The European Parliament's last plenary session & Private International Law

This post was written by Begüm Kilimcio?lu (PhD researcher), Thalia Kruger (Professor) and Tine Van Hof (Guest professor and postdoctoral researcher), all of the University of Antwerp.

During the last plenary meeting of the current composition of the European Parliament (before the elections of June 2024), which took place from Monday 22 until Thursday 24 April, **several proposals relevant to private international law** were put to a vote (see the full agenda of votes and debates). All of the regulations discussed here still have to be formally approved by the Council of the European Union before they become binding law, in accordance with the ordinary legislative procedure.

It is interesting to note that, while many pieces of new legislation have a clear cross-border impact in civil matters, not all of them explicitly address private international law. While readers of this blog are probably used to the discrepancies this has led to in various fields of the law, it is still worth our consideration.

First, the European Parliament voted on and adopted the proposal for a **Directive on Corporate Sustainability Due Diligence** (CSDDD) with 374 votes in favour, 235 against and 19 abstentions (see also the European Parliament's Press Release). The text adopted is the result of fierce battles between the Commission, Parliament and the Council and also other stakeholders such as civil society, academics and practitioners. This necessitated compromise and resulted in a watered-down version of the Commission's initial proposal of 23 February 2022 and does not go as far as envisaged in the European Parliament's Resolution of 10 March 2021 (see also earlier blog pieces by Jan von Hein, Chris Tomale, Giesela Rühl, Eduardo Álvarez-Armas and Geert van Calster).

The Directive is one of the few instruments worldwide that put legally-binding obligations on multinational enterprises. It lays down obligations for companies regarding their adverse actual and potential human rights and environmental

impacts, with respect to their own operation, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities. The Directive further stipulates specific measures that companies have to take to prevent, mitigate or bring an end to their actual or potential adverse human rights impacts. Besides national supervisory authorities for the oversight of the implementation of the obligations, the Directive enacts civil liability for victims of corporate harm.

The adopted Directive is more or less **silent on private international law.** The closest it gets to addressing our field of the law is Article 29(7), placing the duty on Member States to ensure the mandatory nature of civil remedies:

Member States shall ensure that the provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State.

and Recital 90, which is more general:

In order to ensure that victims of human rights and environmental harm can bring an action for damages and claim compensation for damage caused when the company intentionally or negligently failed to comply with the due diligence obligations stemming from this Directive, this Directive should require Member States to ensure that the provisions of national law transposing the civil liability regime provided for in this Directive are of overriding mandatory application in cases where the law applicable to such claims is not the national law of a Member State, as could for instance be the case in accordance with international private law rules when the damage occurs in a third country. This means that the Member States should also ensure that the requirements in respect of which natural or legal persons can bring the claim, the statute of limitations and the disclosure of evidence are of overriding mandatory application. When transposing the civil liability regime provided for in this Directive and choosing the methods to achieve such results, Member States should also be able to take into account all related national rules to the extent they are necessary to ensure the protection of victims and crucial for safeguarding the Member States' public interests, such as its political, social or economic organisation.

While the text contains references to numerous existing Regulations, Brussels I and Rome I are not among them; not even a precursory or confusing reference as

in Recital 147 of the GDRP.

Second, the European Parliament voted on two other proposals that build on and implement the objectives of the European Green Deal and the EU Circular Economy Action Plan. The first is a proposal for a **Regulation establishing a framework for setting eco-design requirements for sustainable products** with 455 votes in favour, 99 against and 54 abstentions (see also the European Parliament's Press Release). The Regulation aims to reduce the negative life cycle environmental impacts of products by improving the products' durability, reusability, upgradability, reparability etc. It sets design requirements for products that will be placed on the market, and establishes a digital product certificate to inform consumers.

This Regulation does not contain a private-international-law type connecting factor for contracts or products. Neither does it expressly elevate its provisions to overriding rules of mandatory law (to at least give us some private international law clue). Its scope is determined by the EU's internal market. All products that enter the European market have to be in conformity with the requirements of both regulations, also those that are produced in third countries and subsequently imported on the European market (Art. 3(1)). "Products that enter the market" is the connecting factor, or the basis for applying the Regulation as overriding mandatory law. The Regulation is silent on products that exit the market. Hopefully the result will not be that products that were still in the production cycle at the time of entry into force will simply be exported out of the EU.

The third adopted proposal is the **Regulation on packaging and packaging waste** with 476 votes in favour, 129 against and 24 abstentions (see also the European Parliament's Press Release). This Regulation aims to reduce the amount of packaging placed on the Union market, ensuring the environmental sustainability of the packaging that is placed on the market, preventing the generation of packaging waste, and the collection and treatment of packaging waste that has been generated. To reach these aims, the regulation's key measures include phasing out certain single-use plastics by 2030, minimizing so called "forever chemicals" chemicals in food packaging, promoting reuse and refill options, and implementing separate collection and recycling systems for beverage containers by 2029.

Like the Eco-design Regulation, no word on Private International Law, no

references. The Regulation refers to packaging “placed on the market” in various provisions (most notably Art. 4(1)) and recitals (e.g. Recitals 10 and 14).

Lastly, the European Parliament approved the proposal for a **regulation on prohibiting products made with forced labour** on the Union market with an overwhelming majority of 555 votes in favour, 6 against and 45 abstentions (see also the European Parliament’s Press Release). The purpose of this Regulation is to improve the functioning of the internal market while also contributing to the fight against forced labour (including forced child labour). Economic operators are to eliminate forced labour from their operations through the pre-existing due diligence obligations under Union law. It introduces responsible authorities and a database of forced labour risk areas or products.

Just as is the case for the other Regulations, this Regulation does not contain references to private international law instruments, and no explicit reference to instruments in this field, even though the implementation of the Regulation requires vigilance throughout the value chain. It would be correct to assume that this provides overriding mandatory law, as the ban on forced labour is generally accepted to be *jus cogens* even though the extent of this ban is contentious (see Franklin).

Other proposals that are more clearly in the domain of private international law have not (yet?) reached the finish line. First, in the procedure on the dual proposals in the field of the protection of adults of 31 May 2023, the European Parliament could either adopt them or introduce amendments at first reading. However, these proposals have not reached the plenary level before the end of term and it will thus be for the Conference of Presidents to decide at the beginning of the new parliamentary term whether the consideration of this ‘unfinished business’ can be resumed or continued (Art. 240 Rules of Procedure of the European Parliament).

In the second file, the proposal for a **Regulation in matters of parenthood and on the creation of a European Certificate of Parenthood** of 7 December 2022 the European Parliament was already consulted and submitted its opinion in a Resolution of 14 December 2023. It is now up to the Council of the European Union to decide unanimously (according to the procedure in Art. 81(3) of the Treaty on the Functioning of the European Union). It can either adopt the amended proposal or amend the proposal once again. In the latter case the

Council has to notify or consult (in case of substantial amendments) the European Parliament again.

Egyptian Supreme Court on the Enforcement of Foreign Judgments – Special Focus on the Service Requirement

I . Introduction

Egypt and its legal system occupy a unique position within the MENA region. Egyptian law and scholarship exert a significant influence on many countries in the region. Scholars, lawyers, and judges from Egypt are actively involved in teaching and practicing law in many countries in the region, particularly in the Gulf States. Consequently, it is no exaggeration to say that developments in Egyptian law are likely to have a profound impact on neighboring countries and beyond, and warrant special attention.

The cases presented here were recently released by the Egyptian Supreme Court (*mahkamat al-naqdh*). They are of particular interest because they illustrate the complex nature of legal sources, particularly with respect to the enforcement of foreign judgments (on this topic, see Béligh Elbalti, "Perspective of Arab Countries", *in* M. Weller et al. (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023), pp. 195 ff). These cases also provide a good opportunity to elucidate the basic principles regarding the service requirement, which, as the cases discussed here and the comments that follow show, can pose particular challenges.

II. Facts

Two cases are presented here. Both involve the enforcement of judgments from neighboring countries (Kuwait in the first case and Saudi Arabia in the second) with which Egypt has concluded conventions on the enforcement of foreign judgments. In both cases, enforcement was granted by lower courts. The parties challenging the enforcement then appealed to the Supreme Court. The main grounds of appeal in both cases revolve around the issue of proper service of process. Ultimately, the Supreme Court ruled in favor of the appellants in both cases.

III. Summary of the Rulings

- **Case 1: Appeal No. 2765 of 25 June 2023 (Enforcement of a Kuwaiti Monetary Judgment)**

Proper service is a prerequisite to be verified by the enforcing court before declaring a foreign judgment enforceable, as stipulated in Article 298 of the Code of Civil Procedure (hereinafter CCP). Enforcement should be refused unless it is established that the parties were duly served and represented. This is in line with the provisions of the Convention on the Enforcement of Judgments concluded between States of the Arab League, in particular Article 2(b), as well as Article 30 of the Riyadh Convention on Judicial Cooperation, which was ratified by Egypt by Presidential Decree No. 278 of 2014, and according to which foreign default judgments rendered in a contracting state shall not be recognized if the defendant has not been properly served with the proceedings or the judgment. […] [The record indicates that the appellant challenged the enforcement of the foreign judgment on the basis of insufficient service. The enforcing court admitted the regularity of the service, but without stating the basis for its conclusion. As a result, the appealed decision is flawed and requires reversal with remand].

- **Case 2: Appeal No. 17383 of 14 November 2023 (Enforcement of a Saudi custody judgment)**

According to Article 301 of the CCP, conventions signed by Egypt take precedence over domestic law. Egypt ratified the Convention on the Enforcement

of Judgments issued by the Council of the League of Arab States by Law No. 29 of 1954 and deposited the instruments of ratification with the General Secretariat of the League on July 25, 1954. The Kingdom of Saudi Arabia also signed the Convention on May 23, 1953. Consequently, the provisions of this Convention are applicable to the present case. […] The appellant argued that he had not been properly served with the summons because he had left the Kingdom of Saudi Arabia before the trial, which led to the foreign judgment. However, the judgment under appeal did not contain any valid response to the appellant's defense or any indication that the enforcing court had reviewed the procedures for serving the appellant. Furthermore, it did not examine whether the service of the appellant was in accordance with the procedures laid down by the law of the rendering State. Consequently, the appealed decision is vitiated by an error of law which requires it to be quashed.

Comments

The enforcement of foreign judgments in Egypt is regulated by Articles 296 to 301 of the CCP (for an English translation of these provisions, see J. Basedow *et al.* (eds.), *Encyclopedia of Private International Law – Vol. IV* (Elgar Editions, 2017), pages 3163-4). It is also governed by the conventions on the enforcement of foreign judgments ratified by Egypt (for a detailed overview in English of the enforcement of foreign judgments in Egypt under the applicable conventions and domestic law, see Karim El Chazli, "Recognition and Enforcement of Foreign Decisions in Egypt", *Yearbook of Private International Law*, Vol. 15 (2013/2014), pp. 387). The two cases presented above concern enforcement under these conventions.

In this regard, it is noteworthy that Egypt has established an extensive network of bilateral and regional multilateral conventions (for a detailed list, see Elbalti, *op. cit.* pp. 196, 199). With regard to multilateral conventions, Egypt has ratified two conventions adopted under the auspices of the League of Arab States: (1) The Arab League Convention on the Enforcement of Foreign Judgments and Arbitral Award of 1952 (hereinafter referred to as the "1952 Arab Judgments Convention". On this Convention, see eg, El Chazli, *op. cit.* pp. 395-399) and (2) The Riyadh Convention on Judicial Cooperation of 1983 (hereinafter referred to as the "1983 Riyadh Convention". On this Convention, see eg, Elbalti, *op. cit.* pp. 197-198). It is

important to note that the 1983 Riyadh Convention is intended to replace the 1952 Arab Judgments Convention in relations between the States Parties to both Conventions (see Article 72).

Bilateral conventions include a convention concluded with Kuwait in 1977. This convention was replaced by a new one in 2017.

1. With regard to the first case, the following observations can be made:

a. This case appears to be the first case in which the Supreme Court has referred to the 1983 Riyadh Convention since its ratification in 2014. This is noteworthy in light of the numerous missed opportunities for the Court to apply the Convention (see eg., *Supreme Court Appeal No. 5182 of 16 September 2018*. In the *Appeal No. 16894 of June 6, 2015*, the Riyadh Convention was invoked by the parties, but the Court did not refer to it. See also 2(b) below).

b. It is also noteworthy, and somewhat surprising, that the Supreme Court referred to the 1983 Riyadh Convention in a case concerning the enforcement of a Kuwaiti judgment. This is because, contrary to what is widely acknowledged, Kuwait has *only signed* but *did not ratify* the Riyadh Convention (on this point see Elbalti, *op. cit.*, page 197 fn (118)). Since Kuwait is a party only to the 1952 Arab Judgments Convention, the Supreme Court's reference to the 1983 Riyadh Convention was inaccurate. Moreover, if the 1983 Riyadh Convention had been applicable, there would have been no need to refer to the 1952 Arab Judgments Convention, since the former is intended to replace the latter (Article 72 of the Riyadh Convention).

c. Conversely, the Supreme Court completely overlooked the application of the 2017 bilateral convention with Kuwait, which, as noted above, superseded the 1977 bilateral convention between the two countries. This case provided another missed opportunity for the Court to address the so-called problem of conflict of conventions, as both the 1952 Arab Convention and the 2017 bilateral convention were applicable with overlapping scopes. In the absence of special guidance in the text of the conventions, such a conflict could have been solved on the basis of one of the two generally admitted principles: *lex posteriori derogat priori* or *lex specialis derogat generali* (for an example of a case adopting the latter solution from the UAE, see *Abu Dhabi Supreme Court, Appeal No. 950 of 26 December*

2022).

d. This is not the first time the Egyptian Supreme Court has dealt with the enforcement of Kuwaiti judgments (there are 10 cases, by my count). In all of these cases, the court referred to the 1952 Arab Judgments Convention in addition to domestic law. It is only in two cases that the Court referred to the 1977 Kuwait-Egypt bilateral convention in addition to the 1952 Arab Judgments Convention (*Supreme Court Appeal No. 3804 of 23 June 2010* and *Appeal No. 15207 of 11 April 2017*). In the majority of cases (8 out of 10), the Court refused to enforce Kuwaiti judgments. The main ground of refusal was mainly due to, or including, lack of proper service.

2. With regard to the second case, the following observations can be made:

a. Egypt does not have a bilateral convention with Saudi Arabia. However, both Egypt and Saudi Arabia are parties to the 1952 Arab Judgments Convention and the 1983 Riyadh Convention. As noted above, the 1983 Riyadh Convention replaces the 1952 Arab Judgments Convention for all States that have ratified it (Article 72). Therefore, the Supreme Court's affirmation that "the provisions of the [1952 Arab Judgments] Convention are therefore applicable to the present case" is incorrect. It is also surprising that the court made such a statement, especially considering that the party seeking enforcement relied on the 1983 Riyadh Convention, and given its erroneous application in Case 1.

b. This is not the first time that the Supreme Court has overlooked the application of the 1983 Riyadh Convention in a case involving the enforcement of a Saudi judgment. In a case decided in 2016, almost two years after the Convention entered into force in Egypt, the Supreme Court referred to the 1952 Arab Judgments Convention to reject the enforceability of a Saudi judgment, again citing the lack of proper service (*Supreme Court, Appeal No. 11540 of 24 February 2016*).

3. Enforcement of Foreign Judgments and Service Requirement in Egypt

As a general rule, service of process under Egyptian law is considered a

procedural matter that should be governed by the *lex fori* (Article 22 of the Civil Code. For an English translation, see Basedow *et al, op. cit.;* see also El Chazli, pp. 397, 402). In the context of foreign judgments, this means that the service of process or judgment is, in principle, governed by the law of the state of origin, subject, however, to considerations of public policy (see eg., *Supreme Court, Appeal No. 2014 of 20 March 2003*). Based on the case law of the Supreme Court, the following features are noteworthy:

- Service by publication was considered sufficient for enforcement purposes if the court could confirm that it had been duly carried out in accordance with the law of the State of origin (*Supreme Court, Appeal No. 232 of 2 July 1964*).
- However, if it appears that the service by publication did not comply with the requirements of the foreign law, the regularity of the service will be denied (*Supreme Court of, Appeal No. 14777 of 15 December 2016* [service of summons]; *Appeal No. 1441 of 20 April 1999* [notification of judgment]).
- Conversely, the Court held that the service irregularities may be cured if the defendant voluntarily appears before the foreign court and presents arguments on the merits of the case (*Supreme Court, Appeal No. 18249 of April 13, 2008*).
- Merely asserting that service was made in accordance with the law of the country of origin is not sufficient. Egyptian courts are required to verify that the judgment debtor has been properly served in accordance with the law of the country of origin and that such service is not contrary to Egyptian public policy (*Supreme Court of Cassation, Appeal No. 558 of 29 June 1988*). This aspect can be particularly important when it appears that the judgment debtor had permanently left the State of origin at the time when the service was made (*Supreme Court, Appeal No. 8376 of 4 March 2010*; *Appeal No. 14235 of 1 January 2014*; *Appeal No. 1671 of 18 February 2016*).
- With regard to ensuring that the defendant has been duly served, the courts are not bound by any specific method imposed by Egyptian law; therefore, the conclusions made by the enforcing court as to the regularity of the service based on the findings of the foreign judgment and not disputed by the appellant may be accepted (*Supreme Court, Appeal No. 1136 of 28 November 1990*).

- Where an international convention applies, the rules for service set out in the convention must be complied with, even if they differ from the rules of domestic law. Failure to comply with the methods of service prescribed by the applicable convention would render the foreign judgment unenforceable (*Supreme Court, Appeal No. 137 of 8 March 1952*).
- The rules provided for by the conventions prevail, including the method of determining whether proper service has been made (eg., the submission of a certificate that the parties were duly served with summons to appear before the proper authorities). Therefore, failure to comply with this rule would result in the rejection of the application for enforcement by the party seeking enforcement (*Supreme Court, Appeal No. 5039 of 15 November 2001*; *Appeal No. 3804 of 23 June 2010*).

4. Service under Conventions

Most of the bilateral and regional conventions ratified by Egypt contain provisions on the service of judicial documents. The Riyadh Convention is particularly noteworthy in this regard, as 18 of the 22 members of the League of Arab States are parties to it (see Elbalti, *op. cit.*, pp. 196-197). In addition, Egypt has been a party to the HCCH 1965 Service Convention since 1968.

The proliferation of these international instruments inevitably leads to the problem of conflict of conventions. This problem can be particularly acute in some cases, where as many as three competing instruments may come into play. This scenario often arises with some Arab countries, such as Tunisia or Morocco, with which Egypt is bound by (1) bilateral conventions, (2) a regional convention (namely the Riyadh Convention), and (3) a global convention (namely the HCCH Hague Service Convention).

In this context, the solution adopted by the Hague Convention deserves attention. Article 25 of the Convention provides that "[…] *this Convention shall not derogate from conventions containing provisions on matters governed by this Convention to which the Contracting States are or will become Parties*". However, the evaluation of this solution deserves a separate comment (for analyses on a similar issue regarding the HCCH 2019 Judgments Convention, see Elbalti, *op. cit.*, p. 206).

An Answer to the Billion-Dollar Choice-of-Law Question

On February 20, 2024, the New York Court of Appeals handed down its opinion in *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.* The issue presented—which I described in a previous post as the billion-dollar choice-of-law question—was whether a court sitting in New York should apply the law of New York or the law of Venezuela to determine the validity of certain bonds issued by a state-owned oil company in Venezuela. The bondholders, represented by MUFG Union Bank, argued for New York law. The oil company, Petróleos de Venezuela, S.A. ("PDVSA"), argued for Venezuelan law.

In a victory for PDVSA, the New York Court of Appeals unanimously held that the validity of the bonds was governed by the law of Venezuela. It then sent the case back to the federal courts to determine whether the bonds are, in fact, invalid under Venezuelan law.

Facts

In 2016, PDVSA approved a bond exchange whereby holders of notes with principal due in 2017 (the "2017 Notes") could exchange them for notes with principal due in 2020 (the "2020 Notes"). Unlike the 2017 Notes, the 2020 Notes were secured by a pledge of a 50.1% equity interest in CITGO Holding, Inc. ("CITGO"). CITGO is owned by PDVSA through a series of subsidiaries and is considered by many to be the "crown jewel" of Venezuela's strategic assets abroad.

The PDVSA board formally approved the exchange of notes in 2016. The exchange was also approved by the company's sole shareholder—the Venezuelan government—and by the boards of the PDVSA's subsidiaries with oversight and control of CITGO.

The National Assembly of Venezuela refused to support the exchange. It passed

two resolutions—one in May 2016 and one in September 2016—challenging the power of the executive branch to proceed with the transaction and expressly rejecting the pledge of CITGO assets in the 2020 Notes. The National Assembly took the position that these notes were "contracts of public interest" that required legislative approval pursuant to Article 150 of the Venezuelan Constitution. These legislative objections notwithstanding, PDVSA followed through with the exchange. Creditors holding roughly $2.8 billion in 2017 Notes decided to participate and exchanged their notes for 2020 Notes.

In 2019, the United States recognized Venezuela's Interim President Juan Guaidó as the lawful head of state. Guaidó appointed a new PDVSA board of directors, which was recognized as the legitimate board by the United States even though it does not control the company's operations inside Venezuela. The new board of directors filed a lawsuit in the Southern District of New York (SDNY) against the trustee and the collateral agent for the 2020 Notes. It sought a declaration that the entire bond transaction was void and unenforceable because it was never approved by the National Assembly. It also sought a declaration that the creditors were prohibited from executing against the CITGO collateral.

The choice-of-law issue at the heart of the case related to the validity of the 2020 Notes. Whether the Notes were validly issued depended on whether the court applied New York law or Venezuelan law. The SDNY (Judge Katherine Polk Failla) ruled in favor of the bondholders after concluding that the issue was governed by the laws of New York. On appeal, the Second Circuit certified the choice-of-law question to the New York Court of Appeals. The Court of Appeals reformulated this question to read as follows:

> *Given the presence of New York choice-of-law clauses in the Governing Documents, does UCC 8-110(a)(1), which provides that the validity of securities is determined by the local law of the issuer's jurisdiction, require the application of Venezuela's law to determine whether the 2020 Notes are invalid due to a defect in the process by which the securities were issued?*

In a decision rendered on February 20, 2024, the Court of Appeals unanimously concluded that the answer was yes.

Section 8-110

The court began with the New York choice-of-law clauses in the Indenture, the Note, and the Pledge Agreement. Under ordinary circumstances, it observed, New York courts will enforce New York choice-of-law clauses by operation of Section 5-1401 of the New York General Obligations Law. That statute provides that the parties to any commercial contract arising out of a transaction worth more than $250,000 may select New York law to govern their agreement even if the transaction has no connection to New York. In this particular case, however, a different part of Section 5-1401 dictated a different result.

Section 5-1401 also states that even when parties choose New York law, that law "shall not apply . . . to the extent provided to the contrary in subsection (c) of section 1-301 of the uniform commercial code." UCC 1-301(c)(6) states, in turn, that if UCC 8-110 "specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted." Finally, UCC 8-110(a)(1) states that "[t]he local law of the issuer's jurisdiction . . . governs . . . the validity of a security."

After following the chain of choice-of-law rules from Section 5-1401 to UCC 1-301(c) to UCC 8-110, the court observed that the validity of a security is governed by the law of the issuer's jurisdiction. The court further observed, based on the statutory text, that Section 8-110 was a mandatory rule that could not be altered by a choice-of-law clause. Against this backdrop, the court held that "because UCC 8-110 is applicable here, any issue of the validity of a security issued pursuant to the Governing Documents is determined by the law of the issuer's jurisdiction. In this case, the issuer is a Venezuelan entity, so the law of Venezuela is determinative of the issue of validity."

Validity

The court next addressed the meaning of "validity" as used in Section 8-110. The bondholders argued that this term did not sweep broadly enough to encompass the requirement in Article 150 of the Venezuelan Constitution, which provides that the National Assembly must approve all "contracts of public interest." They argued that the word encompassed only the usual corporate formalities for issuing a security. PDVSA argued that "validity" could be interpreted to include

constitutional provisions that bear on the issue of whether a security was duly authorized. The Court of Appeals agreed.

In reaching this conclusion, the court first observed that the issue of "validity" had to be distinguished from the issue of "enforceability." The first term refers to the "nature of the obligor and its internal processes." The second term refers to "requirements of general applicability as going to the nature of the rights and obligations purportedly created, irrespective of the nature of the obligor and its processes." The court cited usury laws and anti-fraud laws as examples of laws that dealt with enforceability rather than validity. Although these laws may prohibit a court from *enforcing* a contract, they do not bear on the *validity* of that same contract because they do not address the procedures that must be followed for the contract to be duly authorized.

The court then distinguished between (1) validity and (2) the consequences of invalidity. While Section 8-110 stated the controlling choice-of-law rule with respect to the validity, it was not controlling with respect to the consequences stemming from that invalidity. "Even if a court determines that a security is invalid under the local law of the issuer's jurisdiction," the court held, "the effects of that determination will depend on New York law."

With these distinctions in mind, the court held that "Article 150 and its related constitutional provisions could potentially implicate validity because they speak to whether an entity has the power or authority to issue a security, and relatedly, what *procedures* are required to exercise such authority." In particular, the court observed that this constitutional provision required the approval of the National Assembly before certain contracts could be executed. Since Article 150 identified procedural requirements rather than substantive ones, the court reasoned, it spoke to the issue of validity rather than enforceability. In so holding, the court reasoned that the term "validity," as used in Section 8-110, could implicate constitutional provisions of the issuer's jurisdiction that speak to whether a security is duly authorized.

Caveats

After holding that the issue of validity was governed by the law of the issuer's jurisdiction, and that Section 150 of the Venezuelan Constitution might be

relevant to the issue of validity, the court went on to announce several important caveats.

First, the court stated that the application of Venezuelan law on these facts must be "narrowly confined." It held that the "exception provided by UCC 8-110 provides no opportunity for the application of foreign laws going to the enforceability of a security, nor does it affect the adjudication of any question under the contract other than whether a security issued by a foreign entity is valid when issued."

Second, the court emphasized that "none of this is to say that plaintiffs will ultimately be victorious." It noted that the federal courts would still have to determine whether the securities were, in fact, invalid under the laws of Venezuela.

Third, the court went out of its way to emphasize the fact that—issues of validity notwithstanding—New York law governs the transaction in all other respects, including the consequences if a security was issued with a defect going to its validity.

Conclusion

This long list of caveats suggests that the Court of Appeals *wanted* to apply to New York law in this case to the maximum extent possible. Enforcing New York choice-of-law clauses, after all, generates business for New York lawyers, and the generation of such business ultimately benefits the State of New York. The Court was, however, unable to find an interpretive path that permitted it to apply New York law in light of the text of Section 8-110.

In the days following the court's decision, several news outlets reported that the value of the PDVSA bonds at issue had fallen precipitously. This decline in price presumably reflects the market's perception that the bondholders are less likely to gain access to the CITGO assets anytime soon (if at all) if Venezuelan law governs the validity issue. TLB will report on developments in this case going forward.

[*This post is cross-posted at Transnational Litigation Blog.]*

Dutch Journal of PIL (NIPR) – issue 2023/4

The latest issue of the Dutch Journal on Private International Law (NIPR) has just been published

NIPR 2023 issue 4

EDITORIAL

I. Sumner, The next stops on the European international family law train / p. 569-571

Abstract
The European legislature is not yet finished with the Europeanisation of private international family law. This editorial briefly introduces two new proposals, namely the Proposal for a European Parentage Regulation and the Proposal for a

European Adult Protection Regulation.

ARTICLES

B. van Houtert, Het Haags Vonnissenverdrag: een game changer in Nederland? Een rechtsvergelijkende analyse tussen het verdrag en het commune IPR / p. 573-596

Abstract
On 1 September 2023, the 2019 Hague Judgments Convention (HJC) entered into force in the Netherlands. This article examines whether the HJC can be considered as a game changer in the Netherlands. Therefore, a legal comparison has been made between the HJC and Dutch Private International Law (PIL) on the recognition and enforcement of non-EU judgments in civil and commercial matters. This article shows that the HJC can promote the recognition and enforcement of judgments rendered by non-EU countries in the Netherlands mainly because of the facultative nature of the grounds for refusal in Article 7 HJC. Furthermore, the complementary effect of Dutch PIL on the basis of Article 15 HJC facilitates recognition as some indirect grounds of jurisdiction are broader or less stringent, and some grounds are lacking in Article 5(1) HJC. Compared to the uncodified Dutch PIL, the HJC provides procedural advantages as well as legal certainty that is beneficial to cross-border trade, mobility and dispute resolution. Moreover, preserving the foreign judgment, instead of replacement by a Dutch judgment, serves to respect the sovereignty of states as well as international comity. Despite the limited scope of application, there is an added value of the HJC in the Netherlands because of its possible application by analogy in the Dutch courts, as a Supreme Court's ruling shows. The Convention can also be an inspiration for the future codification of the Dutch PIL on the recognition and enforcement of foreign judgments regarding civil matters. Furthermore, the application of the Convention by analogy will contribute to international legal harmony. Based on the aforementioned (potential) benefits and added value of the HJC, this article concludes that this Convention can be considered as a game changer in the Netherlands.

K.J. Krzeminski, Te goed van vertrouwen? Een kanttekening bij het advies van de Staatscommissie voor het Internationaal Privaatrecht tot herziening van artikel 431 Rv / p. 597-618

Abstract
In February 2023, the Dutch Standing Government Committee for Private International Law rendered its advice on the possible revision of Article 431 Dutch Code of Civil Proceedings (DCCP). This statutory provision concerns the recognition and enforcement of foreign court judgments in civil matters to which no enforcement treaty or EU regulation applies. While paragraph 1 of Article 431 DCCP prohibits the enforcement of such foreign court judgments absent an exequatur regime, paragraph 2 opens up the possibility for new proceedings before the Dutch courts. In such proceedings, the Dutch Courts are free to grant authority to the foreign court's substantive findings, provided that the foreign judgment meets four universal recognition requirements. The Standing Government Committee proposes to fundamentally alter the system under Article 431 DCCP, by inter alia introducing automatic recognition of all foreign court judgments in the Netherlands. In this article, the concept of and the justification for such an automatic recognition are critically reviewed.

B.P.B. Sequeira, The applicable law to business-related human rights torts under the Rome II Regulation / p. 619-640

Abstract
As the momentum for corporate liability for human rights abuses grows, and as corporations are being increasingly brought to justice for human rights harms that they have caused or contributed to in their global value chains through civil legal action based on the law of torts, access to a remedy remains challenging. Indeed, accountability and proper redress rarely occur, namely due to hurdles such as establishing the law that is applicable law to the proceedings. This article aims to analyse the conflict-of-laws rules provided for under the Rome II Regulation, which determines the applicable law to business and human rights tort actions brought before EU Courts against European parent or lead corporations. In particular, we will focus on their solutions and impact on access to a remedy for victims of corporate human rights abuses, reflecting on the need to adapt these conflict rules or to come up with new solutions to ensure that European corporations are held liable for human rights harms taking place in their value chains in a third country territory.

CASE LAW

M.H. ten Wolde, Over de grenzen van de Europese Erfrechtverklaring. HvJ

EU 9 maart 2023, ECLI:EU:C:2023:184, NIPR 2023-753 (R. J. R./Registr? centras V?) / p. 641-648

Abstract
A European Certificate of Succession issued in one Member State proves in another Member State that the person named therein as heir possesses that capacity and may exercise the rights and powers listed in the certificate. On the basis of the European Certificate of Succession, inter alia, foreign property can be registered in the name of the relevant heir. In the Lithuanian case C-354/21 R. J. R. v Registr? centras V?, the question arose whether the receiving country may impose additional requirements for such registration when there is only one heir. The Advocate General answered this question differently from the European Court of Justice. Which view is to be preferred?

SYMPOSIUM REPORT

K. de Bel, Verslag symposium 'Grootschalige (internationale) schadeclaims in het strafproces: beste praktijken en lessen uit het MH 17 proces' / p. 649-662

Abstract
On 17 November 2022, the District Court of The Hague delivered its final verdict in the criminal case against those involved in the downing of flight MH17 over Ukraine. This case was unique in many ways: because of its political and social implications, the large number of victims and its international aspects. The huge number and the international nature of the civil claims for damages exposed several practical bottlenecks and legal obstacles that arise when civil claims are joined to criminal proceedings. These obstacles and bottlenecks, which all process actors had to address, were the focus of the symposium 'Large-scale (international) civil claims for damages in the criminal process: best practices and questions for the legislator based on the MH17 trial' that took place on 10 October 2023. A summary of the presentations and discussions is provided in this article.

First edition of The Hague Academy of International Law's Advanced Course in Hong Kong on "Current Trends on International Commercial and Investment Dispute Settlement"

From 11 to 16 December 2023, the first edition of **The Hague Academy of International Law's Advanced Course in Hong Kong** was held, co-organised by the Asian Academy of International Law and the Department of Justice of the Government of the Hong Kong Special Administration Region. For this

programme, the Hague Academy of International Law convened distinguished speakers to deliver lectures on “Current Trends on International Commercial and Investment Dispute Settlement”.

After welcome notes (Adrian Lai, Deputy Secretary General and Co-Convenor of the Advisory Board of the Asian Academy of International Law; Teresa Cheng, Founding Member and Co-Chairman of the Asian Academy of International Law, also on behalf of Christophe Bernasconi, Secretary General of the HCCH; Jean-Marc Thouvenin, Secretary-General of The Hague Academy of International Law; and Lam Ting-kwok Paul, Secretary for Justice of the Government of the Hong Kong SAR) a welcome lunch was offered where a “beggar‘s chicken” was offered, to be hammered out of the bread casing…

In the afternoon the first class, delivered by **Natalie Morris-Sharma**, Singapore, focused on the **UN 2018 Convention on Settlement Agreements Resulting from Mediation (Singapore Convention)**. Structuring her lecture around the drafting procedure of the new instrument, the former Chairperson provided valuable insights into the deliberations within the Working Group. For instance, the question what form (international treaty, model law, or mere guidelines) the future instrument should take was literally up for debate until the very last session, as some delegations felt that national approaches to enforcing settlement agreements were far too different to justify the adoption of a uniform “hard law” solution. This uncertainty during the discussions is the main reason why the Working Group has taken the unusual course of action to produce not only the Convention but also the amended UNCITRAL 2018 Model Law on International Commercial Mediation. Further in the lecture, it was emphasised that the

Singapore Convention has taken a stance on at least one of these differences, the legal nature of the mediated settlement agreement. By providing for the "enforcement" ("relief") in Articles 3 and 4 which can only be refused on the limited, discretionary grounds contained in Art. 5, the Singapore Convention rejects the traditional view that mediation results in nothing more than a contractual obligation. Finally, the future of the instrument has been discussed, in particular the reasons why the major economic powers (China, EU, USA) have not yet ratified the Convention.

The next morning, **Diego Fernández Arroyo** started his lecture on **investor-state dispute resolution**. Using the Euro Disneyland negotiations as an example, in which corporate counsel Joe Shapiro, envisaging the possibility of legal disputes with the French government, pushed relentlessly for the inclusion of an arbitration clause, he first illustrated the practical importance of ISDS. Subsequently, the historical development of this area of law from diplomatic protection to international arbitration was summarised, with particular reference to the highly specialised International Centre for Settlement of Investment Disputes (ICSID) established under the auspices of the World Bank Group. He stressed that the submission of investment disputes, that involve a public law (global) governance dimension, to essentially the same resolution mechanism as private law commercial disputes is by no means self-evident. On this foundation, Fernández Arroyo finally turned to the contemporary criticism towards the current ISDS practice. He stated, *inter alia*, that the concerns regarding transparency have been adequately addressed through the adoption of new standards (e.g. Mauritius Convention, UNCITRAL 2014 Rules) and elaborated on the prospects of the Multilateral Investment Court project advocated by the EU.

Then, **Franco Ferrari** made use of his part of the course on **international commercial arbitration** to powerfully challenge an overly idealistic understanding of international arbitration. Appealing in particular to the Hong Kong barristers in the room, he initially demonstrated how the loopholes between arbitration and litigation may be strategically utilised in legal practice. While the existence of an arbitration agreement obliges the court to dismiss a claim, it does not prevent filing a lawsuit in the first place. Hence, the resulting fear of publicity or discovery can be used effectively as leverage in settlement negotiations. Thereafter, quite in contrast to the idea of global governance underlying the ISDS frameworks, he reminded the audience of F. A. Mann's statement: "every

arbitration is a national arbitration, that is to say, subject to a specific system of national law". Along the lines of this famous *bon mot*, Ferrari highlighted the persistent relevance of the *lex loci arbitri* by examining, among others, whether the provisions of the UN 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) require an "international" or rather a "domestic" reading. In this context, he discussed with the audience the doctrine of delocalisation as promoted in French jurisprudence (e.g. Cass. Civ., 23 mars 1994, *Hilmarton*, Bull. 1994 I N° 104 p. 79). From the perspective of legal positivism, those approaches, even if striving for a truly transnational understanding, are nevertheless dependent on the applicable domestic legal framework, which is determined by the seat of the respective arbitration.

In the following, the author of these lines focused on the **settlement of international disputes before domestic courts**. After laying out a foundational theory for designing judicial cooperation in civil matters within a field of "trust" and "control" ("trust management") in regard to foreign sovereign judicial acts, in particular foreign judgments, to be integrated (or not) into a state's s own administration of justice, this theory was then applied to the "Hague Package" (Christophe Bernasconi) of instruments on judicial cooperation in civil matters, starting with the HCCH 2019 Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (e.g. when and why and to what extent foreign courts are "courts" in the sense of, inter alia, Art. 4 of the Convention?), touching further upon the ongoing HCCH Jurisdiction Project (currently mainly focusing on parallel proceedings), the HCCH 2005 Choice of Court Agreement Convention, as well as the HCCH Conventions on Service, Taking of Evidence, and the Apostille. This emerging "Hague System" – that is evidently emerging under fundamentally different conditions than the well-established "Brussels System" within the EU's supranational Area of Freedom, Security and Justice – was contrasted with current escalations of "distrust", such as e.g. the current trend of antisuit injunctions (ASIs), anti-antisuit injunctions (AASIs) and even anti-anti-antisuit injunctions (AAASIs) in international Standard Essential Patent (SEP) ligitation in respect to setting global FRAND licences, involving domestic courts from all over the world (e.g. China, Germany, India, UK, USA etc.) – an area of law which is – unfortunately – excluded to a large extent from the material scopes of the younger HCCH Conventions.

Jean-Marc Thouvenin added with a fascinating lecture on **dispute settlements before the International Court of Justice**, and **Judge Gao Xiaoli** explained the latest developments of dispute resolution in (Mainland) China, in particular the setting and functions of China's **Supreme People's Court's International Commercial Court (CICC)**.

In the **afternoon of the last day**, the participants, coming from more than 20 nations, received their certificates, and the week concluded with a **closing reception in celebration of the Centenary of the Hague Academy** against the background of Hong Kong's skyline.

The Course took place in the chapel of the **historic Former French Mission Building**, later the seat of Hong Kong's Court of Final Appeal. Lectures and participants convened in the former hearing hall of the building which added further inspiration to the vivid and intense discussions about the settlement of international commercial disputes on all avenues and levels, a holistic perspective that some liked to call an "integrated approach" (M. Weller, Festschrift für

Herbert Kronke 2020), others a “pluralistic dispute resolution” (“PDR”, see e.g. Wang/Chen, Dispute Res. in the PRC, 2019).

New Proposed Rules on International Jurisdiction and Foreign Judgments in Morocco

Last Thursday, November 9, Draft No. 02.23 proposing the adoption of a new Code of Civil Procedure (*al-musattara al-madaniyya*) was submitted to the Moroccan House of Representatives. One of the main innovations of this draft is the introduction, for the first time in Moroccan history, of a catalogue of rules on international jurisdiction. It also amends the existing rules on the enforcement of foreign judgments.

Despite the importance of this legislative initiative for the development of private international law in Morocco, the proposed provisions are unfortunately disappointing in many respects.

First, with regard to the rules of international jurisdiction, it is surprising that the drafters of the 2023 proposed Code have relied heavily on the rules of the Egyptian Code of Civil Procedure, which date back to the fifties of the last century. These rules are in many respects completely parochial and outdated. Other codifications from the MENA region (e.g., the Tunisian codification of PIL) or elsewhere (e.g., recent codifications of PIL in Europe and Asia) could have served as better models. Furthermore, the proposed rules seem to have overlooked developments at the regional or international level, in particular those in the European Union and the Hague Conference on Private International Law over the last two decades. The fact that the new proposed rules do not even take into account the solutions of the 1991 Ras Lanouf Convention, a double convention concluded between the Maghreb countries (but not yet ratified by Morocco), is difficult to explain.

Examples of questionable aspects of the new proposed rules include, among others:

- Adopting the nationality of the defendant as the basis for jurisdiction in all matters, including civil and commercial matters, even if the dispute has no other connection with Morocco.
- Failure to distinguish between concurrent and exclusive jurisdiction. This is problematic because the new proposed provision on the requirements for the enforcement of foreign judgments allows Moroccan courts to refuse enforcement if the judgments were rendered in matters within the exclusive jurisdiction of Moroccan courts, without providing a list of such matters.
- The adoption of questionable and outdated grounds of jurisdiction, such as the location of property without limitation and the place of the conclusion of the contract.
- Failure to introduce new rules that take into account the protection of weaker parties, especially employees and consumers.
- Failure to include a clear and coherent rule on choice of court agreements.
- Failure to include a rule on lis pendens.

Second, with regard to the enforcement of foreign judgments, the main surprise is the introduction of the reciprocity rule, which was not part of the law on foreign judgments in Morocco. Moreover, Moroccan courts have never invoked the principle of reciprocity when dealing with the enforcement of foreign judgments, either as a possible requirement or as ground for refusing to give effect to foreign judgments. It is not clear why the drafters felt the need to introduce reciprocity when there does not seem to be any particular problem with the enforcement of Moroccan judgments abroad.

The following is a loose translation of the relevant provisions. The text in brackets has been added by the author.

Part II – The Jurisdiction of the Courts

Chapter IV – International Judicial Jurisdiction

Article 72 [(General) Jurisdiction over Moroccans]
The courts of the Kingdom shall have jurisdiction to hear actions brought against Moroccans even if they are not domiciled or resident in Morocco, except when the action concerns immovables located abroad.

Article 73 [(General) Jurisdiction over Foreigners Domiciled or Resident in Morocco]
The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are domiciled or resident in Morocco, except where the dispute concerns immovables located abroad.

Article 74 [(Special) Jurisdiction over Foreigners not domiciled or resident in Morocco]
[1] The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are not domiciled or resident in Morocco [in the following cases]:

1. **[Property and Obligations]** [if the action] concerns property located in Morocco, or an obligation formed, performed, or should have been performed in Morocco;

2. **[Tortious Liability]** [if the action] concerns tortious liability when the act

giving rise to liability or the damage takes place in Morocco;

3. **[Intellectual Property]** [if the action] concerns the protection of intellectual property rights in Morocco;

4. **[Judicial Restructuring]** [if the action] concerns procedures for businesses in difficulty instituted in Morocco;

5. **[Joint Defendants]** [if the action] is brought against joint defendants, and one of them is domiciled in Morocco;

6. **[Maintenance]** [if the action] concerns a maintenance obligation and the maintenance creditor is resident in Morocco;

7. **[Filiation and Guardianship]** [if the action] concerns the filiation of a minor resident in Morocco or a matter of guardianship over a person or property;

8. **[Personal status]** [if the action] concerns other matters of personal status:

a) if the plaintiff is Moroccan;
b) if the plaintiff is a foreigner who has resident in Morocco and the defendant does not have a known domicile abroad,

9. **[Dissolution of marriage]** [if the action] concerns the dissolution of the marital bond:
a) if the marriage contract was concluded in Morocco;
b) if the action is brought by a husband or a wife of Moroccan citizenship;
c) if one of the spouses abandons the other spouse and fixes his/her domicile abroad or has been deported from Morocco

[2] **[Counterclaims and related claims]** The courts of the Kingdom that have jurisdiction over an original action shall also have jurisdiction to hear counterclaims and any related claims.

[3] **[Conservative and Provisional measures]** The courts of the Kingdom shall also have jurisdiction to take conservative and provisional measures to be executed in the Kingdom even if they do not have jurisdiction over the original action.

Article 75

[1. **Consent and Submission]** The courts of the Kingdom shall also have jurisdiction to hear actions even if they do not fall within the jurisdiction of the defendant explicitly or implicitly accepting their jurisdiction unless the action concerns an immovable located abroad.

[2. **Declining jurisdiction]** If the defendant in question does not appear, the court shall [in its motion] rule that it has no jurisdiction.

Part IX – Methods of Execution
Chapter III – General Provisions relating to Compulsory Execution of Judicial Judgments

Article 451 [Necessity of an Exequatur Declaration]
Foreign judgments rendered by foreign courts shall not be enforced unless they are declared enforceable following the conditions laid down in the present Act.

Article 452 [Procedure]
[1] The request for exequatur shall be submitted to the First President of the court of the second instance with subject-matter jurisdiction.
[2] Jurisdiction shall lie with the court of the place of execution, and the executor shall have the authority to pursue the execution wherever the property of the person against whom the execution was issued is found.
[3] The first president or the person replacing him/her shall summon the defendant when necessary.

Article 453 [Requirements]
The foreign judgment shall not be declared enforceable except after verifying that the following requirements are satisfied:
[a] The foreign court did not render a judgment that falls within the exclusive jurisdiction of Moroccan courts;
[b] There exists a substantial connection between the dispute and the court of the state where the judgment was rendered;
[c] There was no fraud in choosing the rendering court;
[d] The parties to the dispute were duly summoned and properly represented;
[e] The judgment became final and conclusive following the law of the rendering court;
[f] The judgment does not contradict with a judgment already rendered by Moroccan courts;

[g] The judgment does not violate Moroccan public policy.

Article 454 [Documents and Appeal]
[1] Except otherwise stipulated in the international conventions ratified by Morocco and published in the Official Gazette, the request [for declarations of enforceability] shall be submitted by way of application accompanied by the following:
[a] an official copy of the judicial judgment
[b] a certificate of non-opposition, appeal, or cassation
[c] a full translation into Arabic of the documents referred to above and certified as authentic by a sworn translator.
[2] The judgment of granting exequatur can be subject to appeal before the Supreme Court.
[3] The Supreme Court shall decide on the appeal within one month.
[4] Judgments granting exequatur in cases relating to the dissolution of marriage shall not be subject to any appeal except by the public prosecutor.

Article 455 [Titles and Authentic Instruments]
Titles and authentic instruments established abroad before competent public officers and public servants can be enforced in Morocco after being declared enforceable, and that after showing that the title or the authentic instrument has the quality of an enforceable title and that it is enforceable following the law of the State where it was drawn up and does not violate the Moroccan public policy.

Article 456 [International Conventions and Reciprocity]
The rules laid down in the previous articles shall be applied, without prejudice to the provisions of the international conventions and treaties ratified by the Kingdom of Morocco and published in the Official Gazette. The rule of reciprocity shall also be considered.

Certificat de coutume: New

volume in French

Gustavo Cerqueira, Nicolas Nord, and Cyril Nourissat have recently edited a new volume on the "Certificat de coutume – Pratiques en droit des affaires internationales" (in French). The editors have kindly provided us with an English translation of the blurb available on the publisher's website:

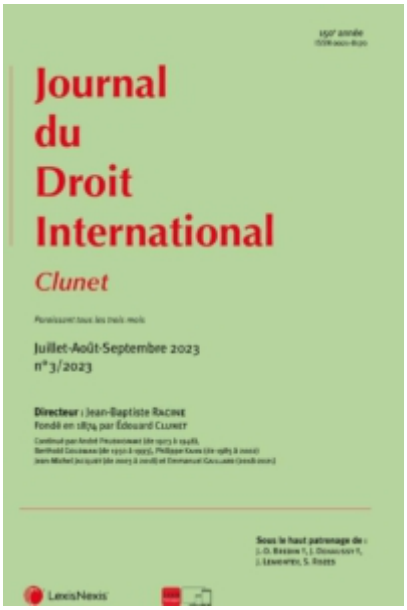
> *Statement or written certificate on the content of a foreign law rule, the Certificat de coutume is subject to a heterogeneous practice both in terms of its establishment and its processing Ignored by many jurists, its reliability is often called into question due to a double insufficiency that it may conceal: about the law attested when it is issued by a public authority, about the impartiality when a private person issues it.*
>
> *However, these criticisms are not insurmountable. In addition to the combination with other means of establishing the content of the foreign law rule in question, the Certificat de coutume does not avoid obliterating any contradictory discussion and the freedom of interpretation of the authority before which it is produced. The liabilities associated with the Certificat de coutume, whether that of the drafter, the counsel of the parties or the notary using such a certificate, constitute a formidable safeguard against tendentious approaches. Above all, we must not ignore the virtues of empiricism, which could – in these times of debates regarding a future codification of French private international law – reveal important and good practices to be considered de lege ferenda.*
>
> *The book contains the reflections of several experts on the practice – little known to the public – of the Certificat de costume in international affairs at a symposium held on 12 April 2022 at the Conseil supérieur du notariat français. The real added value of this book therefore lies in the desire to lift the veil on the Certificat de coutume, which currently constitutes a blind spot in private international law. Its name is certainly known to all, but its legal system still appears to be embryonic.*
>
> *This book aims to be constructive and to come up with concrete proposals, the fruit of collective reflection, bringing together the key players in the field.*

Authors: Bertrand Ancel, Oliver Berg, Marc Cagniart, Gustavo Cerqueira, Louis Degos, Karlo Fonseca Tinoco, Jacques-Alexandre Genet, Giulio-Cesare Giorgini, Kevin Magnier-Merran, Daniel Mainguy, Pierre Jean Meyssan, Pierre Mousseron, Nicolas Nord, Cyril Nourissat, Sylvaine Poillot-Peruzzetto, Pierre Tarrade, Jean-Luc Vallens, Pascal de Vareilles-Sommières.

Journal du Droit International Clunet – issue 2023/3

The third issue of the *Journal du Droit international-Clunet* of 2023 was released in July. It contains three articles and many case notes.

The first article Regard québécois sur le projet de Code de droit international privé français (A view from Quebec on the project of a french private international law Code) is authored by Prof. Sylvette Guillemard (Université Laval). The abstract reads as follows:



> *A draft of a French private international law code project was presented to the Minister of Justice in March 2022. As soon as it was submitted, it was immediately commented on by various parties ; its qualities are admired as much as its shortcomings are pointed out. In 1994, the Quebec legislator adopted a book dedicated to private international law in its new Civil Code. After nearly 30 years, it was able to reveal its flaws and demonstrate its*

advantages. Therefore, neither too old nor too young, it appeared to us as an excellent object of comparison with the French project. At the end of the exercise, we may conclude that French law can only emerge as the winner of this "operation of shaping the rules [of private international law] into a whole", to borrow the words of Rémy Cabrillac.

Dr Djoleen Moya (Université catholique de Lyon) is the author of the second article Vers une redéfinition de l'office du juge en matière de règles de conflit de lois ? (Towards a redefinition of the obligation for a judge to apply choice-of-law rules?). Dr Moya is continuing the reflection of her doctoral work *L'autorité des règles de conflit de loi – Réflexion sur l'incidence des considérations substantielles*, recently published. The abstract reads as follows:

The latest developments in matters of divorce, both in domestic law and in private international law, have largely renewed the question of the obligation for a judge to apply choice-of-law rules. Traditionally, the Cour de cassation considers that in matters of divorce, judges must apply, if necessary ex officio, the applicable conflict rule, because unwaivable rights are concerned. However, this solution is under discussion. First, the qualification of divorce as an unwaivable right is questionable, especially since the admission of a purely private divorce by mutual consent in French law. But above all, the Europeanisation of the applicable choice-of-law rules seems likely to call for a new definition the judges' procedural obligations. If we add to this the recent reorientation of the Cour de cassation's position and the solutions stated in the draft Code of Private of International Law, the question undoubtedly calls for a reassessment.

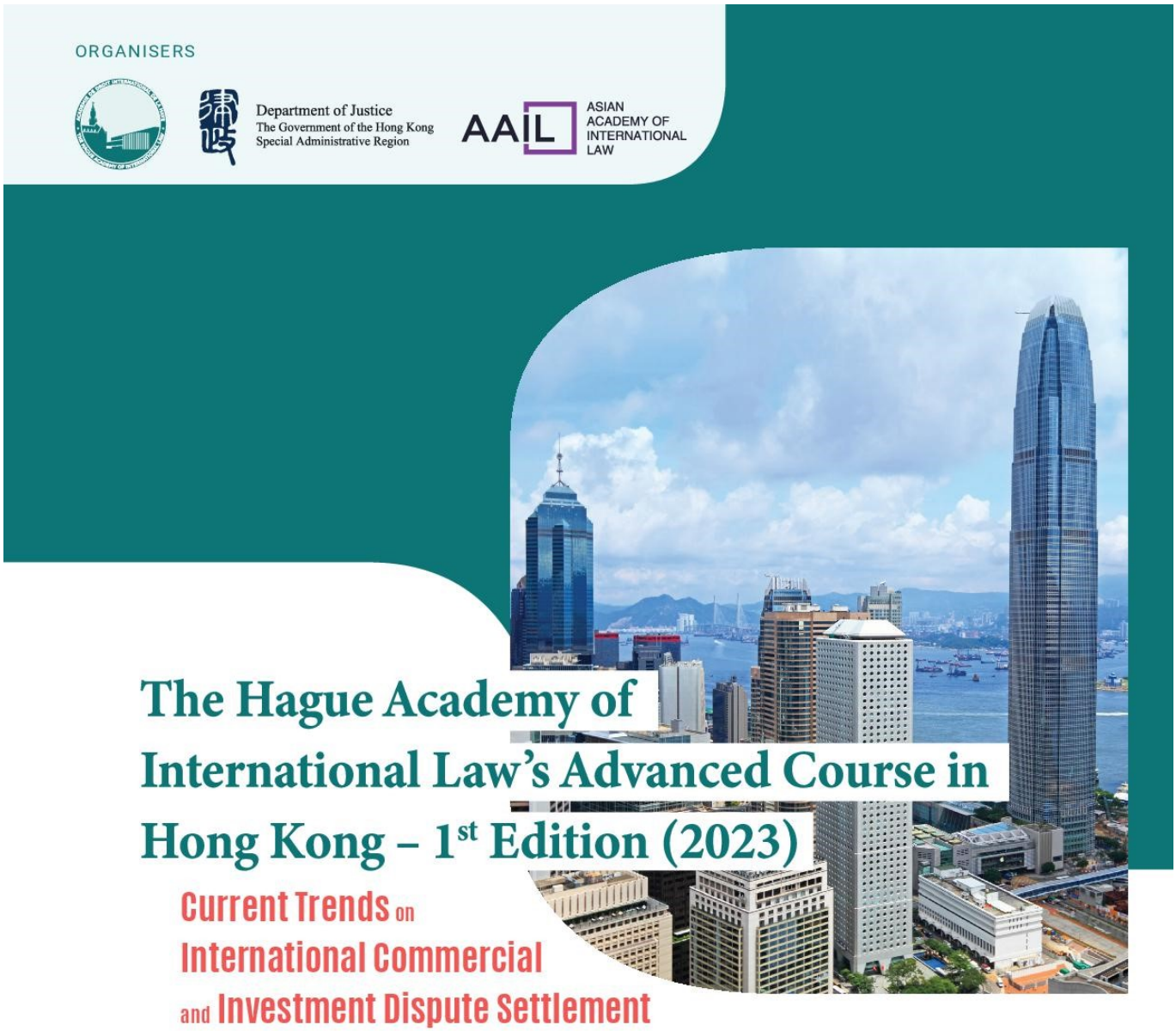
The third article is authored by Prof. Sara Tonolo (Università degli Studi di Padova) and deals with Les actes de naissance étrangers devant la Cour européenne des droits de l'homme – à propos de l'affaire *Valdís Fjölnisdóttir et autres c/ Islande* (Foreign birth certificates before the European Court of Human Rights – about the *Valdís Fjölnisdóttir and others v/ Iceland* case). The abstract reads as follows:

The European Court of Human Rights ruled on the recognition of the filiation status within surrogacy in the Valdís Fjölnisdóttir and others v. Iceland case.

This perspective leaves many questions unanswered and prompts further reflection, particularly with regard to the role that private international law can play in the protection of human rights, in the context of the difficult balance between the protection of the right to private and family life and the margin of appreciation reserved to member states.

The full table of contents is available here.

Application Now Open: The Hague Academy of International Law's Advanced Course in Hong Kong – 1st Edition (2023)



The first edition of the **HAIL Advanced Courses in Hong Kong,** organised in cooperation with with the Asian Academy of International Law and (AAIL) and the Hong Kong Department of Justice, will take place on **11-15 December 2023** with a focus on "**Current Trends on International Commercial and Investment Dispute Settlement**".

For this special programme, the Secretary-General of The Hague Academy of International Law (Professor Jean-Marc Thouvenin) has invited **leading academics and practitioners** from around the world to Hong Kong, including **Diego P. Fernández Arroyo** (Science Po, Paris), **Franco Ferrari** (New York University), **Natalie Morris-Sharma** (Attorney-General's Chambers, Singapore), **Matthias Weller** (University of Bonn) and **Judge Gao Xiaoli** (Supreme People's Court, China), who will deliver **five expert lectures** on:

Lecture 1: ‘The United Nations Convention on International Settlement Agreements Resulting from Mediation’ (Natalie Morris-Sharma)
Lecture 2: ‘Investor-State Dispute Settlement’ (Diego P. Fernández Arroyo)
Lecture 3: ‘International Commercial Arbitration’ (Franco Ferrari)
Lecture 4: , ‘Settlement of International Disputes before Domestic Courts’ (Matthias Weller)
Lecture 5: ‘Latest Developments of Dispute Resolution in China’ (Judge Gao Xiaoli)

This course is **free of charge**. However, full attendance is mandatory. Interested candidates are invited to send the completed application form to events@aail.org **by 13 October 2023**. All applications are subject to review. Succesful applicants will receive email confirmation by October 31. Registered participants will have **pre-course access** to the **HAIL e-learning platform** that provides reading materials prepared by the lecturers. A **certificate of attendanc**e will be awarded to participant with a perfect attendance record.

For **further information** provided by the organisers, please refer to the attached HAIL eFlyer and application form.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2023: 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/)

C. Budzikiewicz/K. Duden/A. Dutta/T. Helms/C. Mayer: **The European Commission's Parenthood Proposal – Comments of the Marburg Group**

The Marburg Group – a group of German private international law scholars – reviewed the European Commission's Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. The Group welcomes the initiative of the Commission and embraces the overall structure of the Parenthood Proposal. Nevertheless, it suggests some fundamental changes, apart from technical amendments. The full article-by-article comments of the Group with redrafting suggestions for the Commission Proposal are available at www.marburg-group.de. Building on the comments, the present article authored by the members of the Marburg Group focuses on the main points of critique and considers the present state of discussion on the proposed Regulation.

U.P. Gruber: **A plea against ex post-adaptation of spousal inheritance rights**

Adaptation is recognized as a tool to eliminate the lack of coordination between the provisions of substantive law derived from different legal systems. According to a widespread view, adaption is very often necessary with regard to the spouse's share in the deceased's estate, namely if the matrimonial property regime and questions relating to succession are governed by different laws. However, in this article, the author takes the opposite view. Especially in light of the ECJ's classification of paragraph 1371(1) BGB as a provision dealing with succession, there are new solutions which render ex post adaptations superfluous.

M. Mandl: **Apparent and virtual establishments reflected through Art. 7 No. 5 Brussels Ia Regulation and Art. 19 (2) Rome I Regulation**

The Federal Court of Justice (Bundesgerichtshof – BGH) has ruled that a dispute has the required connection to the operation of an (existing) establishment pursuant to Article 7 (5) Brussels Ia Regulation if the business owner operates an internet presence that gives the appearance of being controlled by this

establishment instead of the company's central administration and the contract in dispute was concluded via this internet presence. This decision provides an opportunity to examine the prerequisites and legal consequences of apparent establishments and so-called virtual establishments (internet presences) from a general perspective, both in the context of Article 7 (5) Brussels Ia Regulation and in connection with Article 19 (2) Rome I Regulation.

D. Nitschmann: **The consequences of Brexit on Civil Judicial Cooperation between Germany and the United Kingdom**

The United Kingdom's withdrawal from the European Union has far-reaching consequences for international civil procedure law. This is exemplified by the decisions of the Higher Regional Court of Cologne for the international service of process. Since the European Regulation on the Service of Documents no longer applies to new cases, the Brexit leads to a reversion to the Hague Service Convention and the German-British Convention regarding Legal Proceedings in Civil and Commercial Matters. Of practical relevance here is, among other things, the question of whether and under what conditions direct postal service remains permissible.

R.A. Schütze: **Security for costs of english plaintiffs in Austrian litigation**

The judgment of the Austrian Supreme Court (Oberster Gerichtshof – OGH) of 29 March 2022 deals with the obligation of English plaintiffs to provide security for costs according to sect. 57 Austrian Code of Civil Procedure. The principle stated in para. 1 of this section is that plaintiffs of foreign nationality have to provide security for costs. But an exception is made in cases where an Austrian decision for costs can be executed in the country of residence of the plaintiff.

The OGH has found such exception in the Hague Convention 2005 on Choice of Court Agreements. As the United Kingdom has, on 28 September 2020, declared the application of the Hague Convention 2005 for the United Kingdom, the Convention is applicable between Austria and the United Kingdom despite the Brexit. The Hague Convention opens the possibility to recognition and execution of judgments rendered under a choice of court agreement including decisions on

costs.

Th. Garber/C. Rudolf: **Guardianship court authorisation of a claim before Austrian courts ¬– On international jurisdiction and applicable law for the grant of a guardianship court authorization**

The Austrian court has requested court approval for the filing of an action by a minor represented by the parents. The international jurisdiction for the granting of a guardianship court authorisation is determined according to the Brussels II-bis Regulation or, since 1.8.2022, according to the Brussels II-ter Regulation. In principle, the court competent to decide on the action for which authorization by the guardianship court is sought has no corresponding annex competence for the granting of the authorization by the guardianship court: in the present case, the Austrian courts cannot therefore authorize the filing of the action due to the lack of international jurisdiction. If an Austrian court orders the legal representative to obtain the authorization of the guardianship court, the courts of the Member State in which the child has his or her habitual residence at the time of the application have jurisdiction. In the present case, there is no requirement for approval on the basis of the German law applicable under Article 17 of the Hague Convention 1996 (§ 1629 para 1 of the German Civil Code). The Cologne Higher Regional Court nevertheless granted approval on the basis of the escape clause under Article 15 para 2 of the Hague Convention 1996. In conclusion, the Cologne Higher Regional Court must be agreed, since the escape clause can be invoked to protect the best interests of the child even if the law is applied incorrectly in order to solve the problem of adaptation.

M. Fornasier: **The German Certificate of Inheritance and its Legal Effects in Foreign Jurisdictions: Still Many Unsettled Issues**

What legal effects does the German certificate of inheritance („Erbschein“) produce in other Member States of the EU? Is it a reliable document to prove succession rights in foreign jurisdictions? More than one decade after the entry into force of the European Succession Regulation (ESR), these questions remain, for the most part, unsettled. In particular, commentators take differing views as to whether the Erbschein, being issued by the probate courts regardless of

whether the succession is contentious or non-contentious, constitutes a judicial decision within the meaning of Article 3(1)(g) ESR and may therefore circulate in other Member States in accordance with the rules on recognition under Articles 39 ESR. This article deals with a recent ruling by the Higher Regional Court of Cologne, which marks yet another missed opportunity to clarify whether the Erbschein qualifies as a court decision capable of recognition in foreign jurisdictions. Moreover, the paper addresses two judgments of the CJEU (C-658/17 and C-80/19) relating to national certificates of inheritance which, unlike the German Erbschein, are issued by notaries, and explores which lessons can be learned from that case-law with regard to certificates of inheritance issued by probate courts. In conclusion, it is submitted that, given the persisting uncertainties affecting the use of the Erbschein in foreign jurisdictions, the European Certificate of Succession provided for by the ESR is better suited for the settlement of cross-border successions.

E. Vassilakakis/A. Vezyrtzi: **Innovations in International Commercial Arbitration – A New Arbitration Act in Greece**

On 4.2.2023 a new Arbitration Act came into effect in Greece. It was approved by means of Law No. 5016/2023 on international commercial arbitration, and was enacted in order to align the regime of international commercial arbitration with the revision of the UNCITRAL Model Law on International Commercial Arbitration adopted in 2006 (hereinafter the revised Model Law). The new law contains 49 arbitration-related provisions and replaces the Law No. 2735/1999 on international commercial arbitration, while domestic arbitration continues to be regulated by Art. 867–903 of the Greek Code of Civil Procedure (hereinafter grCCP). A reshaping of Art. 867 ff. grCCP was beyond the "mission statement" of the drafting Committee.1 Besides, it should also be associated with a more extensive and, in consequence, time-consuming reform of procedural law. Hence, the dualist regime in matters of arbitration was preserved.

Pursuant to Art. 2, the new law incorporates on the one hand the provisions of the revised Model Law and on the other hand the latest trends in international arbitration theory and practice. Therefore, it is not confined to a mere adjustment to the revised Model Law, but also includes several innovative provisions that merit a brief presentation.

Notifications:

C. Rüsing: Dialogue International Family Law, 28th – 29th April, Münster, Germany.