Conference Report from Luxemburg: On the Brussels Ibis Reform

On 9 September 2022, the Max Planck Institute for Procedural Law Luxembourg hosted a conference on the Brussels Ibis Reform, in collaboration with the KU Leuven and the EAPIL.

The Brussels Ibis Regulation is certainly the fundamental reference-instrument of cross-border judicial cooperation in civil matters within the European Union. Since its establishment in 1968, it has been constantly evolving. At present, the European Commission is required to present a report on the application of the Regulation and to propose improvements. Against this background, a Working Group was set up within the network of the European Association of Private International Law (EAPIL) to draft a position paper. The group is led by Burkhard Hess (MPI Luxembourg) and Geert van Calster (KU Leuven). Members of the working group answered a questionnaire, reporting the application and possible shortcomings of the Brussels Ibis Regulation in their respective jurisdictions.

The topics of the conference were based on the 19 reports that were received from 16 working group members and 3 observers. Additional experts presented topics ranging from insolvency proceedings to third state relationships. The aim of the conference is to prepare a position paper. The paper will be presented to the European Commission to advise it on the evaluation process. EAPIL Members are invited to join the Members Consultative Committee (MCC) of the EAPIL Working Group on reforming Brussels Ibis.

After welcome notes by Burkhard Hess (MPI Luxembourg), Andreas Stein (Head of Unit, DG JUST – A1 "Civil Justice", European Commission European Commission, connected via Video from outside), Gilles Cuniberti (University of Luxemburg/EAPIL) and Geert van Calster (KU Leuven), the first panel, chaired by Marie-Élodie Ancel, Paris, focused on the role and scope of the Brussels Ibis Regulation in European Procedural Law. Dário Moura Vicente, Lisbon, highlighted the Regulation's indispensable function as a "backbone" of European civil procedural law, reaching far beyond civil and commercial matters into e.g.

family law, in order to increase consistency. Room for improvement in this respect was identified, inter alia, for the definition of the substantive scope, in particular in relation to arbitration, the subjective or personal scope, in particular in relation to third state domiciled defendants, and for coordinating the relationships with other instruments such as the GDPR. Following up on the latter aspect, Björn Laukemann, Tübingen, analysed the delineation of the Regulation and the European Insolvency Regulation with a view to annex actions and preventive restructuring proceedings. No imminent need for textual reform was seen for the former, whereas for the latter suggestions for amendments of the Recitals were submitted. Vesna Lazic, Utrecht/The Hague, discussed the controversial judgment of the ECJ in London Steamship that certainly put again on the table the question whether the arbitration exception of the Regulation should be drafted more precisely. Whereas some argued that the large differences in the arbitration laws of the Member States would not allow any unifying approach based on notions of mutual trust, others held that there was some sense in the ECJ's attempt not to get blocked the Spanish judgments in the UK via arbitration. As to the suggestion of a full-fledged European Arbitration Regulation, one reaction was that this might result in unintended consequences, namely exclusive external competence by the EU on arbitration. Further, the question came up whether in light of the ECJ's judgment in London Steamship its earlier decision in Liberato should be rectified in the reform. In Liberato, the ECJ held that a violation of the lis pendens rules of the Regulation does not amount to a ground for refusal of recognition whereas in London Steamship the Court held that the lis pendens rules formed part of the fundamental principles of the Regulation to be respected under all circumstances. Speaking of lis pendens, another question in the discussion was whether a backbone instrument like the Brussels Ibis Regulation would or should allow *de lege lata* transferring certain core elements, such as the rules on lis pendens, to other instruments without any rules on lis pendens, such as the European Insolvency Regulation. The ECJ in Alpine Bau GmbH had rejected the application of Article 29 Brussels Ibis Regulation by way of analogy, as it considered the EIR as a special and distinct instrument of its own kind, so the question was whether analogies from the "backbone" should be encouraged expressly where appropriate in the concrete constellation.

The second panel, chaired by Burkhard Hess, dealt with collective redress. François Mailhé, Picardy, Stefaan Voet, Leuven, and Camelia Toader, Bucharest,

discussed intensely the cross-border implications of the new Representative Actions Directive, in particular the potential need for specific heads of jurisdiction, as the Directive was described as subtly seeking to encourage pan-European actions but at the same time leaves a number of options to the Member States. Obviously, this means that provision and allocation of – ideally one-stop – jurisdiction would be of the essence, e.g. by extending the forum connexitatis of Article 8 (1) Brussels Ibis Regulation to connected claimants, possibly even for third state domiciled claimants. However, concerns were formulated that the Brussels Ibis Regulation should not be "politicized" (too strongly). In addition, the importance of other aspects were highlighted such as coordinating and consolidating proceedings, the delineation of settlements and court judgments in respect to court-approved settlements (probably to be characterised as judgments) and the essential role of funding. The overall tendency in the room seemed to be that one should be rather careful with (at least large-scale) legislative interventions at this stage.

The third panel, chaired by Thalia Kruger, Antwerp, focused on third state relations. Chrysoula Michailidou, Athens, discussed potential extensions of heads of jurisdiction for third state domiciled defendants, in particular in respect to jurisdiction based on (movable) property and a forum necessitatis. Alexander Layton, London, focused on the operation of Articles 33 and 34 and reiterated the position that discretion of the court to a certain extent was simply inevitable, also in a distributive system of unified heads of jurisdiction, as it is provided for e.g. in these Articles, in particular by the tool of a prognosis for the chances of recognition of the future third state judgment ("Anerkennungsprognose") in Article 33(1) lit. a and Article 34(1) lit. b, and by the general standard that the later proceedings in the Member State in question should only be stayed if the Member State court is satisfied that a stay is necessary for the proper administration of justice (Articles 33(1) lit. b and 34(1) lit. c). Further, the question was posed why Articles 33 and 34 would only apply if the proceedings in the Member State court are based on Articles 4, 7, 8 or 9, as opposed to e.g. Articles 6(1) and sections 3, 4 and 5 of Chapter II. The author of these lines observed that relations to third states should be put on a consistent basis including all aforementioned aspects as well as recognition and enforcement of such judgments. Further, need for clarification, e.g. in the respective Recitals, was identified for the question whether there is an implicit obligation of the Member State courts not to recognize third state judgments that violate Articles

24, 25 and the said sections 3, 4 and 5 of Chapter II. This could be framed as a matter of the Member States' public policy, including fundamental notions of EU law (see ECJ in Eco Swiss on another fundamental notion of EU law as an element of the respective Member State's public policy). The central point, however, was the suggestion to correct the latest steps in the jurisprudence of the ECJ towards allowing double exequatur, if a Member State's lex fori provides for judgments upon foreign judgments (see ECJ in H Limited). Options for doing so would be either adjusting the relevant Recitals, 26 and 27 in particular, or the definition of "judgment" or inserting another specific ground for refusal outside the general public policy clause, thereby in essence restating the principle of "no double exequatur" within the mechanics of the Regulation as understood by the ECJ, or limiting the effects of a judgment upon judgments for the purposes of the Brussels system, a method (altering the effects of a judgment under its lex fori) employed by the ECJ in Gothaer Versicherung in respect to other effects of a judgment from a Member State court, or, finally, by introducing an entire set of rules on the recognition and enforcement of third state judgments. In the latter case, all measures would have to be coordinated with the latest and fundamental development within the EU on third state judgments, namely the (prospective) entering into force of the HCCH 2019 Judgments Convention on 1 September 2023. Anyone who is interested in what this Convention could offer should feel warmly invited to participate and discuss, inter alia, the interplay between the Brussels and the Hague systems at the Bonn / HCCH Conference on 9 and 10 June 2023.

The next panel, chaired by Geert van Calster, related to certain points on jurisdiction and pendency to be reformed. Krzystof Pacula, Luxemburg, discussed Articles 7 no. 1 and no. 2 and, inter alia, suggested abstaining from a general reformulation of these heads of jurisdiction but rather opted for concrete measures for improving the text in light of lines of case law that turned out to be problematic. Problems identified were, inter alia, the delineation of the personal scope of Article 7 no. 1 in light of the principle of privity of contracts ("Relativität des Schuldverhältnisses") and the concurrence of claims under Article 7 no. 1 and no. 2. In this regard, it was discussed whether both of these heads should allow to assume annex competence in regard to each other. Marta Requejo Isidro, Luxemburg, discussed the intricate interplay of Article 29 and 31 and, inter alia, considered increased obligations of the two Member State courts involved to coordinate conclusively the proceedings, for example by inserting certain time

limits and, in case only the non-designated court is seized, powers to order the parties to institute proceedings at the designated court within a certain time limit. Otherwise the court seized should decline jurisdiction finally. Victória Harsági, Budapest, discussed the implications of the judgment of the ECJ in Commerzbank in respect to balancing consumer protection with foreseeability when the consumer, after a Lugano Convention State court has been seized with the matter, transferred its domicile to another (Lugano Convention) State, thereby creating the only international element of the case. Burkhard Hess dealt with reforming Article 35 of the Brussels Ibis Regulation after the ECJ in Toto and observed that there was no express hierarchy between measures under that Article and measures by the court of the main proceedings, and the Court did not infer any such hierarchy in its decision. The suggestion, therefore, was to think about introducing express coordination, be it along the lines of Rules 202 et seq. of the 2020 European Model Rules of Civil Procedure, be it along those of Article 6(3) of the 2022 Lisbon Guidelines on Privacy (on these see here and here), be it along those of Article 15 (3) Brussels IIter Regulation. Good reasons for the latter approach were identified, and this led back to the fundamental question to what extent the notion of a coherent "Brussels system" might allow even *de lege lata* not only to apply concepts from the Brussels Ibis Regulation, the "backbone" of that system, to other instruments by analogy, but also vice versa from the latter instruments to the former.

The last panel started with a submission by Gilles Cuniberti, Luxemburg, to remove Article 43, based on a number of reasons, as the Brussels I Recast aimed at removing "intermediate measures" such as exequatur, which rendered it inconsistent to uphold the intermediate measure foreseen in Article 43 – service of the certificate of Article 53 upon the judgment debtor. This was held to be all the more so, as this measure would primarily protect the debtor, already adjudged to pay, to an unjustifiable degree. Marco Buzzoni, Luxemburg, discussed the adaptation of enforcement titles under Article 54, a provision that was held to be one of the major innovations of the last Recast but turned out to be of little practical relevance. A similar provision had been proposed in the preparatory works for the HCCH 2019 Judgments Convention (February 2017 Draft Convention, Article 9), but was ultimately dropped, as opposed to the 2022 Lisbon Guidelines on Privacy (see its Article 12(2) Sentence 2). Vesna Rijavec, Maribor (unfortunately unable to attend for compelling reasons, but well represented by the chair, Geert van Calster) presented proposals on refining

Articles 45(1) lit. c and d, mainly arguing that these should connect to pendency (as had already been proposed by the Heidelberg Report for the Recast of the Brussels I Regulation).

An overall sense of the conference was that no radical revolutions should be expected in the forthcoming Recast, which should be taken as another sign for the overall success of the backbone of the Brussels system, but that there was quite some room for specific and well-reasoned improvements. The conference contributed to preparing these in a truly excellent and inspiring way and in outstanding quality.

Enforceability of CAS awards in Greece – a short survey

Introductory remarks

Applications to recognize and enforce CAS awards are not part of Greek court's daily order business. About ten years ago, the first decision of a Greek court was published, which accepted an application to declare a decision of the Court of Arbitration for Sports (CAS) enforceable. For this ruling, see here (in English), and here (in Spanish). Two recent decisions are added to this short list of judgments, where the corresponding decisions of the above sports arbitration body were again declared enforceable

(Piraeus Court of first instance, decision published on 28. July 2021, and Thessaloniki Court of first instance, decision published on 26. April 2022, both unreported).

A summary of the new decisions

The first decision concerned a company of sport? management located in France, who initiated CAS proceedings against a football team in Greece due to non-

payment of agreed fees for the transfer of a football player. The CAS granted the application and ordered the payment of 45.000 Euros and 16.391 CHF for the costs of the arbitral proceedings (case number 2018/O/5850).

The second decision concerned two accredited sports managers from Argentina against an Argentinian football player who terminated unilaterally the agreement, hence, he failed to abide by the conditions of the contract signed with the managers. They initiated arbitration proceedings before the CAS, which ordered the payment of 1 million Euros and 49.585,80 CHF for the costs of the arbitral proceedings (case number 2014/O/3726). The player appealed unsuccessfully before the Swiss Supreme Court (no reference available in the text of the decision).

Main findings

From the assessment of the aforementioned decisions, it is possible to draw the following conclusions:

- **NYC: The ruler of the game**. The application of the New York Convention regarding requests to recognize CAS awards is undisputable and common to all Greek decisions.

- **National rules of Civil procedure.** From the combination of Articles 3 and 4 NYC, and those of the Greek Code of Civil Procedure (Book on voluntary jurisdiction), it is clearly concluded that the true meaning of Articles 3 and 4 of the above convention is that, the one who requests the declaration of enforceability of a foreign arbitral award, is required to present the relevant decision and the arbitration agreement, either in original or in an official copy, as well as an official translation into the Greek language, *during the hearing* of his application, and without being obliged to file these documents at the court, when submitting the relevant application.

This because, to the eyes of Greek judges, Article 4 NYC, referring to a

presentation “at the time of the application”, does not determine the procedural ‘moment’ (stage) when the documents of the arbitration agreement and the arbitral decision must be submitted to the court. It simply determines the burden of proof and the party borne with it. The procedural method and the time of presentation of the documents referred to in Article 4 § 1 NYC are still regulated by the procedural law of the trial judge, in the case at hand the Greek Code of Civil Procedure.

- **Field of application of CAS.** On the grounds of the decisions rendered by Greek courts, it has been confirmed that the CAS has jurisdiction over the following disputes:
- Application for arbitration by an athlete against the team in which he plays;
- Application for arbitration by the sports manager of athletes and/or coaches against the sports club.
- Application for arbitration by the sports manager against the athlete.

- **Enforceability in the country of origin not a pre-requisite.** Contrary to finality, it is not necessary to meet the condition of enforceability of the arbitral award in the state of origin, i.e., Switzerland.

- **Enforceability of CAS Costs.** The ‘order’ awarding arbitration costs, following the CAS award, must also be declared enforceable, according to Rule R.64.4 CAS Procedural Rules. The matter is noteworthy, as the above ‘order’ is issued after the award by the CAS Secretariat, not by the arbitration Panel that ruled on the dispute, and without the participation of the parties. However, it should be underlined that the letter from the CAS Secretariat merely specifies the amount of the arbitration costs awarded by the Panel; hence, it is considered as belonging to the award’s operative part. In addition, the act of awarding costs is notified to the parties in accordance with CAS rules.

- **Irreconcilable judgments.** It is not necessary to furnish a certificate of

non-irreconcilability with a decision, by following the domestic model of article 903 § 5 and 323 nr. 4 Greek Code of Civil Procedure. According to the judgment of the Greek court, it is not permissible to transfuse a condition regulated by domestic arbitration law into the context of the New York Convention.

- **No revision on the merits.** Finally, although not directly stated in the text of the NYC, a revision of the foreign arbitral award by the Greek court is prohibited, the latter being unanimously accepted and labelled as the principle of non-examination on the merits.

AMEDIP: Annual seminar to take place from 16 to 18 November 2022

The *Mexican Academy of Private International and Comparative Law* (AMEDIP) will be holding its annual XLV Seminar entitled "Private International Law in the conformation of a new international order" (*el derecho internacional privado en la conformación de un nuevo orden internacional*) from 16 to 18 November 2022. The venue is still to be determined but it is likely to be a hybrid event (online and

on-site).

The main focus of the seminar will be to analyse the *Proyecto de Código Nacional de Procedimientos Civiles y Familiares* (draft *National* Code of Civil and Family Procedure, which includes Private International Law provisions and whose objective is to replace all the existing states' legislation on the matter -32-), and the hotly debated litigation regarding non-contractual obligations arising out of a tort/delict resulting from the illicit traffic of firearms (the case of Mexico vs. Smith and Wesson), among other matters.

Potential speakers are invited to submit a paper in Spanish, English or Portuguese by ***31 August 2022***. Papers must comply with the criteria established by AMEDIP and will be evaluated accordingly. Selected speakers will be required to give their presentations preferably in Spanish as there will be no interpretation services but some exceptions may be made by the organisers upon request. For more information, please click here.

Participation is free of charge. A certificate of participation may be issued upon (a modest) payment.

Opinion by AG Maciej Szpunar of 14 July 2022 in C- 354/21 – R.J.R., Intervener Registru centras, on the interpretation of the European Succession Regulation: "Extended substitution" in light of mutual

trust?

The deceased, living in Germany, leaving as her sole heir her son, who also lives in Germany, owned immovable property in Germany and Lithuania. Her son obtained a European Certificate of Succession from the German authorities, naming him as the sole heir of the deceased's entire estate. He presented the certificate to the Lithuanian authorities and applied for the immovable property to be recorded in the Real Property Register. They refused to do so on the grounds that the certificate was incomplete, as the European Certificate of Succession submitted did not contain the information required under the Lithuanian Law on the Real Property Register to identify the immovable property by documents to be submitted, in that it did not list the property inherited by the applicant. The heir sought legal redress against this rejection with the Lithuanian courts. Against this background the referring court asked:

Must point (l) of Article 1(2) and Article 69(5) [of Regulation No 650/2012] be interpreted as not precluding legal rules of the Member State in which the immovable property is situated under which the rights of ownership can be recorded in the Real Property Register on the basis of a European Certificate of Succession only in the case where all of the details necessary for registration are set out in that European Certificate of Succession?

AG Szpunar first of all referred to the overall objective of the ESR as spelled out in recital 7 to facilitate the proper functioning of the internal market by removing the obstacles to the free movement of persons who want to assert their rights arising from a cross-border succession (para. 39). In doing so, the Regulation does not harmonise substantive law but has opted for harmonising private international law, choice of law in particular (para. 40) but also provides for the European Certificate of Inheritance, subject to an autonomous legal regime, established by the provisions of Chapter VI (Art. 62 et seq.) of the Regulation.

Article 68 lists the information required in a European Certificate of Succession "to the extent required for the purpose for which it is issued" and this includes "the share for each heir and, *if applicable*, the list of rights and/or assets for any given heir" (italic emphasis added).

Under a succession law like the German that does not provide for succession

other than universal succession it is clear that the estate as a whole, rather than particular assets, is transferred as a totality. AG Szpunar concludes: “That being so, it is not necessary to include an inventory of the estate in the European Certificate of Succession, inasmuch as the situation referred to in point (l) of Article 68 of Regulation No 650/2012 by the phrase ‘if applicable’, the need for a list of assets for any given heir, does not arise” (para. 55). Thus, the phrase “if applicable” is not to be understood solely as a reflection of the wishes of the person applying for a European Certificate of Succession (para. 57). Even though the applicant is required to inform the authority issuing the certificate of its purpose, it is for that authority to decide, based on that information, whether or not an asset should be specified. The Commission Implementing Regulation No 1329/2014 (point 9 of Annex IV to Form V) does not have a bearing on this decision as it can only implement but not modify the Regulation (para. 73).

However, where the situation does not depend upon a national right of succession governed by the principle of universal succession and where the purpose of the certificate can only be achieved by indicating the share of the inheritance for the person in question, “it is most likely that the asset in question should be specified” (para 62). And even if there is no need to list assets (such as under German law), “it should be noted in that regard that, if a European Certificate of Succession is to produce its full effects, a degree of cooperation and mutual trust between the national authorities is required. That may imply that the issuing authority is required, in a spirit of sincere cooperation with the authorities of other Member States, to take account of the requirements of the law governing the register of another Member State, especially if that authority holds relevant information and elements” (para. 65).

Of course, Point (l) of Article 1(2) of the ESR states that “any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register” is excluded from the scope of the regulation. By its judgment in *Kubicka*, AG Spzunar explained, “the Court found that points (k) and (l) of Article 1(2) and Article 31 of that regulation must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy ‘by vindication’, provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of that regulation, where that refusal is based on the ground that the legacy concerns the right of

ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place. As a consequence of that judgment in *Kubicka*, the German law disputed in the main proceedings was not applied to the transfer of ownership. However, it did not concern real property registration rules. The national property law of a Member State may therefore impose additional procedural requirements, but only inasmuch as any such additional requirements do not concern the status attested by the European Certificate of Succession." (paras. 77 et seq).

As Advocate General Bot noted in his Opinion in *Kubicka*, in practice, other documents or information may be required in addition to the European Certificate of Succession where, for example, the information in the certificate is not specific enough to identify the asset the ownership of which must be registered as having been transferred. In the present case, however, AG Szpunar rightly observed, "the Lithuanian authorities have all the information needed for the purpose of making an entry in the Real Property Register: they are able to identify the person to whom the asset in question belongs or belonged and to ascertain, from the European Certificate of Succession, the status of heir of the applicant in the main proceedings". Thus "the *effet utile* of the European Certificate of Succession would be undermined if Lithuanian property law were able to impose additional requirements on the applicant" (para. 81).

In other words, even though the contents of a European Certificate of Succession, due to the underlying *lex successsionis*, may not exactly represent what is required for documentation by the *lex registrii* of the requested Member State, the overarching principle of the EU's efforts for integration, namely mutual trust, and, more concretely, the effet utile of the ESR create the obligation of the requested Member State to substitute required documents under its *lex registrii* as much as functionally possible – a methodical tool that may perhaps be abstractly framed as "extended substitution" and may well develop to a powerful concept for the European Succession Certificate.

Be that as it may, limited to the constellation in question, AG Szpunar concluded:

"Point (l) of Article 1(2), point (l) of Article 68 and Article 69(5) of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession

and on the creation of a European Certificate of Succession preclude the application of provisions of national law pursuant to which an immovable property acquired by a sole heir pursuant to a right of succession governed by the principle of universal succession can only be recorded in the Real Property Register of the Member State in whose territory that asset is located on the basis of a European Certificate of Succession if all the data required under the national law of that Member State to identify the immovable property are included in the certificate."

The full text of the Opinion is here.

Is Chinese Judicial Mediation Settlement 'Judgment' in Private International Law?

Judicial mediation is a unique dispute resolution mechanism in Chinese civil procedure. Wherever civil disputes are brought to the court, the judge should, based on parties' consent, mediate before adjudicating. Judicial mediation, therefore, is an 'official' mediation process led by the judge and if successful, the judge will make a document to record the plea, the fact and the settlement agreement. This document is called 'judicial mediation settlement' in this note.

On 7 June 2022, the Supreme Court of New South Wales recognized and enforced two Chinese judicial mediation settlement issued by the People's Court of Qingdao, Shandong Province China in Bank of China Limited v Chen. It raises an interesting question: is Chinese judicial mediation settlement recognisable as a foreign 'judgment' and enforceable in the other country? Two commentors provide different views on this matter.

Judicial Mediation Settlement can be classified as 'Judgment'
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In Chinese civil trial practice, there are two types of legal document to merits

issued by courts that has the res judicata effect, namely Minshi Panjue Shu ("MPS") (civil judgment) and Minshi Tiaojie Shu ("MTS"). The MTS refers to the mediation settlement reached by the parties when a judge acts as a mediator and as part of the judicial process. It has been translated in various ways: civil mediation judgment, civil mediation statement, civil mediation, mediation certificate, mediation agreement, written mediation agreement, written mediation statement, conciliation statement and consent judgment, civil mediation statement, mediation agreement and paper of civil mediation. In order to distinguish it from private mediation settlement, the mediation settlement reached during the court mediation process is translated into the 'judicial mediation settlement'.

No matter how the translation of MTS is manifested, the intrinsic nature of a judicial mediation settlement should be compared with the civil judgment, and analysed independently in the context of recognition and enforcement of judgments ("REJ"). Take the HCCH 2019 Judgments Convention as an example in an international dimension, Article 4 Paragraph 3 of the Convention provides that "A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin." In terms of REJ, a foreign judgment shall be effective and enforceable. While the validity of a foreign judgment specifically means when the judgment is made by a court has competent jurisdiction, the parties' rights in proceedings are not neglected or violated, and the judgment is conclusive and final; the enforceability is more associated with types of judgments, such as fixed sum required in monetary judgments.

1. What is a judicial mediation settlement

Firstly, judicial mediation settlement is granted effectiveness by Chinese court in accordance with Article 100 of Civil Procedure Law of China (revised in 2021), which stipulates that "When a mediation agreement is reached, the people's court shall prepare a written mediation statement, stating the claims, the facts of the case and the result of the mediation. The written mediation statement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court and shall be served on both parties. A written mediation statement shall come into force immediately upon signatures after receiving by both parties." In the civil trial proceedings of China, judges are encouraged to carry out mediation on a voluntary and lawful basis, failing which, a judgment shall be

rendered forthwith. Article 125 also affirms that for a civil dispute brought by the parties to the people's court, if it is suitable for mediation, mediation shall be conducted first, unless the parties refuse mediation. According to Article 96 of Civil Procedure Law of China, in trying civil cases, a people's court shall conduct mediation to the merits of case under the principle of voluntary participation of the parties and based on clear facts. Article 97 Paragraph 1 states that mediation conducted by a people's court may be presided over by a single judge or by a collegiate bench. Thus, with the consent of parties, judges are entitled to make a judicial mediation settlement. Once a written mediation statement based on the mediation agreement reached by parties is made by the judges and served to litigant parties, the judicial mediation settlement shall come into effect.

Secondly, the effective judicial mediation settlement has the enforceability. As paragraph 3 of Article 52 of Civil Procedure Law represented, the parties must exercise their litigation rights in accordance with the law, abide by the litigation order, and perform legally effective judgments, rulings and mediation decisions. Therefore, assumed China is the state of origin to make a judicial mediation settlement, which has effect, and it is enforceable in the state of origin.

2. Similarity between judicial mediation settlement and judgment

Although the mediation and judgment exist under different articles of the Chinese Civil Procedure Law (an MTS under art 97, an MPS under art 155), the judicial mediation settlement has more common points than difference compared with a civil judgment. First of all, in terms of adjudicative power, the judicial mediation settlement is not only a verification of the parties' agreement as the judges are involved in the whole of mediatory process and they exercise the power of adjudication. The consent of parties to mediation is a premise, but the judicial mediation settlement is not only to do with the parties' consent. For example, according to Article 201 of the Civil Procedure Law of China, where a mediation agreement is reached through mediation by a legally established mediation organization and an application for judicial confirmation is to be filed, both parties shall jointly submit the application to the prescribed court within 30 days from the date when the mediation agreement takes effect. After the people's court accepts the application and review it, if the application complies with the legal provisions, the mediation agreement will be ruled as valid, and if one party refuses to perform or fails to perform in full, the other party may apply to the people's court for enforcement; if the application does not comply with the legal

provisions, the court will make a ruling to reject the application. Moreover, the written mediation statement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court, which also means the judges or courts are responsible for the mediation decision they have made.

Secondly, the judicial mediation settlement has the almost same enforceability with the civil judgment. On the one hand, the judicial mediation settlement and other legal documents that should be enforced by the people's court must be fulfilled by the parties. If one party refuses to perform, the other party may apply to the people's court for enforcement. On the other hand, a legally effective civil judgment or ruling must be performed by the parties. If one party refuses to perform, the other party may apply to the people's court for enforcement, or the judge may transfer the execution to the executioner.

Thirdly, the judicial mediation settlement has the legal effect of finality similar with a final civil judgment. According to article 102, if no agreement is reached through mediation or if one party repudiates the agreement prior to service of the mediation settlement, the people's court shall promptly make a judgment. Therefore, once a written mediation statement (MTS) served and signed by both parties, it has the same binding force as a legally effective judgment.

It is worth noting that mediation can take place in several different stages: if mediation is possible before the court session, the dispute shall be resolved in a timely manner by means of mediation; after the oral argument is over, a judgment shall be made in accordance with the law. If mediation is possible before the judgment, mediation may still be conducted; if mediation fails, a judgment shall be made in a timely manner. The people's court of second instance may conduct mediation in hearing appeal cases. When an agreement is reached through mediation, a mediation statement shall be prepared, signed by the judges and the clerk, and affixed with the seal of the people's court. After the judicial mediation settlement is served, the judgment of the first instance and original people's court shall be deemed to be revoked. Therefore, the mediation is a vital part of adjudication power of people's court has in China.

Additionally, under the common law, a "judgment" is an order of court which gives rise to res judicata. According to Article 127 (5) of Civil Procedure Law of China (2021): "if a party to a case in which the judgment, ruling or civil mediation has become legally effective files a new action for the same case, the plaintiff

shall be notified that the case will be handled as a petition for a review…" , which represents that a legally effective civil mediation by the court establishes res judicata and embodies a judgment.

3. Conclusion

To conclude, Chinese civil mediation could be recognized and enforced by foreign countries as a judgment. For now, China and Australia have neither signed a bilateral judicial assistance treaty, nor have they jointly concluded any convention on the recognition and enforcement of foreign court judgments, but de facto reciprocity should have been established between China and Australia (or at least the states of Victoria and NSW). Although there was the precedent of Bao v Qu; Tian (No 2) [2020] NSWSC 588 judgment recognized and enforced by the Supreme Court of New South Wales, the civil mediation judgment marks the first time that foreign courts of common law jurisdictions may recognize and enforce Chinese mediation judgments, which means important reference for other common law jurisdictions. Also, it has broadened the path for many domestic creditors who have obtained judicial claims through civil mediation, especially financial institutions, to recover and enforce the assets transferred by the debtor and hidden overseas.

Chinese Judicial Mediation Settlement should not be treated as 'judgment'

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1. Applicable Law

Whether a foreign document that seeks recognition and enforcement is a 'judgment' is a question of law. Therefore, the first question one needs to consider is which law applies to decide the nature of the foreign document. In Bank of China Limited v Chen, Harrison AsJ held that this matter should be determined under the law of Australia, which is the country where recognition is sought.

Interestingly, the Singapore High Court gave a different answer to the same question. In Shi Wen Yue v Shi Minjiu and another, the Assistant Registrar held that it was indeed the law of the foreign country where an official act occurs that determines whether that official act constitutes a final and conclusive judgment.

Therefore, he applied Chinese law to determine the nature of the judicial mediation settlement.

It is argued applying the law of the state of origin is more appropriate. When the parties seek recognition of a foreign judgment, they anticipate that the foreign judgment is viewed as having the effect it has in its state of origin. But by applying the law of the state of recognition, a document may have greater or less effect in the state of recognition than in the state of origin. In Bank of China Limited v Chen, the plaintiff advocated for applying the Australian Law, stating that applying the law of the state of origin may lead to absurd mistakes. For example, if a ticket were regarded as a judgment by a foreign state, the Australian would have to treat it as a judgment and enforce it. The argument can hardly be the case in reality. Firstly, it is suspicious that a civilized country in modern society may randomly entitle any document as "judgment". Secondly, even if the state of origin and the state of recognition have different understandings of the notion of judgment, a state usually will not deny the effect of a foreign state's act in order to preserve international comity, unless such classification fundamentally infringes the public order of the state of recognition in some extreme occasions. Therefore, out of respect for the state of origin, the nature of the judicial mediation settlement shall be determined by Chinese law as a question of fact.

2. The Nature of Judicial mediation settlement

In Bank of China Limited v Chen, Harrison AsJ made an analogy to a consent judgment in common law jurisdiction when determining the nature of judicial mediation settlement. It was held that both were created by the parties' consent but nevertheless are judgments being mandatorily enforceable and having coercive authority. On the contrary, the Assistant Registrar in Shi Wen Yue v Shi Minjiu and another specifically pointed out that "a common law court must be conscious of the unexamined assumptions and biases of the common law". The common law and civil law view the notion of judicial power differently. The common law embodies an adversarial system of justice. Thus, the common law courts do not take issue with settlement agreements being given the imprimatur of consent judgments. However, in civil law countries, judges play an active inquisitorial role. They are "responsible for eliciting relevant evidence" while party-led discovery is anathema and seen as a usurpation of judicial power. Therefore, it is the proper and exclusive province of judges to judge and issue

judgments. It would almost be a contradiction in terms for a party-negotiated settlement to be given the moniker of a consent judgment. For these reasons, judicial mediation settlements are not labelled as judgments.

Chinese law explicitly differentiates the judicial mediation settlement from judgment. Primarily, court judgments and judicial mediation settlements fall under different chapters in the Chinese Civil Procedure Law, while the former belongs to Part II "Adjudication Process". It is further evidenced by the principle that the parties reaching an agreement during judicial mediation cannot request the court to make a judgment based on such an agreement.

A judgment reflects the court's determination on the merits issue after adjudication. The judicial mediation settlement is a document issued by the court which records the settlement agreement reached between the parties during the judicial mediation. The differences between them are as follows. Firstly, the judicial mediation settlement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court and shall be served on both parties. It comes into force once the parties sign after receiving. The parties are entitled to repudiate the agreement prior to service of the mediation agreement. Namely, the court's confirmation per se is insufficient to validate a judicial mediation settlement. The effectiveness of judicial mediation settlement depends on the parties' consent. Conversely, a judgment does not require the parties' approval to become effective.

Secondly, a judicial mediation settlement could be set aside if it violates the law or party autonomy, which are typical grounds for invalidating a contract. The grounds for nullifying a judgment include erroneous factual findings or application of law and procedural irregularities, which put more weight on the manner of judges.

Thirdly,the content of the judicial mediation settlement shall not be disclosed unless the court deems it necessary for protecting the national, social or third parties' interests. However, as required by the principle of "Public Trial" and protection for people's right to know, a judgment shall be pronounced publicly. Disclosing the judgment is important for the public to supervise the judicial process. Compared to court judgments, since a judicial mediation settlement is reached internally between the parties for disposing of their private rights and obligations, naturally, it is not subject to disclosure.

Fourthly, while the judicial mediation settlement is a document parallel to judgment in the sense of putting an end to the judicial proceedings, the effect of the judicial mediation settlement is more limited. An effective judicial mediation settlement settles the parties' rights and obligations on the merits and refrains them from filing another lawsuit based on the same facts and reasons. A judicial mediation settlement is enforceable against the debtor immediately without requiring further order or judgment from the Chinese court. However, unlike judgments, judicial mediation settlements lack the positive effect of res judicata. In other words, matters confirmed by judicial mediation settlements cannot be the basis of the lawsuits dealing with different claims afterwards.

It is fair to say that the judicial mediation settlement combines party autonomy and the court's confirmation. But it would be far-reaching to equate the court's confirmation with exercising judicial power. Judges act as mediators to assist the parties in resolving the dispute instead of making decisions for them. The judicial mediation settlement is intrinsically an agreement but not barely a private agreement since it has undertaken the court's supervision.

3. Conclusion

It is understandable that the plaintiff sought to define judicial mediation settlements as judgments. The judgment enforcement channel is indeed more efficient than seeking enforcement of a private agreement. However, considering the nature of the judicial mediation settlement, it is doubtful to define it as court judgment. In the author's opinion, since the original court has confirmed the justification of the judicial mediation settlement, it shall be recognized by foreign states. At the same time, a different approach to recognition is worth exploring.

First Instance where a Mainland China Civil Mediation Decision has

been Recognized and Enforced in New South Wales, Australia

I Introduction

Bank of China Limited v Chen [2022] NSWSC 749 (‘*Bank of China v Chen*’), decided on the 7 June 2022, is the first instance where the New South Wales Supreme Court (‘NSWSC’) has recognised and enforced a Chinese civil mediation decision.

II Background

This case concerned the enforcement of two civil mediation decisions obtained from the People’s Court of District Jimo, Qingdao Shi, Shandong Province China (which arose out of a financial loan dispute) in Australia.[1]

A foreign judgement may be enforced in Australia either at common law or pursuant to the *Foreign Judgements Act 1991*(Cth).[2] As the People’s Republic of China is not designated as a jurisdiction of substantial reciprocity under the *Foreign Judgements Regulation 1992* (Cth) schedule 1, the judgements of Chinese courts may only be enforced at common law.[3]

For a foreign judgement to be enforced at common law, four requirements must be met:[4] (1) the foreign court must have exercised jurisdiction in the international sense; (2) the foreign judgement must be final and conclusive; (3) there must be identity of parties between the judgement debtor(s) and the

defendant(s) in any enforcement action; and (4) the judgement must be for a fixed, liquidated sum. The onus rests on the party seeking to enforce the foreign judgement.[5]

Bank of China Ltd ('plaintiff') served the originating process on Ying Chen ('defendant') pursuant to r 11.4 and Schedule 6(m) of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') which provides that an originating process may be served outside of Australia without leave of the court to recognise or enforce any 'judgement'.[6] Central to this dispute was whether a civil mediation decision constituted a 'judgement' within the meaning of schedule 6(m).

III Parties' Submission

A *Defendant's Submission*

The defendant filed a notice of motion seeking for (1) the originating process to be set aside pursuant to rr 11.6 and 12.11 of the UCPR, (2) service of the originating process on the defendant to be set aside pursuant to r 12.11 of the UCPR and (3) a declaration that the originating process had not been duly served on the defendant pursuant to r 12.11 of the UCPR.[7]

The defendant argued that the civil mediation decisions are not 'judgements' within the meaning of UCPR Schedule 6(m).[8] Moreover, the enforcement of foreign judgment at common law pre-supposes the existence of a foreign judgement which is absent in this case.[9]

The defendant submitted that the question that must be asked in this case is

whether the civil mediation decisions were judgements as a matter of Chinese law which is a question of fact.[10] This was a separate question to whether, as a matter of domestic law, the foreign judgements ought to be recognised at common law.[11]

B *Plaintiff's Submission*

In response, the plaintiff submitted that all four common law requirements were satisfied in this case.[12] Firstly, there was jurisdiction in the international sense as the defendant appeared before the Chinese Court by her authorised legal representative.[13] The authorised legal representative made no objection to the civil mediation decisions.[14] Secondly, the judgement was final and conclusive as it was binding on the parties, unappealable and can be enforced without further order.[15] Thirdly, there was an identity of parties as Ying Chen was the defendant in both the civil mediation decisions and the enforcement proceedings.[16] Fourthly, the judgement was for a fixed, liquidated sum as the civil mediation decisions provided a fixed amount for principal and interest.[17]

In relation to the defendant's notice of motion, the plaintiff argued that the question for the court was whether the civil mediation decisions fell within the meaning of 'judgement' in the UCPR, that is, according to New South Wales law, not Chinese law (as the defendant submitted).[18] On this question, there was no controversy.[19] While the UCPR does not define 'judgement', the elements of a 'judgement' are well settled according to Australian common law and Chinese law expert evidence supports the view that civil mediation decisions have those essential elements required by Australian law.[20]

Under common law, a judgement is an order of Court which gives rise to res judicata and takes effect through the authority of the court.[21] The plaintiff relied on Chinese law expert evidence which indicated that a civil mediation decision possesses those characteristics, namely by establishing res judicata and

having mandatory enforceability and coercive authority.[22] The expert evidence noted that a civil mediation decision is a type of consent judgement resulting from mediation which becomes effective once all parties have acknowledged receipt by affixing their signature to the Certificate of Service.[23] The Certificate of Service in respect of the civil mediation decisions in this case had been signed by the legal representatives of the parties on the day that the civil mediation decisions were made.[24] While a civil mediation decision is distinct to a civil judgement,[25] a civil mediation decision nonetheless has the same binding force as a legally effective civil judgement and can be enforced in the same manner.[26]

The expert evidence further noted that Mainland China civil mediation decisions have been recognised and enforced as foreign judgements in the Courts of British Columbia, Hong Kong and New Zealand.[27] The factors which characterise a 'judgement' under those jurisdictions are the same factors which characterise a 'judgement' under Australian law.[28]This supports the view that the same recognition should be afforded under the laws of New South Wales.[29]Accordingly, the plaintiff submitted the a civil mediation decision possesses all the necessary characteristics of a 'judgement' under Australian law such that service could be effected without leave under schedule 6(m).[30]

IV Resolution

Harrison AsJ noted that the judgements of Chinese courts may be enforceable at common law and found that all four requirements was satisfied in this case.[31] There was jurisdiction in the international sense as the defendant's authorised legal representative appeared before the People's Court on her behalf, the parties had agreed to mediation, the representatives of the parties came to an agreement during the mediation, and this was recorded in a transcript.[32] The parties' representatives further signed the transcript and a civil mediation decision had been issued by the people's courts.[33] Moreover, the civil mediation decision was final and binding as it had been signed by the parties.[34] The third and fourth requirements were also clearly satisfied in this case.[35]

In relation to the central question of whether the civil mediation decisions constituted 'judgements' in the relevant sense, Harrison AsJ found in favour of the plaintiff.[36] Harrison AsJ first noted that this question should not be decided on the arbitrary basis of which of the many possible translations should be preferred.[37] Moreover, the evidence of the enforcement of civil mediation decisions as judgements in the jurisdictions of British Columbia, Hong Kong and New Zealand was helpful, though also not determinative.[38]

Rather, this question must be determined by reference to whether civil mediation decisions constituted judgements under Australian law as opposed to Chinese law, accepting the plaintiff's submission.[39] The civil mediation decisions were enforceable against the defendant immediately according to their terms in China without the need for further order or judgement of the People's Court.[40] The parties could not vary or cancel the civil mediation decisions without the permission of the Jimo District Court.[41] The civil mediation decisions also had the same legal effects as a civil judgement.[42] Therefore, Harrison AsJ concluded that the civil mediation decisions were judgements for the purposes of Australian law as they established res judicata and were mandatorily enforceable and had coercive authority.[43] It then followed that the civil mediation decisions fell within the scope of UCPR schedule 6(m) and did not require leave to be served.[44]

V Orders

In light of the analysis above, Harrison AsJ held that the Chinese civil mediation decisions were enforceable and dismissed the defendant's motion.[45] Costs were further awarded in favour of the plaintiff.[46]

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References:

[1] *Bank of China Limited v Chen* [2002] NSWSC 749, [1], [16].

[2] Ibid [8]; citing *Bao v Qu; Tian* (No 2) [2020] NSWSC 588, [23]-[29].

[3] Ibid [8].

[4] Ibid.

[5] Ibid.

[6] Ibid [9] – [11].

[7] Ibid [6].

[8] Ibid [57].

[9] Ibid [59], [84].

[10] Ibid [61].

[11] Ibid.

[12] Ibid [25].

[13] Ibid [18].

[14] Ibid.

[15] Ibid [20].

[16] Ibid [22].

[17] Ibid [24].

[18] Ibid [27].

[19] Ibid [28].

[20] Ibid.

[21] Ibid [37].

[22] Ibid [38].

[23] Ibid [39].

[24] Ibid.

[25] Ibid [41].

[26] Ibid [42].

[27] Ibid [49].

[28] Ibid [50].

[29] Ibid [51].

[30] Ibid [52].

[31] Ibid [83], [90].

[32] Ibid [86].

[33] Ibid.

[34] Ibid [87].

[35] Ibid [88]-[89].

[36] Ibid [105].

[37] Ibid [91]-[92].

[38] Ibid [93].

[39] Ibid [96].

[40] Ibid [103].

[41] Ibid.

[42] Ibid.

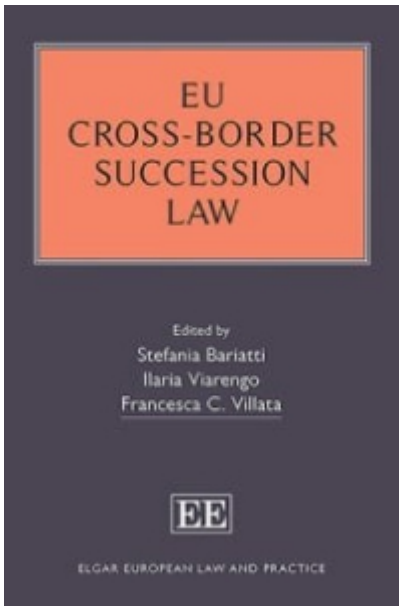
[43] Ibid [105].

[44] Ibid [106].

[45] Ibid [107]-[108].

[46] Ibid [109]-[112].

Just released: ‘EU Cross-Border Succession Law’ (Bariatti, Viarengo and Villata, eds)



EU Cross-Border Succession Law, edited by Stefania Bariatti, Ilaria Viarengo and Francesca C. Villata, was just released. Providing a comprehensive and dedicated analysis of the EU law on cross-border successions and benefitting from the insight of internationally renowned scholars, this volume is a welcome addition to the already thriving ‘Elgar European Law and Practice series’.

The abstract reads as follows:

With cross-border successions becoming increasingly common in the context of the European Union, this timely volume offers a systematic practical analysis of how cross-border successions should be treated, including an examination of

which courts may establish jurisdiction over succession disputes and which law governs such disputes. Studying cross-border successions in the context of estate planning and in the opening and liquidation of a succession, the volume examines the specificities of the European Certificate of Succession, contextualising it within its interface with the national laws and practices of EU Member States.

Key Features:

- Practical analysis of the provisions of the EU Succession Regulation
- Consideration of issues at the intersection between cross-border successions and taxation
- Analysis of the specificities of the European Certificate of Succession and its interface with national laws
- Study of cross-border successions in the context of both estate planning and the opening and liquidation of a succession
- Contextualization of the EU Succession Regulation in the framework of the national law and practice of several EU Member States

A comprehensive study of EU cross-border succession law with global reach, this volume is an invaluable source of reference and guidance for practitioners specialising in estate planning, family law and property law, including judges, notaries, tax specialists and lawyers. Scholars of European succession law and conflict of laws will also find this volume's critical analysis an instrumental tool in their research.

EU Cross-Border Succession Law, Stefania Bariatti, Ilaria Viarengo and Francesca C. Villata (eds), Elgar European Law and Practice series (2022) 576 pp.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)

3/2022: Abstracts

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

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

P. Hay: **On the Road to a Third American Restatement of Conflicts Law**

American private international law (Conflict of Laws, “Conflicts Law”) addresses procedure (jurisdiction of courts, recognition of judgments) as well as the choice of the applicable law. The last of these has been a mystery to many scholars and practitioners – indeed, even in the United States. Since 2014 the American Law Institute now seeks to draft a new “Restatement” – the Third – of the subject, with the aim to clarify and perhaps to bring more uniformity to the resolution of conflict-of-laws problems. The following comments first recall the role of restatements in American law. The second part provides some historical background (and an assessment of the current state of American conflicts law, as it relates to choice of law) in light of the Second Restatement, which was promulgated in 1971. The third part addresses the changes in methodology adopted and some of the rules so far proposed by the drafters of the future new Restatement. Examples drawn from existing drafts of new provisions may serve to venture some evaluation of these proposed changes. In all of this, it is important to bear in mind that much work still lies ahead: it took 19 years (1952–1971) to complete the Second Restatement.

L. Hübner: **Climate change litigation at the interface of private and public law – the foreign permit**

The article deals with the interplay of private international law, substantive law, and public law in the realm of international environmental liability. It focuses on the question, whether the present dogmatic solution for the cognizance of foreign permits in “resident scenarios” can be extended to climate change scenarios.

Since there exists significant doubts as to the transferability of this concept, the article considers potential solutions under European and public international law.

C. Kohler: **Recognition of status and free movement of persons in the EU**

In Case C-490/20, V.M.A., the ECJ obliged Bulgaria to recognise the Spanish birth certificate of a child in which two female EU citizens, married to each other, were named as the child's parents, as far as the implementation of the free movement of persons under EU law was concerned, but left the determination of the family law effects of the certificate to Bulgarian law. However, the judgment extends the effects of the recognition to all rights founded in Union law, including in particular the right of the mobile Union citizen to lead a "normal family life" after returning to his or her country of origin. This gives the ECJ the leverage to place further effects of recognition in public law and private law under the protection of the primary and fundamental rights guarantees of EU law without regard to the law applicable under the conflict rules of the host Member State. The author analyses these statements of the judgment in the light of European and international developments, which show an advance of the recognition method over the traditional method of referral to foreign law in private international law.

W. Hau: **Interim relief against contracting authorities: classification as a civil and commercial matter, coordination of parallel proceedings and procedural autonomy of the Member States**

After a Polish authority awarded the contract for the construction of a road to two Italian companies, a dispute arose between the contracting parties and eventually the contractors applied for provisional measures in both Poland and Bulgaria. Against this background, the ECJ, on a referral from the Bulgarian Supreme Court of Cassation, had to deal with the classification of the proceedings as a civil and commercial matter and the coordination of parallel interim relief proceedings in different Member States. The case also gave the ECJ reason to address some interesting aspects of international jurisdiction under Article 35 of the Brussels Ibis Regulation and the relationship between this provision and the procedural laws of the Member States.

M. Thon: **Jurisdiction Clauses in General Terms and Conditions and in Case of Assignment**

Choice of court agreements are one of the most important instruments of international civil procedure law. They are intended to render legal disputes plannable and predictable. The decision under discussion comes into conflict with these objectives. In DelayFix, the CJEU had to deal with the question of whether (1.) Art. 25 of the Brussels Ibis Regulation is to be interpreted as precluding a review of unfairness of jurisdiction clauses in accordance with Directive 93/13/EEC and whether (2.) an assignee as a third party is bound by a jurisdiction clause agreed by the original contracting parties. The first question is in considerable tension between consumer protection and the unification purpose of the Brussels Ibis Regulation considering that the Member States may adopt stricter rules. For the latter question, the CJEU makes it a prerequisite that the assignee is the successor to all the initial contracting party's rights and obligations, which regularly occurs in the case of a transfer of contract, but not an assignment. In this respect, too, the CJEU's decision must be critically appraised.

C.F. Nordmeier: **International jurisdiction and foreign law in legal aid proceedings – enforcement counterclaims, section 293 German Code of Civil Procedure and the approval requirements of section 114 (1) German Code of Civil Procedure**

The granting of legal aid in cases with cross-border implications can raise particular questions. The present article illustrates this with a maintenance law decision by the Civil Higher Regional Court of Saarbrücken. With regard to international jurisdiction, a distinction must be made between an enforcement counterclaim and a title counterclaim. The suspension of legal aid proceedings analogous to section 148 of the German Code of Civil Procedure with pending preliminary ruling proceedings before the European Court of Justice in a parallel case is possible. When investigating foreign law in accordance with section 293 of the German Code of Civil Procedure, the court may not limit itself to "pre-ascertaining" foreign law in legal aid proceedings. In principle, the party seeking legal aid is not obliged to provide information on the content of foreign law. If the

desired decision needs to be enforced abroad and if this is not possible prospectively, the prosecution can be malicious. Regardless of their specific provenance, conflict-of-law rules under German law are not to be treated differently from domestic norms in legal aid proceedings.

R.A. Schütze: **Security for costs under the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America**

The judgment of the Regional Court of Appeal Munich deals with the application of the German-American Treaty of Friendship, Commerce and Navigation as regards the obligation to provide security of costs in German civil procedure, especially the question whether a branch of plaintiff in Germany reliefs him from his obligation under section 110 German Code of Civil Procedure. The Court has based its judgment exclusively on article VI of the Treaty and section 6 and 7 of the protocol to it and comes to the conclusion that any branch of an American plaintiff in Germany reliefs him from the obligation to put security of costs.

Unfortunately, the interpretation of the term “branch” by the Court is not convincing.

The court has not taken into regard the ratio of section 110 German Code of Civil Procedure. The right approach would have been to distinguish whether the plaintiff demands in the German procedure claims stemming from an activity of the branch or from an activity of the main establishment.

P. Mankowski: **Whom has the appeal under Art. 49 (2) Brussels Ibis Regulation to be (formally) lodged with in Germany?**

Published appeal decisions in proceedings for the refusal of enforcement are a rare breed. Like almost anything in enforcement they have to strike a fine balance between formalism and pragmatism. In some respects, they necessarily reflect a co-operative relationship between the European and the national legislators. In detail there might still be tensions between those two layers. Such a technical issue as lodging the appeal to the correct addressee might put them to the test. It

touches upon the delicate subject of the Member States' procedural autonomy and its limits.

K. Beißel/B. Heiderhoff: **The closer connection under Article 5 of the Hague Protocol 2007**

According to Article 5 of the Hague Protocol 2007 a spouse may object to the application of the law of the creditor's habitual residence (Article 3 of the Protocol) if the law of another state has a "closer connection" with the marriage. The Local Court of Flensburg had to decide whether there was a "closer connection" to the law of the state, in which the spouses had lived together for five years in the beginning of their marriage. The criteria which constitute a "closer connection" in the sense of Article 5 of the Protocol have received comparatively little discussion to date. However, for maintenance obligations, the circumstances at the end of marriage are decisive in order to ascertain the claim. Therefore, they should also have the greatest weight when determining the closest connection. This has not been taken into account by the Local Court of Flensburg, which applied the law of the former common habitual residence, the law of the United Arab Emirates (UAE).

The authors also take a critical stance towards the Court's assessment of public policy under Article 13 of the Protocol. As the law of the UAE does not provide for any maintenance obligations of the wife (as opposed to maintenance obligations of the husband), the Court should not have denied a violation.

M. Lieberknecht: **Transatlantic tug-of-war – The EU Blocking Statute's prohibition to comply with US economic sanctions and its implications for the termination of contracts**

In a recent preliminary ruling, the European Court of Justice has fleshed out the content and the limitations of the EU's Blocking Statute prohibiting European companies from complying with certain U.S. economic sanctions with extraterritorial reach. The Court holds that this prohibition applies irrespective of whether an EU entity is subject to a specific order by U.S. authorities or merely practices anticipatory compliance. Moreover, the ruling clarifies that a

termination of contract – including an ordinary termination without cause – infringes the prohibition if the terminating party's intention is to comply with listed U.S. sanctions. As a result, such declarations may be void under the applicable substantive law. However, the Court also notes that civil courts must balance the Blocking Statute's indirect effects on contractual relationships with the affected parties' rights under the European Charter of Fundamental Rights.

E. Piovesani: **The Falcone case: Conflict of laws issues on the right to a name and post-mortem personality rights**

By the commented decision, the LG Frankfurt dismissed the action of two Italian claimants, namely the sister of the anti-mafia judge Falcone and the Falcone Foundation, for protection of their right to a name and the said judge's postmortem personality right against the owner of a pizzeria in Frankfurt. The decision can be criticized on the grounds that the LG did not apply Italian law to single legal issues according to the relevant conflict of laws rules. The application of Italian law to such legal issues could possibly have led to a different result than that reached by the court.

M. Reimann: **Jurisdiction in Product Liability Litigation: The US Supreme Court Finally Turns Against Corporate Defendants, Ford Motor Co. v. Montana Eighth Judicial District Court / Ford Motor Company v. Bandemer (2021)**

In March of 2021, the US Supreme Court handed down yet another important decision on personal jurisdiction, once again in a transboundary product liability context. In the companion cases of Ford Motor Co. v. Eighth Montana District Court and Ford Motor Co. v. Bandemer, the Court subjected Ford to jurisdiction in states in which consumers had suffered accidents (allegedly due to a defect in their vehicles) even though their cars had been neither designed nor manufactured nor originally sold in the forum states. Since the cars had been brought there by consumers rather than via the regular channels of distribution, the "stream-of-commerce" theory previously employed in such cases could not help the plaintiffs (see World-Wide Volkswagen v. Woodson, 444 U.S. 286, 1980). Instead, the Court predicated jurisdiction primarily on the defendant's extensive

business activities in the forum states. The problem was that these in-state activities were not the cause of the plaintiffs' harm: the defendant had done nothing the forum states that had contributed to the plaintiffs' injuries. The Court nonetheless found the defendant's business sufficiently "related" to the accidents to satisfy the requirement that the defendant's contacts with the forum state be connected to the litigation there. The consequences of the decision are far-reaching: product manufacturers are subject to in personam jurisdiction wherever they are engaged in substantial business operations if a local resident suffers an accident involving merely the kind of product marketed in the forum state, regardless how the particular item involved arrived there. This is likely to apply against foreign corporations, especially automobile manufacturers, importing their products into the United States as well. The decision is more generally remarkable for three reasons. First, it represents the first (jurisdictional) victory of a consumer against a corporation in the Supreme Court in more than half-a-century. Second, the Court unanimously based in personam jurisdiction on the defendant's extensive business activities in the forum state; the Court thus revived a predicate in the specific-in-personam context which it had soundly rejected for general in personam jurisdiction just a few years ago in Daimler v. Baumann (571 U.S. 117, 2014). Last, but not least, several of the Justices openly questioned whether corporations should continue to enjoy as much jurisdictional protection as they had in the past; remarkably these Justices hailed from the Court's conservative camp. The decision may thus indicate that the days when the Supreme Court consistently protected corporations against assertions of personal jurisdiction by individuals may finally be over.

R. Geimer: **Service to Foreign States During a Civil War: The Example of an Application for a Declaration of Enforceability of a Foreign Arbitral Award Against the Libyan State Under the New York Convention**

With the present judgment, the UK Supreme Court confirms a first-instance decision according to which the application to enforce an ICC arbitral award against the state of Libya, and the later enforcement order (made ex parte), must have been formally served through the Foreign, Commonwealth and Development Office under the State Immunity Act 1978, despite the evacuation of the British Embassy due to the ongoing civil war. The majority decision fails to recognize the importance of the successful claimant's right of access to justice under Art 6(1)

ECHR and Art V of the 1958 New York Convention.

K. Bälz: **Arbitration, national sovereignty and the public interest – The Egyptian Court of Cassation of 8 July 2021 ("Damietta Port")**

The question of whether disputes with the state may be submitted to arbitration is a recurrent topic of international arbitration law. In the decision Damietta Port Authority vs DIPCO, the subject of which is a dispute relating to a BOT-Agreement, the Egyptian Court of Cassation ruled that an arbitral award that (simultaneously) rules on the validity of an administrative act is null and void. The reason is that a (private) arbitral tribunal may not control the legality of an administrative decision and that the control of the legality of administrative action falls into the exclusive competency of the administrative judiciary. This also applies in case the legality of the administrative decision is a preliminary question in the arbitral proceedings. In that case, the arbitral tribunal is bound to suspend the proceedings and await the decision of the administrative court. The decision of the Egyptian Court of Cassation is in line with a more recent tendency in Egypt that is critical of arbitration and aims at removing disputes with the state from arbitration in order to preserve the "public interest".

CEDEP: Online course on Choice of Law, International Contracts and the Hague Principles

The Center for Law, Economics and Policy Studies (CEDEP) is organising an online course on Choice of Law, International Contracts and the Hague Principles. For more information on this course, click here.

The course will officially begin on Tuesday 22 March 2022, with weekly sessions (a total of 9) to be released on Tuesdays (which may be supplemented with additional lessons in May). The sessions will be in English with Spanish subtitles and will be available throughout the year 2022 on the CEDEP e-learning platform, thus there is no deadline for registration. The registration fee is 90USD – several payment methods are possible (including online). To register click here.

CEDEP has kindly provided in advance the link to the Introductory Session (Choice of Law – 22 March 2022) for Conflictoflaws.net readers, which may be viewed free of charge here: 1. Choice of Law – Introductory Session.

The speakers of the Introductory Session are Luca Castellani (UNCITRAL), Anna Veneziano (UNIDROIT) and Ning Zhao (HCCH) and the topic is UNCITRAL, HCCH, and UNIDROIT Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales. The Legal Guide and other information may be accessed on the Hague Conference website, click here.

The e-learning platform will also make available relevant bibliography, the presentations of the speakers, discounts for a relevant publication and much more. A certificate of participation will be given if a minimum attendance is confirmed.

Below is a list of the speakers per session:

CEDEP

CHOICE OF LAW IS GLOBAL

CONTRIBUTORS:	TOPIC
LUCA CASTELLANI ANNA VENEZIANO NING ZHAO	Tripartite Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts.
DANIEL GIRSBERGER	Introductory lecture on the Hague Principles
MARTA PERTEGÁS	Practical implementation of the Hague Principles
GENEVIÈVE SAUMIER	Art. 3 of the Hague Principles
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