a paralegal with Shanghai Dabang Law firm. Already the US State of Vermont has passed legislation to allow courts to use data on blockchain as evidence. In 2018, the U.K. Law Commission has announced its plans to review legal frameworks involving smart contracts so that it doesn't lag behind as blockchain legal applications develop. However, no other country has yet actively followed suit with China's model of Internet Courts. One reason copyright lawyer Liu Hongze argues is the fact that the acceptance of evidence

stored on the blockchain may have little impact now on non-internet-related civil or criminal lawsuits. Indeed, blockchain data being legal evidence is relatively new and courts' acceptance of it will depend on individual courts and situations. Nevertheless, what is certain is that China's Internet Courts have a strong potential to launch the reliance of blockchain in the legal sphere, and western countries should watch such developments carefully not to fall behind. The recent backlash on Facebook with the judgment of the Bundeskartellamt demonstrates the need to respond to an ever increasing backlog of internet related disputes which interwind privacy, competition, data, cybersecurity and technology. Specialized courts such as Internet Courts might well be the answer.

Just published: "Towards a global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters" by Hans van Loon, former Secretary General of the HCCH

Hans van Loon, former Secretary General of the Hague Conference on Private International Law (HCCH), has just published an article entitled "Towards a global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters" in the *Collection of Papers of the Faculty of Law,* Niš, No 82, Year LVIII, 2019 (see pp. 15-36). The paper develops a lecture held at the Law Faculty.

The author has provided the following summary of his article (emphasis has been added):

The article traces the history of the "Judgments Project", and provides background on the current negotiations at the Hague Conference on Private International Law, which have resulted in the May 2018 draft Convention, and, it is hoped, will very soon culminate in the adoption of a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. To that end, a Diplomatic Session has been convoked at the Peace Palace in The Hague (the Netherlands) from 18 June to 2 July 2019.

The article starts by recalling the interaction between, on the one hand, the *1971 Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters* and *its Supplementary Protocol*, and, on the other, the *1968 Brussels Jurisdiction and Enforcement Convention* (now: Brussels I recast). The 1968 Brussels Convention drew inspiration both from the 1971 Hague Convention and its Protocol (excluding exorbitant grounds of jurisdiction) and the 1965 Hague Choice of Court Convention. Yet, it went beyond those instruments by (1) providing uniform rules on original jurisdiction; (2) enabling recognition and enforcement generally without review of the original grounds of jurisdiction; and (3) benefitting from a mechanism of uniform interpretation by the Court of Justice of the European Union (CJEU). The success of the Brussels Convention, however, contributed to a lack of interest in the 1971 Convention, which never came off the ground. Other reasons were the 1971 Convention's alleged discriminatory effect vis-à-vis companies and persons not domiciled in Europe and the issue of bilateralisation – the 1971 Convention required for its operation a supplementary agreement between any two Contracting States, an issue that has come up again in the current negotiations.

In 1992, having considered the possibility of bilateral negotiations with EEC Member States, the USA made a proposal to the Hague Conference for a "mixed" Convention. The idea was that this instrument would provide a list of permitted grounds of jurisdiction and a list of prohibited grounds of jurisdiction, while leaving a "grey area" that would allow Contracting States to establish additional grounds of original jurisdiction and provisions on recognition and enforcement under national law. With the "mixed" Convention idea as a start, negotiations took place between 1996-2001.They ultimately led, via a preliminary draft Convention, to an "Interim text" adopted at a diplomatic conference in 2001. The dynamics of those negotiations were very much determined by the transatlantic dimension, with different, and as it turned out, incompatible strategic objectives (the US

being interested in securing recognition and enforcement of its judgments in Europe, and non-discrimination regarding direct grounds of jurisdiction for US-based companies and persons, and Europe, in urging the US to reduce the reach of jurisdiction of its courts regarding Europe-based companies and persons). The resulting text left many issues unresolved, including: (1) (commercial) activity as a ground of jurisdiction (2) the use of the internet, including e-commerce, (3) the protection of weaker parties, in particular consumers and employees, (4) intellectual property (IP), (5) the issue of bilateralisation and (6) the relationship with the Brussels/Lugano texts. It was therefore decided to take a step back, and focus first, separately as with the 1965 Convention, on choice of court agreements.

The article then discusses how the 2005 Choice of Court Convention was able to avoid some of these six major issues, and how it dealt with the remaining ones. Importantly, the Choice of Court Convention found a solution for its relationship to the Brussels/Lugano texts (it also had a substantial impact on the Brussels I recast). In fact, the 2005 Convention provides an important source of inspiration for the 2018 draft, which can be seen, for example, in the definition of its substantive scope, and its provisions on recognition and enforcement, including of judgments awarding punitive damages. However, the coming negotiations are still faced with several of the aforementioned major issues, and some new ones.

Meanwhile, however, the dynamics of the negotiations have changed. Whereas in the past the transatlantic dimension was predominant, the current negotiations have taken on a much more global character, China and other (formerly) "emerging" States having become more actively involved. In some respects, this adds to the difficulty of reaching agreement (for instance regarding IP). On the other hand, the current negotiations are limited to recognition and enforcement only. Yet, indirectly, the difference in approach to judicial jurisdiction between the US – where this is a constitutional matter, with a focus on the relationship between the *defendant and the forum* (the article discusses recent developments in the case law of the US Supreme Court on international jurisdiction) – and most other States – where the focus is on the relationship between the *subject matter of the litigation and the forum* – has reappeared in the current negotiations.

The article discusses how this is reflected in the draft, in particular in art. 5, in its provisions on contracts, torts, the internet, intellectual property and consumers and employees.

It is noted, with some regret, that as a result, the torts jurisdiction provision is very limited, indeed even narrower than its predecessor in the 2001 Interim text. It is hoped that the final text will make room for recognition and enforcement of judgments emanating from the court of the place where the injury arose, at least if the defendant could reasonably foresee that its conduct would give rise to the harm in that State. This would be important, for example, concerning civil judgments resulting from cross-border environmental litigation. Regarding IP, the May 2018 draft does not take a firm position, and it even leaves open the possibility of a complete exclusion. That would be a step back in comparison with the Choice of Court Convention, so hopefully it will be possible to avoid such a far-reaching result.

Finally, a number of other, including novel, features of the draft are highlighted. Some concern is expressed about the addition of "situations involving infringements of security or sovereignty of [the requested] State" as a ground of refusal of recognition and enforcement (art. 7 (1) (c)), because that may invite a review of the merits of the judgment, which is in principle, rightly, prohibited (art. 4(2)). Interesting novelties include a provision which gives the requested court a certain flexibility in dealing with judgments that are subject to review in the State of origin (art. 4 (4)); the exclusion of *forum non conveniens* at the stage of recognition and enforcement (art. 14 (2)), and a tentative provision dealing with "common courts", such as the future Unified Patent Court art. 4 (5).

The article concludes by expressing the hope that the Convention will avoid the complexity of its 1971 predecessor, notably by avoiding its bilateralisation system, or at least by drafting it in such a manner that it does not make the ratification unattractive or its application unduly difficult. In any event, the Convention will fulfill a long-felt need for a global multilateral framework for the recognition and enforcement of civil and commercial judgments, and thereby contribute to the global transnational legal order.

First Meeting of the Young Private International Law Research Network

Maximilian Schulze, an assistant of Dr. Susanne Gössl, LL.M. (Tulane), University of Bonn, has kindly provided us with the following report.

On 5 April 2019, the first meeting of the newly established research network "Young Private International Law in Europe" took place at the University of Würzburg, Germany. The network intends to create a Europe-wide exchange at 'junior faculty' level (predoc/postdoc) in the context of various comparative Private International Law (PIL) projects. The first research project and meeting in Würzburg deal with the "Recognition/Acceptance of Legal Situations". This topic was selected in view of the recent series of decisions by the CJEU regarding international name law (see, e.g. CJEU C-148/02 – *Garcia Avello*) and, most recently, same-sex marriage (CJEU C-673/16 – *Coman*)) and a parallel discussion which evolved in the context of the case law of the ECtHR, in particular regarding the recognition of adoptions, same-sex marriages and surrogacy. In order to contribute to a pan-European understanding of 'acceptance' of legal situations related to a person's status in a cross-border context to enhance the free movement of EU citizens and protect their fundamental rights regarding private and family life, the aforementioned first project of the research network compares the reception and implementation of the CJEU and ECtHR case law in 16 EU Member States (Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Spain, and Sweden).

The meeting, organised by *Susanne Lilian Gössl*, Bonn, and *Martina Melcher*, Graz, comprised a public and a workshop session. The meeting was kindly supported by the German Research Foundation (Deutsche Forschungsgemeinschaft – DFG) as well as by the prior meeting of the German "Conference for Young PIL scholars" at the University of Würzburg.

The public session

Martina Melcher and *Susanne Lilian Gössl* opened the public session with an

overview of the project and outlined the results of the comparative study. Martina Melcher highlighted the aim of the project as an "academic offspring" for young scholars to facilitate their comparative law and PIL research interests by setting up a network for young scholars. Methodologically, the network selects a specific topic – in this project/meeting the "Recognition/Acceptance of Legal Situations" – on which participants first submitted national reports, which then led to a comprehensive comparative report and analysis, which will be finalized and published in 2020. Susanne Gössl further specified the network's approach on how the individual reports are to be composed. This is to take CJEU and ECtHR case law in all fields of the law where member states' awareness is high (e.g. name law, surrogacy and same-sex marriage) as a starting point and then look at the individual states' implementations, including in particular the recognition by judgments and by rules of PIL. As the network is not limited to international family law, future meetings and comparative reports will also deal with commercial law topics.

Marion Ho-Dac, Valenciennes, then set out the methodological approaches to recognition. She highlighted the increasing importance of cross-border continuity of status in view of the circulation of people and recent refugee movements. When looking at the Member States' approaches, she stressed two considerations one has to bear in mind: the legal technique of recognition and the underlying legal policy thereof. She then set of the three different approaches: traditional PIL methods, procedural recognition and alternative methods (e.g. uniform law on supranational level or a mutual recognition system at EU level). However, she concluded that none of these were perfect methods. In his responsio, *Tamás Szabados*, Budapest, doubted that legislators always have a clear methodology in mind. He exemplified this by the Hungarian PIL Act, in effect since 2018, in which no general theory of recognition is followed, although the responsible committee was aware of the recognition questions discussed.

Sarah den Haese, Gent, then referred to a 2014 academic proposal on the recognition of names that was not acted upon by the Commission and analysed its weaknesses which need addressing for a future proposal to be successful. Firstly, any proposal would require a harmonisation of conflict of laws rules. Secondly, she proposed recognition without a conflict of laws test and no control of the substantive law subject to a very narrow public policy exception only. *Tena Hoško*, Zagreb, responded by setting out the conflict rules implemented in

Croatia. Although academic proposals had been submitted, the Croatian legislator did not follow them but rather opted to copy the German conflicts rule (Art. 10 EGBGB). Although she exemplified certain weaknesses in this newly implemented approach (i.e. the issues of dual citizenship and renvoi), she concluded that the new rules are a huge step forward.

The workshop session

The public session was followed by a workshop session in which the preliminary results of the draft comparative report on "Recognition/Acceptance of Legal Situations" were discussed among the project participants and a few other interested parties. The workshop contained four parts, each initiated by a short introduction summarising the major findings and followed by an in-depth discussion among the participants.

In the first part, the general awareness was addressed. In her introduction, *Giulia Vallar*, Milan, pointed out an academic awareness in many Member States that a comprehensive overhaul of the rules of PIL is required. This awareness is also registered by the legislator, however mostly by countries that were involved in CJEU cases. She went on to set out the areas of law in which awareness for recognition is high (e.g. name law and same-sex marriages or partnerships). She concluded that based on their awareness of the issue, the analysed Member States can be subdivided into those involved in CJEU cases, those indirectly influenced by CJEU case law and those influenced by the ECtHR.

The second part, focusing to the legal methodology employed for recognition, was introduced by *Katarzyna Miksza*, Vilnius. She pointed out and illustrated the huge variety of methods of recognition detected by the draft comparative report by reference to national laws. In the subsequent discussion it was pointed out that it would be rather difficult to reconcile the different kinds of approaches to recognition.

Thirdly, the substantive requirements for recognition were discussed. In their presentation, *María Asunción Cebrián Salvat* and *Isabel Lorente Martínez*, Murcia, highlighted the (general) prohibition of a *revision au fond* as a starting point before outlining three hotspots of the public policy exception (surrogacy, same sex marriages or civil partnerships, and name law) and further challenges for recognition, in particular *fraus legis* and the legitimate expectations of the

parties, in the various countries. In the subsequent discussion it was pointed out that the comparative report also shows that the public policy exception does not only function as a bar to recognition, but can, as well as human rights, require and facilitate recognition.

Finally, the formal requirements for recognition were discussed. *Florian Heindler*, Vienna, initially drew attention to the difficulty of distinguishing between formal and substantive requirements and stated the definition of the comparative report of the former as requirements relating to form (i.e. of documents) as well as procedural requirements (regarding certain additional procedural steps). Also in the subsequent discussion the challenging identification and categorisation of requirements was brought up.

In the final discussion, it was immediately agreed that the project was until now only able to scratch the surface of the issues and further work and discussions were required and promising. Therefore, a continuation of the project was agreed on and a further meeting is already being planned.

The Centre for European Policy on the Proposal for an Assignment Regulation

The Centre for European Policy (CEP) in Freiburg (Breisgau) is the European-policy think tank of the German non-profit foundation “Stiftung Ordnungspolitik”. It has just released its policy brief on the Proposal COM(2018) 96 of 12 March 2018 for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims. The CEP’s main conclusion reads as follows:

“The general rule, that the applicable law is that of the assignor’s habitual residence, strengthens legal clarity and thus legal certainty. However, it increases transaction costs and complexity. For syndicated loans, an exception to

the general rule should be added to avoid the application of various laws. To avoid legal uncertainty, the Regulation must clarify what is meant by the habitual residence 'at the material time' and should only allow overriding mandatory provisions of the law of the Member State in which the assignment has to be or has been performed. The Regulation's rules on conflict of laws overlap with those of other EU directives and regulations. This results in inconsistencies."

The full text of the policy brief is available here. See also the earlier posts on this topic by Robert Freitag and by Leonhard Hübner.

The 2nd Dialogue on International Family Law

On 10 and 11 May 2019, the 2nd Dialogue on International Family Law took place at the University of Marburg (Germany). The dialogue serves as a forum for the exchange between high-level practitioners and academics active in the field of international family law; it is organised on an annual basis by Professors *Christine Budzikiewicz* (Marburg) and *Bettina Heiderhoff* (Münster), Dr. *Frank Klinkhammer*, a judge at the German Federal Supreme Court and an honorary professor in Marburg, and Dr. *Kerstin Niethammer-Jürgens*, a renowned family lawyer in Potsdam/Berlin. This year's meeting focused on the well-being of the child in international family law, the pending revision of the Brussels II*bis* Regulation and conflict of laws with regard to matrimonial property.

The conference was opened by Professor *Rüdiger Ernst*, a judge at the Kammergericht (Court of Appeals of Berlin), who described and analysed the various standards regarding the procedure to hear a child in international cases, with a special focus on the current state of play concerning the Brussels II*bis* Regulation. The second presentation on the well-being of the child in the procedural law of the EU (the Brussels II*bis* and the Maintenance Regulation) was given by *Bettina Heiderhoff*, who, in light of an intense scrutiny of the case-law, posed the critical question as to whether judges actually give weight to the well-

being of the child in determining jurisdiction or whether they merely pay lip-service to this overarching goal. In particular, *Heiderhoff* focused on the question to which degree concerns for the well-being of children had an influence on determining their habitual residence. The second panel was started by Professor *Anatol Dutta* (University of Munich), who dealt with issues of *lis pendens* and annex jurisdiction in international family procedures – apparently, this is another area where more coherence between the various European regulations would be highly desirable. Then, Dr. *Andrea Schulz* (European Commission) analysed the new system of enforcement of judgments in the framework of the revised Brussels II*bis* Regulation, which, by abolishing *exequatur*, shows a discernible influence of the paradigm shift already achieved by Brussels I*bis*. At the moment, the English text is being finalised; it is to be expected that the revised version will be adopted by the Council of Ministers at the end of June 2019.

On the second day of the conference, Professor *Dirk Looschelders* (University of Düsseldorf) gave a presentation on the substantive scope of the Matrimonial Property Regulation (and the Regulation on Property Aspects of Registered Partnerships). The fact that there is no common European definition of the concept of "marriage" leads to numerous difficulties of characterisation; moreover, European courts will have to develop autonomous criteria to draw the line between matrimonial property regimes and adjacent legal areas (contracts, partnerships) not governed by the Regulation. Subsequently, Dr. *Jens Scherpe* (University of Cambridge) talked about forum shopping before English courts in matrimonial property cases. He focused on determining jurisdiction, calculating alimony and maintenance under English law and the thorny issue of under which circumstances English courts will accept matrimonial contracts as binding. Finally, *Frank Klinkhammer* gave a survey on recent case-law of the Federal Supreme Court in cases involving international agreements on surrogacy, in particular regarding the Ukraine. In a recent decision of 20 March 2019 (XII ZB 530/17), the Court had decided that a child who, after being born by a Ukrainian surrogate mother, was then brought to Germany as planned by all parties did not have its first habitual residence in the Ukraine, but in Germany, which, in effect, leads to consequence that the German designated mother has no other option but to adopt the child if she wishes to establish a family relationship. This led to an intense discussion about the principle of recognition and the determination of habitual residence (again). The conference proceedings will be published by Nomos. The next dialogue will take place on 24-25 April 2020 in Münster.

Patience is a virtue – The third party effects of assignments in European Private International Law

Written by Leonhard Huebner, Institute for Comparative Law, Conflict of Laws and International Business Law (Heidelberg University)

The third-party effects of the assignment are one of the “most discussed questions of international contract law” as it concerns the “most important gap of the Rome I Regulation”. This gap is regrettable not only for dogmatic reasons, but above all for practical reasons. The factoring industry has provided more than 217 billion euros of working capital to finance more than 200,000 companies in the EU in 2017 alone. After a long struggle in March of 2018, the European Commission, therefore, published a corresponding draft regulation (COM(2018)0096; in the following Draft Regulation). Based on a recent article (ZEuP 2019, 41) the following post explores whether the Draft Regulation creates the necessary legal certainty in this economically important area of law and thus contributes to the further development of European private international law (see also this post by Robert Freitag).

Legal background and recent case law

Although Article 14 of the Rome I Regulation provides for a rule governing the question regarding which law is applicable to the voluntary assignments of claims, it is the prevailing opinion that the third party effects of assignments are not addressed within the Rome I Regulation. According to Article 27 (2) of the Rome II Regulation, the European Commission was under the obligation to submit a report concerning the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. Said report should have been

published no later than 17 June 2013. In March 2018, almost nine years after the Rome I Regulation came into force, the Commission finally presented said report in form of the Draft Regulation subject to this article. The practical importance and the need for a harmonized European approach have also been demonstrated by recent case law proving the rather unsatisfactory status quo in European PIL. Two recent decisions of the Higher Regional Court of Saarbrücken (dated 8 August 2018 – 4 U 109/17) and of the Norwegian Supreme Court (see IPRax 2018, 539) gave striking examples of how the diverging requirements for the effectiveness of the assignment vis-à-vis third parties lead to different solutions within the respective PIL rules of the member states. The preliminary reference to the ECJ of the Higher Regional Court of Saarbrücken concerns a multiple assignment, while the ruling of the Norwegian Court of Justice deals with the question whether unsecured creditors of the assignor can seize the allegedly assigned claims of the assignor in insolvency (see also this post by Peter Mankowski).

The material scope of the proposed regulation

Art. 5 of the Draft Regulation determines the material scope of application of said Draft Regulation with regard to the effectiveness of an assignment as well as its priority vis-à-vis third parties. The effectiveness vis-à-vis third parties is regularly determined by registration or publication formalities (lit. a), while priority conflicts for the assignee arise vis-à-vis various persons. Lit. b) concerns multiple assignments, while lit. c) regulates the priority over the rights of the assignor's creditors. In addition, lit. d) and e) assign priority conflicts between the assignee and the rights of the beneficiary of a contract transfer/contract assumption and a contract for the conversion of debts to the Draft Regulation.

In essence, Art. 5 of the Draft Regulation covers notification requirements to the assignee. Most legal systems require a publicity act for binding effects vis-à-vis third parties and the debtor, such as a notice of assignment to the debtor or a registration in a public register. Whereas under German law the assignment becomes effective immediately between the assignor and the assignee as well as against third parties, in other jurisdictions this only applies once the debtor has been notified of the assignment (*signification* in French law pursuant to former Art. 1690 of the Code civil or within the framework of legal assignment in the UK).

Connecting factor: habitual residence of the assignor combined with sectorial exceptions

The connecting factors employed by current national PIL rules considerably vary between the member states. In principle, three connecting factors compete with each other: the habitual residence of the assignor, the law applicable to the transfer agreement (assignment ground statute) and the law applicable to the transferred claim. Furthermore, the law at the debtor's domicile might also be considered an important factor.

Art. 4 (1) of the Draft Regulation unties this gordic knot as it specifies the law of the country in which the assignor has his habitual residence "at the relevant time" as the primary connecting factor. The goal of the European Commission is to create legal certainty and, above all, to promote cross-border trade in claims. By way of sectoral exceptions, the law of the transferred claim is to be applied if either (i) "cash collateral" credited to an account or (ii) claims from financial instruments are transferred (Art. 4 (2) of the Draft Regulation).

A downside of the link to the law of habitual residence is its changeability, which may lead to a *conflit mobile*. By altering the connecting factor, the applicable law may also change leading to legal uncertainty. To overcome such conflict, so called meta conflict of laws rules are also provided for in the Draft Regulation. In this case, it is a matter of determining the relevant point in time in order to make a viable connection. This rule has been implemented in Art. 4 (2) of the Draft Regulation.

An unsolved problem is the determination of the "material point in time" cited in Art. 4 (1) of the Draft Regulation. Accordingly, the third parties' effects are determined by the assignor's habitual residence at the relevant time. However, neither a recital nor the catalogue of Art. 2 of the Draft Regulation give an adequate definition of this relevant point in time so far. It is therefore advisable to replace the term "at the relevant time" with "at the time of conclusion of the assignment contract" in the final regulation. This is also reflected in the EP's legislative resolution of 13 February 2019 (P8_TA-PROV(2019)0086, p. 12). The advantage of this clarification would be that the same point in time would be relevant in the legal systems of the member states which follow the principle of separation as well as those which follow the principle of unity.

A step forward?

The Draft Regulation would represent a major step forward in the trade of cross-border receivables in the EU. It closes a large gap within European PIL, while at the same time aiding EU member states to partly adapt their domestic legal system accordingly. Even if the European Commission did not comply with the (unrealistic) deadline for the review cited in Art. 27 (2) of the Rome I Regulation, the legal debate made this essential progress possible demonstrating the EU's ability to reach compromises. Although the Draft Regulation solves many problems, it may also raise new ones. That is again good news for lawyers interested in PIL. Nevertheless, the enactment of the Draft Regulation would eventually answer "one of the most frequently discussed questions of international contract law". The old saying "patience is a virtue" would be proven right again.

This blog post is a condensed version of the author's article in ZEuP 2019, 41 et seqq. which explores the new Draft Regulation in more detail and contains comprehensive references to the relevant literature.

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.