# Rome III Regulation Adopted by Council

As a Christmas gift for European PIL scholars, the first enhanced cooperation in the history of the EU has been achieved in the field of conflict of laws (on the origin of the initiative see our previous post here).

**The Council**, in its meeting of 20 December 2010, **adopted the Rome III regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation** (for previous steps of the procedure, see here and here). As of mid-2012 (18 months after its adoption, pursuant to Art. 21), the Rome III reg. will apply in the **14 Member States** which have been authorised to participate in the enhanced cooperation by Council decision no. 2010/405/EU: Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. Further Member States which wish to participate may do so in accordance with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union.

The text of the new regulation is available in Council doc. no. 17523/10 of 17 December 2010; after the signing of the President of the Council, it will be soon published in the Official Journal. The regulation is accompanied by a Declaration of the Council regarding the insertion of a provision on *forum necessitatis* in reg. no. 2201/2003, worded as follows:

> *The Council invites the Commission to submit at its earliest convenience to the Council and to the European Parliament a proposal for the amendment of Regulation (EC) No 2201/2003 with the aim of providing a forum in those cases where the courts that have jurisdiction are all situated in Member States whose law either does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings (forum necessitatis).*

The European Parliament, merely consulted under the special legislative procedure provided by Art. 81(3) TFEU for measures concerning family law, gave its opinion on 15 December 2010 (informal contacts with the Council have ensured that the EP views were taken into account in the final text). In the

preamble of the legislative resolution, the EP called “on the Commission to submit a proposal for amendment of Regulation (EC) No 2201/2003, limited to the addition of a clause on *forum necessitatis*, as a matter of great urgency before the promised general review of that Regulation”.

*Many thanks to Federico Garau (Conflictus Legum blog) and to Marina Castellaneta for the tip-off.*

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# BIICL event: Rome I Regulation: The UK Set to Opt-in

As part of the BIICL’s 2007-2008 Seminar Series on Private International Law the BIICL organizes on Wednesday 18 June 2008 17:30 to 19:30 (British Institute of International and Comparative Law, Council Chamber, Charles Clore House, 17 Russell Square, London, WC1B 5JP) a seminar titled “Rome I Regulation: The UK Set to Opt-in”. The aim of the seminar is to provide one of the final opportunities for a discussion of the merit and implications of opting into the Rome I Regulation, and moreover to consider the questions which are raised by the Ministry of Justice in its consultation. Also, the changes to be expected for the legal practice in England & Wales upon entry into force of the Regulation will be addressed. The seminar will feature several presentations from expert academics and practitioners, while leaving ample space for discussion. For more information about the seminar, its Chair, speakers and sponsor, have a look at the website.

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# Rome II and Small Claims

# Regulations published in the Official Journal

The Rome II Regulation (see the dedicated section of our site) and the Regulation establishing a European Small Claims Procedure have been published in the Official Journal of the European Union n. L 199 of 31 July 2007. The official references are the following:

**Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)** (OJ n. L 199, p. 40 ff.): pursuant to its Articles 31 and 32, the Rome II Regulation will apply from 11 January 2009, to events giving rise to damage occurred after its entry into force (the twentieth day following its publication in the O.J., according to the general rules on the application in time of EC legislation).

**Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure** (OJ n. L 199, p. 1 ff.). The text of the Regulation is accompanied by four annexes, containing the standard forms to be used by the parties and the court in the procedure, as follows:

- Annex I: Form A – Claim form, to be filled in by the claimant (see Art. 4(1) of the Reg.)
- Annex II: Form B – Request by the Court or Tribunal to complete and/or rectify the claim form (see Art. 4(4) of the Reg.);
- Annex III: Form C – Answer form, containing information and guidelines for the defendant (see Art. 5(2) and (3) of the Reg.);
- Annex IV: Form D – Certificate concerning a judgment in the European Small Claims Procedure (to be filled by the Court/Tribunal: see Art. 20(2) of the Reg.).

According to its Art. 29, the ESCP Regulation will enter into force today (1 August 2007, the day following its publication in the O.J.), and will apply from 1 January 2009.

# CoL.net Virtual Roundtable on the Commission’s Rome II Report

ConflictofLaws.net will be hosting an ad-hoc virtual roundtable on the Commission’s Rome II Report

on **11 March 2025, 12pm–1.30pm (CET)**.

The conversation will focus on the long-awaited report published by the Commission on 31 January 2025 and its implications for a possible future reform of the Regulation.

The event will feature the following panellists:

**Rui Dias**
University of Coimbra

**Thomas Kadner Graziano**
University of Geneva

**Xandra Kramer**
Erasmus University Rotterdam

**Eva Lein**
University of Lausanne &
British Institute of International and Comparative Law

**Tobias Lutzi**
University of Augsburg

Everyone interested is warmly invited to join via this Zoom link.

# Transforming legal borders: international judicial cooperation and technology in private international law – Part II

*Written by Yasmín Aguada*** [1]– *Laura Martina Jeifetz* ***[2].* Part I is available here

**Abstract:** Part II aims to delve deeper into the aspects addressed in the previously published Part I. International Judicial Cooperation (IJC) and advanced technologies redefine Private International Law (PIL) in a globalized world. The convergences between legal collaboration among countries and technological innovations have revolutionized how cross-border legal issues are approached and resolved. These tools streamline international legal processes, overcoming old obstacles and generating new challenges. This paper explores how this intersection reshapes the global legal landscape, analyzing its advantages, challenges, and prospects.

**Keywords:** private international law, international judicial cooperation, new technologies, videoconferencing, direct judicial communications, Smart contracts, and Blockchain.

### II.III. Videoconferences and virtual hearings

Videoconferencing and video-links are familiar today after the widespread use they acquired during the COVID-19 pandemic. These resources perform various functions in judicial processes, ranging from facilitating communications with the parties involved, experts and witnesses, to holding hearings and training activities. These are just examples that illustrate the wide range of uses they offer.[3]

Despite its long presence both nationally and internationally, videoconferencing has seen a notable increase in its application, particularly in the context of

criminal cases, as can be seen in inmates' statements.[4] However, its growing expansion into areas such as international abduction cases and civil and commercial matters is also evident.[5]

Regarding the concept, Tirado Estrada states that videoconferencing constitutes *"an interactive communication system that simultaneously transmits and "in real time" the image, sound and data at a distance (in point-to-point connection), allowing relationships and interaction, visually, auditorily and verbally, to a group of people located in two or more different places as if the meeting and dialogue were held in the same place."* [6] It allows communication between people in different places and simultaneously through equipment reproducing images and sound.

Among the advantages that should be highlighted is its notable contribution to the agility in the processing of legal processes, which affects the quality and effectiveness of judicial procedures. These technologies enable a direct link without intermediaries between those involved in the judicial process, the administration of justice, and the relevant authorities.

Likewise, it is pertinent to point out the significant reduction in costs associated with transportation to the judicial headquarters while facilitating the recording and, therefore, the exhaustive record of the events in the hearings. Furthermore, it must be emphasized that videoconferencing ensures security conditions by applying robust encryption protocols.

Ultimately, videoconferences guarantee the observance of essential principles within the framework of due process, such as the publicity of the acts, the practical possibility of contradiction of the parties involved, and the immediacy in the perception of evidence.[7]

### II.III.I. Regulatory instruments regarding the use of videoconferencing

In April 2020, The Hague Conference on Private International Law (HCCH) published a document within the March 18, 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[8]. The publication of this work, called *Guide to Good Practice on the Use of Video-Link under the Evidence Convention*, was drafted by the Permanent Bureau, with a Group of Experts

contributing their insights and comments. Although the project started in 2015, its publication occurred during the pandemic. This soft law instrument provides a series of guidelines regarding platforms intended to enable the simultaneous interaction of two or more people through bidirectional audio and video transmission[9].

It is worth mentioning the Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems (Ibero-American Convention) and its Additional Protocol[10], signed in 2010. Both instances were approved by law 27. 162, dated August 3, 2015.

This Ibero-American Convention conceives videoconferencing as a resource that enhances and expedites cooperation between the competent authorities of the signatory States. The treaty's scope covers the civil, commercial, and criminal matters. However, it is possible to extend its application to other fields in which the parties involved expressly agree (article 1).

The Convention recognizes the relevance of new technologies as fundamental tools for achieving swift, efficient, and effective justice. The primary objective is to promote the use of videoconferencing among the competent authorities of the States Parties, considering this medium as a concrete mechanism to strengthen and expedite cooperation in various areas of law, including civil, commercial, and criminal matters, as well as any other agreed upon by the parties. The Convention defines videoconferencing as an *"interactive communication system that allows the simultaneous and real-time transmission of image, sound, and data over a distance, with the aim of taking statements from one or more persons located in a place different from that of the competent authority, within the framework of a judicial process, and under the terms of the applicable law of the involved States."* (art. 2). This definition underscores the importance of immediacy and direct interaction, critical aspects ensuring the validity and effectiveness of the statements obtained through this medium.

Among the most relevant provisions of the Convention is the regulation of hearings via videoconference. The Convention establishes that if the competent authority of a State Party needs to examine a person within the framework of a judicial process, whether as a party, witness, or expert, or during preliminary investigative proceedings, and this person is in another State, their statement can

be requested via videoconference, provided that this tool is deemed appropriate for the case. Additionally, the Convention details the requirements that must be met for the request to use videoconferencing and the rules governing its conduct, thus ensuring a standardized and efficient procedure.

The Additional Protocol to the Convention adds significant value by regulating practical aspects that enhance the efficiency of the judicial process. In particular, it addresses issues related to videoconferencing costs, establishing clear criteria on who should bear the expenses. It also regulates the linguistic regime, determining the language or languages used during the videoconferences, which is crucial to ensuring all parties' understanding and effective participation. Moreover, the Protocol sets precise rules for transmitting videoconference requests, simplifying and streamlining the procedure, which contributes to incredible speed and effectiveness in international judicial cooperation.

The ASADIP Principles on Transnational Access to Justice (TRANSJUS), approved on November 12, 2016, are again relevant. In article 4.6, using video conferences or any other suitable means to hold joint hearings is included[11]. Next, as already mentioned, it proposes that legal operators favour the use of new technologies, such as telephone and video conferencing, among other available means, as long as the security of communications is guaranteed.[12]

Within the scope of cooperation in civil matters, it is relevant to point out the Convention in force in Argentina since 7-VII-1987, which addresses the Obtaining of Evidence Abroad in Civil or Commercial Matters[13]. Regarding the integration of video conferences in this context, we underscore that in July 2024, a Special Commission was held to review the implementation of various Conventions, including the taking of evidence. During these deliberations, it was stressed that video links are in line with the provisions of the 1970 Convention.

The role of videoconferencing as an increasingly relevant means for taking evidence under Chapter I of the Convention was discussed. However, a marked division of opinion was identified among the Contracting States regarding the possibility of using videoconferencing to directly take evidence, highlighting a significant challenge for the Convention. Another issue addressed was the update of the Guide to Good Practices on the Use of Videoconferencing, published in 2020, which has been largely incorporated into the Evidence Handbook. This

reflects the growing importance of videoconferencing in international proceedings and the recognition that new technologies must be integrated into conventional practices.

Furthermore, regarding compatibility with the modern technological environment, the Commission noted that, although the 1970 Convention continues to function well in a paper-based environment, it faces challenges adapting to technological developments, such as videoconferencing. This issue raises doubts about the Convention's ability to remain relevant in the future without greater acceptance of the "functional equivalence" approach by the Contracting States. Finally, a proposal was discussed to develop an international system to facilitate the electronic transmission of requests or create a decentralized system of platforms for such transmission. This proposal aims to improve the efficiency and modernize obtaining international evidence[14]. These discussions underscore the importance of updating and adapting the 1970 Convention to new technological realities to ensure its effectiveness and relevance.

Moreover, it was established that Article 17[15] of the said Convention does not constitute an obstacle for a judicial officer of the court requesting a party located in a State Party to conduct virtual interrogations of a person in another Contracting State. In this sense, the use of technologies such as videoconferencing is adequately adapted to the principles and provisions of the Convention mentioned above, facilitating international cooperation in judicial matters.

Article 17 of the 1970 Hague Convention regulates the possibility of a duly appointed commissioner obtaining evidence in the territory of a contracting State about a judicial proceeding initiated in another contracting State. This article establishes a mechanism for obtaining evidence that does not involve coercion and is subject to two essential requirements: authorization by a competent authority and compliance with established conditions. Additionally, the article allows for a contracting State to declare that obtaining evidence under this article can be carried out without prior authorization.

This article is particularly relevant for international judicial cooperation in the region, as it facilitates evidence collection abroad without resorting to coercive

mechanisms. However, countries like Argentina have objected to the application of Article 17. The reasons are related to the protection of national sovereignty, as the appointment of foreign commissioners to act in a State's territory to obtain evidence may be seen as an intrusion into that State's sovereignty. Some countries in the region consider that allowing commissioners appointed by foreign courts to operate could compromise their jurisdictional autonomy.

On the other hand, concerning legal security and process control, the States that have objected to Article 17 value maintaining rigorous control over the procedures for obtaining evidence within their territory. Authorizing the actions of foreign commissioners without strict supervision could raise concerns about legal security and fairness in the process. Finally, differences between the legal systems of the countries in the region and those from which the appointed commissioners come could create difficulties in the uniform application of the article.

In summary, while Article 17 of the 1970 Hague Convention offers a valuable mechanism for obtaining evidence abroad, its implementation has generated tensions in the region due to concerns about sovereignty, process control, and differences in legal systems. These objections reflect the need to balance international cooperation and respect for each state's jurisdictional autonomy.

**The regulation in Argentina**

In Argentina, the Order of the Supreme Court of Justice of the Nation (CSJN) 20/2013 is relevant. It establishes a set of Practical Guidelines for implementing video conferences in cases in process before the courts, oral tribunals, and appeals chambers, both national and federal, belonging to the Judicial Branch of the Nation.

This Order contemplates the possibility of resorting to videoconferencing when the accused, witnesses, or experts are outside the jurisdiction of the competent court. Consequently, it is essential to have adequate technical resources and a secure connection, which will be submitted to the evaluation of the General Directorate of Technology of the General Administration of the Judiciary. In this context, the regulations explicitly state that the application of these Guidelines must ensure full observance of the adversarial principles and effective defense.[16]

On the other hand, it should be noted that in February 2014, the Federal Board of Cortes and Superior Courts of Justice of the Argentine Provinces and the Autonomous City of Buenos Aires (JUFEJUS) gave its approval to the Protocol for the Use of the Videoconferencing System. This initiative aims to promote the adoption of hearings through video media as a resource aimed at reinforcing reciprocal collaboration, optimizing the effectiveness of jurisdictional processes, and simplifying the conduct of training and coordination meetings, among other relevant purposes.[17]

**II.IV. Direct judicial communications**.

Another of the IJC's essential tools is direct judicial communications (DJC), intended to facilitate communication between two judges involved in a specific case[18]. In the autonomous source, DJC finds legal reception in Art. 2612 of the Civil and Commercial Code of the Nation.[19]

Direct judicial communications *"are communications between two judicial authorities from different countries that are developed without the intervention of an administrative authority (intermediary authorities), as is the usual case of international warrants that are processed through Chanceries and/or Central Authorities designated by the country itself (generally administrative)."* [20]

DJC can be implemented in all areas of the IJC. The HCCH has indicated that direct judicial communications can be used to obtain information about specific cases or to request information. Initially, DJC has shown notable success in two main fields: international return proceedings for children and adolescents and cross-border insolvency processes. Over time, it has been acknowledged that various international instruments, both regional and multilateral—such as the 1996 Child Protection Convention—benefit from the use of direct judicial communications. As of March 2023, the International Hague Network of Judges (IHNJ)'s scope has expanded to include the 2000 Protection of Adults Convention[21].

Regarding international child abduction, since 2001, the Special Commission of the 1980 Hague Convention has explored the possibility and feasibility, as well as the limits, safeguards, and guarantees of direct judicial communications, initially linked to the development of the IHNJ to obtain the quick and safe return of the

child. Shortly after the IHNJ of Specialists in Family Matters was created in 2002, a Preliminary Report was presented, and the DJC was identified as an ideal mechanism to facilitate the IJC. In 2013, the Permanent Bureau, in collaboration with a Special Commission, published the Emerging Guidance Regarding the Development of the International Hague Network of Judges[22].

In this context, direct judicial communications have evolved to incorporate updated safeguards and protocols. According to the "Emerging Guidance regarding the development of the International Hague Network of Judges," all communications must respect the legal frameworks of the countries involved, and judges should maintain their independence when reaching decisions. The guidance also outlines procedural safeguards, such as notifying the parties before the communication, keeping a record of the communications, and ensuring that conclusions are documented in writing. These practices help ensure transparency and preserve the rights of the parties involved.

In this framework, the HCCH has identified at least two types of communications: those of a general nature not related to a specific case and consisting, for example, of sharing general information from the IHNJ or coming from the Permanent Bureau of the Hague Conference, with his colleagues, or in keeping the Hague Conference informed of national developments affecting the work of the Conference; and those that consist of direct judicial communications related to specific cases, the objective of these communications being very varied, but on many occasions aimed at mitigating the lack of information that the competent judge may have about the situation and legal implications in the State of habitual residence of the child. These types of direct judicial communications are complemented by the safeguards incorporated in the 2013 Guidance, ensuring that the parties' rights are respected and transparency is maintained throughout the process.

Additionally, technological advancements are recognized as essential for improving direct judicial communications. The document highlights the importance of using the most appropriate technological facilities, such as telephone or videoconference, to ensure communications are carried out efficiently and securely. These technological tools are crucial in safeguarding the confidentiality of sensitive information, particularly in cases where confidential data is involved.

Direct judicial communications, which represent an essential advance in the field of the IJC, are widely influenced by the implementation of new information and communication technologies. Members of the International Hague Network of Judges emphasized the importance of the Hague Conference implementing, as soon as possible, secure internet-based communication, such as secure email and video conferencing systems, to facilitate networking and reduce costs derived from telephone communications.[23] In 2018, on the 20th Anniversary of the IHNJ, the participants reiterated the need to develop a Secure Platform for the IHNJ[24]. Currently, the secure platform for the IHJN is available.

Since its initial implementation, a secure communications system has been established to facilitate efficient and protected exchanges between judges from different jurisdictions within the IHNJ. This system strengthens judicial cooperation in cross-border child protection, allowing judges to share relevant information directly under security standards that ensure confidentiality and procedural efficiency. During the 25th anniversary celebration of the IHNJ on October 14, 2023, representatives from over 30 jurisdictions gathered in The Hague, highlighting the value of this network and discussing its expansion, which -as was mentioned- now includes the 2000 Protection of Adults Convention in addition to the 1980 Child Abduction and 1996 Child Protection Conventions?[25].

## III. FUTURE PERSPECTIVES. SMART CONTRACTS AND BLOCKCHAIN?

In analyzing possible future evolution in the interaction between international judicial cooperation and new technologies, it is essential to consider how blockchain technology and its derivatives, such as smart contracts, could significantly impact this area.

Blockchain technology, known for its ability to create immutable and transparent records, has the potential to revolutionize international judicial cooperation by providing a secure and trusted platform for the exchange and management of legal information between jurisdictions. Records on the blockchain could be used to ensure the authenticity and integrity of court documents, which in turn would strengthen trust between the parties involved.[26]

Smart contracts are autonomous and self-executing protocols that could simplify and speed up the execution of agreements between international judicial systems.

These contracts may be designed to execute automatically when certain predefined conditions are met, which could be helpful in legal cooperation involving the transfer of information or evidence between jurisdictions.

However, successfully implementing blockchain technologies in international judicial cooperation would require overcoming significant challenges. Critical considerations include the standardization of protocols and data formats, interoperability between judicial systems, and the question of the legal sovereignty of records on the blockchain.

Blockchain technology and smart contracts could offer innovative solutions for international judicial cooperation by improving reliability, transparency, and process automation. Although the challenges are significant, their proper adoption could transform how jurisdictions interact and collaborate globally on legal matters.

Concerning automated contracting, it is noteworthy that during its fifty-seventh session in 2024, the United Nations Commission on International Trade Law (UNCITRAL) finalized and adopted the Model Law on Automated Contracting (MLAC)[27] and gave in principle approval to a draft guide for its enactment. In November, Working Group IV (Electronic Commerce) is expected to review this guide to enacting the UNCITRAL Model Law on Automated Contracting to finalize and publish it.

## IV. BENEFITS AND CHALLENGES.

The convergence between international judicial cooperation and new technologies presents several substantial benefits that can profoundly transform how jurisdictions worldwide collaborate on legal matters. Certain advantages can be identified by explicitly analyzing electronic requests, direct judicial communications, videoconferences, and future projections related to blockchain technology and smart contracts. Between them:

*Efficiency*: New technologies allow for streamlining judicial cooperation processes, eliminating unnecessary delays. Electronic requests and direct judicial communications reduce document processing and sending times, significantly reducing shipping times by traditional mail.

*Cost savings*: Technologies reduce the need for physical resources, such as paper,

transportation, and additional personnel for administrative procedures. Video conferencing also reduces travel costs for witnesses, experts, and attorneys as they can participate from their respective locations.

*Transparency and authenticity*: Document digitization and electronic system implementation ensure a transparent and reliable record of communications. Additionally, electronic signature and authentication technologies guarantee the integrity and legitimacy of shared documents.

*Greater access to justice*: Technologies can democratize access to justice, allowing involved parties, especially those in remote locations or with limited resources, to participate in judicial proceedings and collaborate more effectively. These promises to avoid the long delays that traditional processing channels suffer, ultimately undermining the basic principles of access to justice and making adequate judicial protection difficult.

New technologies are transforming international judicial cooperation by eliminating time, distance, and resource barriers while improving the efficiency and effectiveness of transnational judicial processes. These technologies could raise the quality and speed of justice globally.

## V. FINAL CONSIDERATIONS

Throughout this journey, we have explored how the intersection between international judicial cooperation and new technologies is transforming the legal landscape internationally. We have observed the growing impact of these new technologies in the IJC field and in the collaborative efforts between States to seek legal and administrative solutions to improve access to justice in cross-border proceedings. In this context, we have analyzed several technological tools, such as electronic requests and videoconference. At the same time, we have observed how facilitating instruments such as Apostilles and direct judicial communications have also incorporated, or are incorporating, technological components to improve their results.

Contemplating the possible future directions of this complex network of connections between the IJC and new technologies immerses us in searching for answers and alternatives and deep reflection on the numerous challenges that arise. Indeed, the rapid integration of new technologies is fundamentally changing various aspects of the legal field, which requires careful contemplation.

In conclusion, it is appropriate to emphasize the benefits that the implementation of new technologies can bring to the field of the IJC: reduction of costs and delays that lead to greater efficiency and agility while guaranteeing the fundamental rights of due process, defense, and security, always guided by the basic principle of ensuring access to justice.

In essence, this contribution highlights the crucial role that the symbiotic relationship between international judicial cooperation and evolving technologies will play in shaping the future of global legal practices.

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[3] HARRINGTON, CAROLINA. “Justicia, aislamiento y videoconferencia la experiencia del derecho internacional privado en desandar barreras: guía de buenas prácticas de la conferencia de la haya 2019”, in Guillermo Barrera Buteler (Dir.), *El derecho argentino frente a la pandemia y post-pandemia covid-19*. Córdoba, Universidad Nacional de Córdoba, 2020.

[4]In the field of criminal cooperation, various legal instruments recognize the viability of the technological use of videoconferencing. These include the Statute of the International Criminal Court, ratified at the Rome Conference on July 17, 1998; the European Convention on Legal Assistance in Criminal Matters, approved on May 29, 2000 by the Council of Ministers of Justice and Foreign Affairs of the European Union; the Second Additional Protocol of 2001 (Strasbourg, November 8, 2001) to the European Convention on Mutual Assistance in Criminal Matters, signed in Strasbourg on April 20, 1959 by the

member states of the Council of Europe. Additionally, noteworthy are the influential 2000 Palermo Convention on Transnational Organized Crime and the 2003 Mérida United Nations Convention against Corruption, among other notable instruments. These treaties highlight the usefulness and effectiveness of videoconferencing as a technological resource in criminal cooperation at the international level.

[5] GOICOECHEA, IGNACIO. "Nuevos desarrollos en la cooperación jurídica internacional en materia civil y comercial", in *Revista de la Secretaría del Tribunal Permanente de Revisión (STPR)*, 7, year 4, 2016.

[6] TIRADO ESTRADA, JESÚS JOSÉ. "Videoconferencia, cooperación judicial internacional y debido proceso.", in *Revista de la Secretaria del Tribunal Permanente de Revisión*, year 5, no. 10, 2017, p. 154. Available in: https://dialnet.unirioja.es/servlet/articulo?codigo=6182260. Consultation date: 10/11/2024.

[7] GONZALEZ DE LA VEGA, CRISTINA, SEONE DE CHIODI, MARÍA Y TAGLE DE FERREYRA, GRACIELA. "Bases para el acceso a la justicia en la restitución internacional de NNA". Paper presented at the Argentine Congress of International Law, Córdoba, September 2019.

[8] Such Convention has been in force in Argentina since 07/07/1987. For more details: https://www.hcch.net/en/instruments/conventions/status-table/?cid=82. Consultation date: 10/11/2024.

[9] Video-link refers to the technology which allows two or more locations to interact simultaneously by two-way video and audio transmission, facilitating communication. – HCCH Guide to Good Practice on the Use of Video-Link under the Evidence Convention.

[10] For the Convention, videoconference is understood as an interactive communication system that reproduces, simultaneously and in real time, images, sound and data of people who are located in geographical locations other than that of the competent authority. This system allows the taking of statements in accordance with the applicable law of the intervening States. Available in: https://www.comjib.org/wp-content/uploads/imgDrupal/Convenio-Videoconferenci

a-ES-publicaciones_1.pdf

Consultation date: 06/13/2024.

In the following link you can check the status of signatures and ratifications of the treaties and agreements of the conference of ministers of justice of the Ibero-American countries. Available in: https://drive.google.com/drive/folders/1EzscrkCSThRo7gtjZJlt9LZphoMBtA0q. Consultation date: 04/09/2024.

[11] *"They are characterized by being framed in two (or more) processes for closely linked cases, heard before courts in different countries. The hearing is developed to "serve" more than one main process. Frequently, in family cases involving children, one can observe the existence of lawsuits initiated in different countries with various objects (restitution, parental responsibility, custody, communication regime, maintenance), which can benefit from the simultaneity implied in the joint celebration of the audience".* HARRINGTON, CAROLINA. "Audiencias Multijurisdiccionales. Configuraciones y perspectivas para facilitar el acceso a justicia en litigios internacionales". Paper presented at the Argentine Congress of International Law, Córdoba, September 2019.

[12]ASADIP PRINCIPLES ON TRANSNATIONAL ACCESS TO JUSTICE (TRANSJUS). Available at: http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf. Consultation date: 10/11/2024.

[13] This Agreement, approved by Law No. 23,480, links us with 64 countries. HCCH. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Available in: https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 . Consultation date: 10/11/2024.

[14] Consult Celis, Mayela, July 3, 2024 "This week at The Hague: A few thoughts on the Special Commission on the HCCH Service, Evidence and Access to Justice Conventions" Available in: https://conflictoflaws.net/2024/this-week-at-the-hague-a-few-thoughts-on-the-special-commission-on-the-hcch-service-evidence-and-access-to-justice-conventions/.

Consultation date: /10/11/2024.

[15] *Article 17. In civil or commercial matters any person duly designated as a commissioner may, in the territory of a Contracting State, proceed, without compulsion, to obtain evidence relating to a proceeding instituted before a Court of another Contracting State. : a) if a competent authority designated by the State where the evidence is to be obtained has given its authorization, in general, or for each particular case; and b) if said person meets the conditions that the competent authority has established in the authorization. Any Contracting State may declare that the collection of evidence in the manner provided for in this article may be carried out without prior authorization.* Available in: https://www.hcch.net/es/instruments/conventions/full-text/?cid=82 . Consultation date: 05/20/2024.

[16]SUPREME COURT OF JUSTICE OF THE NATION. Agreed on 20/2013. Available at: https://www.csjn.gov.ar/documentos/descargar/?ID=77906 . Consultation date: 10/11/2024.

[17] JU.FE.JU. "Protocol for the use of the Videoconferencing System", 2014. Art. 3 defines: *"Videoconferencing shall be understood as an interactive communication system that simultaneously and in real time transmits image, sound and data at a distance between one or more sites."* Available in: https://www.jufejus.org.ar/protocolo-de-videoconferencias/. Consultation date: 10/11/2024.

[18] For more information see: HARRINGTON, CAROLINA. "Comunicaciones judiciales directas. Un arma versátil para enfrentar desafíos procesales en el derecho internacional privado de familia" in *LLC2018* (October), 3, 2017. Online Citation: AR/DOC/3303/2017.

[19]Art. 2612.- International procedural assistance. Without prejudice to the obligations assumed by international conventions, communications addressed to foreign authorities must be made by means of a letter. When the situation requires it, Argentine judges are empowered to establish direct communications with foreign judges who accept the practice, as long as the guarantees of due process are respected (...) ."

[20] GOICOECHEA, IGNACIO. Nuevos desarrollos en la cooperación jurídica internacional en materia civil y comercial. *Revista de la Secretaria del Tribunal Permanente de Revisión (STPR)*, year 4, No 7 (pp. 127-151), 2016, p. 136.

[21] HCCH. Details. 25th Anniversary of the International Hague Network of Judges. Available in: https://www.hcch.net/en/news-archive/details/?varevent=944. Consultation date: 22/10/2024.

[22] Direct Judicial Communications. Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges. Available in: https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf. Consultation date: 22/10/2024.

[23] Conclusions 7 and 41, Inter-American Meeting of Judges and Central Authorities of the Hague International Network on International Child Abduction, Mexico, February 23-25, 2011. Available in: https://www.hcch.net/es/%20news-archive/details/?varevent=217. Consultation date: 10/11/2024.

[24] Conference Of Hague Convention Network Judges Celebrating the 20th. Anniversary of The International Hague Network Of Judges. Conclusions And Recommendations. Available in: https://assets.hcch.net/docs/69f03498-8a72-4ffe-aa44-30fc70493859.pdf. Consultation date: 24/10/2024.

[25] https://www.hcch.net/en/news-archive/details/?varevent=944 Consultation date: 27/10/2024.

[26]AGUADA, YASMÍN and JEIFETZ, LAURA MARTINA. Nuevas oportunidades de la cooperación judicial internacional: exhorto electrónico y blockchain. Anuario *XIX* CIJS, 2019.

[27] The UNCITRAL Model Law on Automated Contracting introduces essential

principles to legitimize contracts formed and executed by automated systems, even in the absence of human intervention. First, its focus on technological neutrality and legal recognition ensures that contracts are valid regardless of whether a person has directly reviewed them. This aspect is particularly valuable for smart contracts and blockchain applications, as it aligns with the requirements of coded and dynamic agreements, which may use information that updates periodically. Additionally, action attribution is clarified to hold users accountable for automated system actions, even in cases of unforeseen outcomes. These provisions are poised to enhance cross-border legal coherence and foster trust in automation within global legal frameworks. The document is available here: https://uncitral.un.org/sites/uncitral.un.org/files/mlac_en.pdf. Consultation date: 25/10/2024.

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# European Commission Proposal for a Regulation on Private International Law Rules Relating to Parenthood

*This piece was written by Helga Luku, PhD researcher at the University of Antwerp*

On 7 December 2022, the European Commission adopted a Proposal for a Regulation which aims to harmonize at the EU level the rules of private international law with regard to parenthood. This proposal aims to provide legal certainty and predictability for families in cross-border situations. They currently face administrative burdens when they travel, move or reside in another Member State (for family or professional reasons), and seek to have parenthood recognised in this other Member State. The proposal follows on a declaration two years ago by the Commission President von der Leyen in her State of the Union address that **“If you are a parent in one country, you are a parent in every**

**country".**

How will this proposal change the current situation?

In line with the case law of the Court of Justice of the EU, Member States are required to recognise parenthood for the purpose of the rights that the child derives from Union law, permitting a child who is a Union citizen, to exercise without impediment, with each parent, the right to move and reside freely within the territory of Member States. Thus, parenthood established in one Member State should be recognised in other Member States for some (limited) purposes. There is currently no specific EU legislation that requires Member States to recognise parenthood established in other Member States for all purposes.

Different substantive and conflict-of-law rules of Member States on the establishment and recognition of parenthood can lead to a denial of the rights that children derive from national law, such as their succession or maintenance rights, or their right to have any one of their parents act as their legal representative in another Member State on matters such as medical treatment or schooling. Thus, the proposal aims to protect the fundamental rights of children and as it is claimed by the Commission, to be in full compliance with the UN Convention on the Rights of the Child. Through the proposed Regulation, the Commission intends to enable children, who move within the Union to benefit from the rights that derive from national law, **regardless of**:

- **the nationality of the children or the parents** (on the condition that the document that establishes or proves the parenthood is issued in a Member State);
- **how the child was conceived or born** (thus including conception with assisted reproductive technology);
- **the type of family of the child** (including e.g. the recognition of same-sex parenthood or parenthood established through adoption).

In principle, the proposal does not interfere with substantive national law in matters related to parenthood, which are and will remain under the competence of Member States. However, by putting the children's rights and best interests in the spotlight of the proposal, the Commission is requiring Member States to disregard their reluctance toward the recognition of some types of parenthood.

As the Union aspires an area of freedom and justice, in which the free movement

of persons, access to justice and full respect of fundamental rights are guaranteed, the Commission proposes the adoption of Union rules on international jurisdiction and applicable law in order to facilitate the recognition of parenthood among the Member States. It covers not only the recognition of judgments but also the recognition and acceptance of authentic instruments. In this sense, the proposal covers the three main pillars of private international law and it will also introduce a European Certificate on Parenthood.

The main aspects of this proposal include:

- **Jurisdiction**: jurisdiction shall lie alternatively with the Member State of habitual residence of the child, of the nationality of the child, of the habitual residence of the respondent (e.g. the person in respect of whom the child claims parenthood), of the habitual residence of any one of the parents, of the nationality of any one of the parents, or of the birth of the child. Party autonomy is excluded. (Chapter II, articles 6-15)
- **The applicable law**: as a rule, the law applicable to the establishment of parenthood should be the law of the State of the habitual residence of the person giving birth. If the habitual residence of the person giving birth cannot be established, then the law of the State of the birth of the child should apply. Exceptions are foreseen for the situation where the parenthood of a second person cannot be established under the applicable law. (Chapter III, articles 16-23).
- **Recognition**: the proposal provides for the recognition of court decisions and authentic instruments with binding legal effects, which establish parenthood, without any special procedure being required. However, if one of the limited grounds for refusal is found to exist, competent authorities of Member States can refuse the recognition of parenthood established by a court decision or an authentic instrument with binding effects. (Chapter IV, articles 24-43)
- **Acceptance:** the proposal also provides for the acceptance of authentic instruments with no binding legal effect. These instruments do not have a binding legal effect because they do not establish parenthood, but they refer to its prior establishment by other means or to other facts, thereby having only evidentiary effects. It may be a birth certificate, a parenthood certificate, an extract of birth from the register or any other form. The acceptance of these instruments with evidentiary effects can be refused

only on public policy grounds. (Chapter V, articles 44-45)

- **Creation of a European Certificate of Parenthood**: children or their legal representatives can request it from the Member State in which the parenthood was established. This Certificate will be issued in a uniform standard form and will be available in all Union languages. It is not mandatory but children or their legal representatives have the right to request it and have it recognised in all Member States (chapter VI, articles 46-57).

What is next?

Since the current proposal concerns family law issues with cross-border implications, under Article 81(3) of the Treaty on the Functioning of the European Union, the Council shall act unanimously via a special legislative procedure after consulting the European Parliament. Besides the sensitive area the proposal regulates, it also adopts a pro-diversity and non-discrimination policy, including the recognition of same-sex parenthood and surrogacy. Thus, considering the different approaches and national identities of Member States, often associated with their more conservative or liberal convictions, unanimity will not be easy to reach. However, if unanimity cannot be reached, a number of Member States can still adopt the proposal in enhanced cooperation (see: Article 20 Treaty on European Union). This is not an uncommon procedure for Member States when they have to adopt legislation that concerns family law issues, e.g. Regulation 1259/2010 on the law applicable to divorce and legal separation (Rome III) and Regulation 2016/1103 on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. However, if it happens that the proposal is adopted in enhanced cooperation, it is doubtful whether its objective to provide the same rights for all children is truly achieved. Additionally, the participating Member States will probably include those that did not impose very restrictive requirements with regard to the recognition of parenthood in their national laws, even before the adoption of the Regulation in enhanced cooperation.

# CJEU on Lugano II Convention and choice of court through a simple reference to a website, case Tilman, C-358/21

In its judgment handed down today, the Court of Justice clarifies in essence that, under the Lugano II Convention, an agreement of choice of court meets the requirements set in Article 23(1) and (2) of the Convention in the scenario where that choice of court agreement is contained in the general terms and conditions set out on a web page, to which the contract signed by the parties contains a reference to, with no box-ticking being mechanism being implemented on the said web page.

Doing so, the Court ruled that the relevant requirements provided for in the Lugano II Convention are drafted in essentially identical terms to those of the Brussels I bis Regulation (para. 34). Thus, the relevance of the judgment may not confine itself to the framework of the aforementioned Convention, but could possibly also extend to the Regulation.

Interestingly enough, earlier this week, thanks to the post made by Geert van Calster on his blog, I learned about the EWHC judgment concerning, inter alia, the choice of court and law included in general terms and conditions, by inclusion in email and /or e-mailed click-wrapeable hyperlink. While the facts and issues discussed in those cases are not identical, both of them illustrate that there is still something to say about choice of court agreements in online environment, despite their widespread use.

**Context of the request for a preliminary ruling and the legal issue at hand**

A company established in Belgium enters into a contract with a Swiss company.

The contract states that it is subject to the general terms and conditions for the purchase of goods set out on a specific web page (with the address to the website

being precisely indicated in the agreement).

The aforementioned general terms and conditions provide that the English courts have jurisdiction to hear and determine any dispute in connection with the contract, and that contract is governed by, and to be interpreted in accordance with, English law.

A dispute arises and the Belgian company initiates proceedings against its Swiss contractor before the courts in Belgium.

The dispute concerns whether that agreement on choice of court was properly concluded between the parties and, therefore, whether it is enforceable in the main proceedings.

Through the proceedings, up to the Court of Cassation, the Belgian company argues that it signed a contract which contained merely a reference to it contractor's general terms and conditions, which are available on the latter's website. It claims that it was in no way prompted to accept the general terms and conditions formally by clicking on the corresponding box on the website. It therefore follows that the guidance provided by case-law cannot be transposed to the present proceedings. The situation in which a party signs a document which contains a reference to general terms and conditions that are accessible online (as in the present case) differs from that in which that party formally and directly agrees to those general terms and conditions by ticking a relevant box (see judgments in Estasis Saloti di Colzani, 24/76, and El Majdoub, C-322/14).

Faced with this argument, the Court of Cassation brought its request for a preliminary ruling before the Court of Justice, asking:

"Are the requirements under Article 23(1)(a) and (2) of the [Lugano II Convention] satisfied where a clause conferring jurisdiction is contained in general terms and conditions to which a contract concluded in writing refers by providing the hypertext link to a website, access to which allows those general terms and conditions to be viewed, downloaded and printed, without the party against whom that clause is enforced having been asked to accept those general terms and conditions by ticking a box on that website?

**Findings of the Court and its answer**

Before addressing the preliminary question itself, the Court notes that is being called to interpret the Lugano II Convention in order to allow the Belgian courts to decide whether the parties to the main proceedings have conferred jurisdiction to set their disputes to the English courts. The Court recognizes that Brexit may have affected the admissibility of the request for a preliminary ruling and addresses that issue (paras. 28-31).

Indeed, under Article 23 of the Lugano II Convention, the parties may choose a court or the courts of a State bound by this Convention to set their disputes.

Seen from today's perspective, the choice of court made by the parties to the main proceedings relate to the courts of a State not-bound by the Convention (and, I digress, still looking from that perspective: even where the Belgian court declines jurisdiction in favour of the English prorogated court, the latter would not be bound by the Convention).

However, the Court notes that the main proceedings were initiated before the end of the transition period provided for in the Withdrawal Agreement (i.e. before 31 December 2020), during which the Lugano II Convention applied to the UK. As the choice of court agreement produces its effect at the time where the proceedings are brought before a national court (para. 30), and – in the present case – at that time the UK applied the Convention, it cannot be concluded that the interstation thereof is not necessary for the referring court to decide on the dispute before it (para. 31).

Concerning the substance, it stems from the request for a preliminary ruling that the argumentation of the Belgian company that led to the preliminary reference boiled down to the contention that the interpretation of the Lugano II Convention under which the choice of law agreement in question is enforceable against that company ignores the requirement of genuine consent. For the said company, observance of genuine consent should be an overriding interpretative policy with regard to Article 23.

The Court addresses this line of argumentation in a detailed manner in paras. 32-59. Thus, I just confine myself to mention only some of its findings.

In particular, the Court seems to stress the commercial/professional nature of the relationship that gave rise to the dispute in the main proceedings and distinguishes those proceedings from the situations that call for consumer-oriented protection (para. 55).

Following this approach the Court addresses, by extension, Article 23(1)(b) and (c) of the Lugano II Convention, which concern, respectively, the agreements concluded "in a form which accords with practices which the parties have established between themselves" and the agreements "in [a form regular for] international trade or commerce" (para. 56).

Ultimately, without necessarily distinguishing between the three scenarios described in (a), (b) and (c), the Court indicates that the requirements stemming from Article 23(1) and (2) can be met by a choice of court agreement, contained in general terms and conditions to which a contract concluded in writing refers by providing the hypertext link to a website, access to which allows those general terms and conditions to be viewed, downloaded and printed, even without the party against whom that clause is enforced having been asked to accept those general terms and conditions by ticking a box on that website (para. 59).

The judgment is available here (for now only in French).

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# What is an international contract within the meaning of Article 3(3) Rome I? – Dexia Crediop SpA v

# Provincia di Pesaro e Urbino [2022] EWHC 2410 (Comm)

*The following comment has been kindly provided by Sarah Ott, a doctoral student and research assistant at the University of Freiburg (Germany), Institute for Comparative and Private International Law, Dept. III.*

On 27 September 2022, the English High Court granted summary judgment and declaratory relief in favour of the Italian bank Dexia Crediop SpA ("Dexia") in its lawsuit against the Province of Pesaro and Urbino ("Pesaro"), a municipal authority in the Marche region of Italy. This judgement marks the latest development in a long-running dispute involving derivative transactions used by Italian municipalities to hedge their interest rate risk. Reportedly, hundreds of Italian communities entered into interest rate swaps between 2001 and 2008 having billions of Euros in aggregate notional amount. It is also a continuation of the English courts' case law on contractual choice of law clauses. Although the judgments discussed in this article were, for intertemporal reasons, founded still on Art. 3(3) of the Rome Convention, their central statements remain noteworthy. The Rome Convention was replaced in almost all EU member states, which at the time included the United Kingdom, by Regulation (EC) No 593/2008 ("Rome I"), which came into effect on 17 December 2009. Article 3 Rome I Regulation contains only editorial changes compared to Article 3 of the Rome Convention. As a matter of fact, Recital 15 of the Rome 1 Regulation explicitly states that despite the difference in wording, no substantive change was intended compared to Article 3(3) of the Rome Convention.

In the case at hand, Pesaro and Dexia entered into two interest rate swap transactions in 2003 and 2005. Each of the transactions was subject to the 1992 International Swap Dealers Association ("ISDA") Master Agreement, Multicurrency – Cross Border and a Schedule therto. During the 2008 financial crisis, the swaps led to significant financial burdens for Pesaro. In June 2021, Pesaro commenced legal proceedings in Italy seeking to unwind or set aside these transactions. Dexia then brought an action in England to establish the transactions were valid, lawful and binding on the parties.

A central question of the dispute was the law applicable to the contract. Pesaro

claimed breaches of Italian civil law in its proceedings, while Dexia argued that only English law applies. As correctly stated by the court, the applicable law is determined by the Rome Convention, as the transactions between the parties took place in 2003 and 2005. According to Article 3(1) Rome Convention, a contract is governed by the law chosen by the parties. The ISDA Master Agreement in conjunction with the Schedule contained an express choice of law clause stating that the contract is to be governed by and construed in accordance with English law. Of particular importance therefore was whether mandatory provisions of Italian law could nevertheless be applied via Article 3(3) Rome Convention. This is the case if "*all the [other] elements relevant to the situation at the time of the choice are connected with one country only […]*". In order to establish weather Article 3(3) applied, the court referred to two decisions of the English Court of Appeal. Both cases also concerned similar interest rate swap transactions made pursuant to an ISDA Master Agreement with an expressed choice of English law.

In *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, the Court of Appeal extensively discussed the scope of this provision in connection with the principle of free choice of law, more precisely, which factors are to be considered as "*elements relevant to the situation*". This was a legal dispute between the Portuguese Santander Bank and various public transport companies in Portugal. First, the Court of Appeal emphasised that Article 3(3) Rome Convention is an exception to the fundamental principle of party autonomy and therefore is to be construed narrowly. Therefore, "*elements relevant to the situation*" should not be confined to factors of a kind which connect the contract to a particular country in a conflict of laws sense. Instead, the Court stated that it is sufficient if a matter is not purely domestic but rather contains international elements. Subsequently the court assessed the individual factors of the specific case. In so far, the Court of Appeal confirmed all factors the previous instance had taken into account. Relevant in the case was the use of the "Multi-Cross Border" form of the 1992 ISDA Master Agreement instead of the "Local Currency-Single Jurisdiction" form, that the contract included the right to assign to a foreign bank and the practical necessity for a foreign credit institution to be involved, as well as the foreseeability of the conclusion of hedging arrangements with foreign counterparties and the international nature of the swap market. These factors were found sufficient to establish an international situation.

In *Dexia Crediop S.P.A. v. Comune di Prato* [2017] EWCA Civ 428, the Court of Appeal addressed the issue again and concluded that already the fact that the parties had used the "Multi-Cross Border" form of the 1992 ISDA Master Agreement in English, although this was not the native language of either party, and the conclusion of back-to-back hedging contracts in connection with the international nature of the derivatives market was sufficient.

In the present case, Dexia again relied on the use of the ISDA Master Agreement, Multicurrency – Cross Border and on the fact that Dexia hedged its risk from the transactions through back-to-back swaps with market participants outside Italy. But as the relevant documents were not available, the second circumstance could not be taken into account by the court. Nevertheless, the court considered that the international element was sufficient and Article 3(3) of the Rome Convention was not engaged.

Thus, this new decision not only continues the very broad interpretation of the Court of Appeal as to which elements are relevant to the situation, but also lowers the requirements even further. This British approach appears to be unique. By contrast, according to the hitherto prevailing opinion in other Member States, using a foreign model contract form and English as the contract language alone was not sufficient to establish an international element (see, e.g., *Ostendorf* IPRax 2018, p. 630; *Thorn/Thon* in Festschrift Kronke, 2020, p. 569; *von Hein* in Festschrift Hopt, 2020, p. 1405). Relying solely on the Master Agreement in order to affirm an international element seems unconvincing, especially when taking Recital 15 of the Rome I Regulation into account. Recital 15 Rome I states that, even if a choice of law clause is accompanied by a choice of court or tribunal, Article 3(3) of the Rome I Regulation is still engaged. This shows that it is the purpose of this provision to remove the applicability of mandatory law in domestic matters from the party's disposition. The international element must rather be determined according to objective criteria. With this interpretation, Article 3(3) of the Rome I Regulation also loses its *effet utile* to a large extent.

Unfortunately, the Court of Appeal considered its interpretation to be an *acte clair* and therefore refrained from referring the case to the CJEU. Since Brexit became effective, the Rome I Regulation continues to apply in the United Kingdom in an "anglicised" form as part of national law, but the English courts are no longer bound by CJEU rulings. As a result, a divergence between the English and the Continental European assessment of a choice of law in domestic

situations is exacerbated.

This also becomes relevant in the context of jurisdiction agreements. In the United Kingdom, these are now governed by the HCCH 2005 Choice of Court Convention which is also not applicable according to article 1(2) if, "*the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*". As there is a great interest in maintaining the attractiveness of London as a the "jurisdiction of choice", it is very likely that the Court of Appeal will also apply the standards that it has developed for Article 3(3) Rome I to the interpretation of the Choice of Court Convention as well.

One can only hope that in order to achieve legal certainty, at least within the European Union, the opportunity for a request for referral to the CJEU will present itself to a Member State court as soon as possible. This would allow the Court of Justice to establish more differentiated standards for determining under which circumstances a relevant foreign connection applies.

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# German Federal Court of Justice: Hungarian street tolls can be claimed in German courts, based on, inter alia, Article 21 Rome I Regulation (public policy exception)

By judgment of 28 September 2022 – XII ZR 7/22 (so far, only the press release is available, on which the following considerations are based), the German Federal Court of Justice held that Hungarian street tolls can be claimed before German

courts.

The claimant is a Hungarian company that collects Hungarian street tolls, the defendant a domestic car rental company. According to Hungarian regulation, it is the registered keeper of the car that owes the toll. If the toll is not paid by a virtual vignette (e-Matrica), an „increased substitute toll", five times higher than the vignette, must be paid within 60 days, afterwards additonally a large „processing fee". The first instance rejected the claim, on appeal the defendant was ordered to pay the claimed amount, the second appeal, on issues of law alone, confirmed the judgment on first appeal (except on the issue of which currency could be claimed, Hungarian Forinth or also Euros optionally).

The main point on the second appeal was whether the public policy exception in Article 21 Rome I Regulation applies. This analysis implies that the claim is characterised as contractual and that the Hungarian law on street tolls applies. The first issue was rather whether imposing liability solely on the part of the registered keeper would conflict with German public policy in case that this keeper is a car rental company whose business obviously is renting out its registered cars to the respective driver. As German law (section 7 German Road Traffic Act) prescribes, rather similarly, at least a subsidiary liability of the registered keeper, the Court rightly rejected a violation of German public policy. Since this result was obvious, the issue must have been dealt with upon party submission with which the Court has to deal with as a matter of fair proceedings (right to be heard, extending to a right to see the Court dealing with the Party's core points).

More interestingly, the „increased substitute toll" was seen as a contractual penalty which was – again rightly – considered as „not entirely unknown under German law", referring to similar substitute tolls indeed used in contracts for tramway or underground railroad traffic etc. if the traveller does not have a valid ticket. One is tempted to add that a contractual practice does not necessarily indicate the legal validity of this practice, but as this practice is virtually uncontested it is certainly convincing to take it as a „proof" for how German law deals with contractual penalties. The German Civil Code provides for the basis in sections 339 et seq., combined with sections 305 et seq. (control of unfair terms).

On the issue of the currency of the claim, the Court observed that the debt in question in foreign currency can only be claimed in that foreign currency unless

the applicable Hungarian law allows optional payment in Euros. In order to assess this point of Hungarian law the case was referred back to the court of first instance.

The case shows that Member State Courts continue being careful before striking down the results of a foreign applicable law as a violation of the national public policy. Had the highest instance of the German civil courts tended towards the opposite it would have had the obligation to refer the question to the ECJ whether activating the public policy exception was still within the confines of this exception as defined in its outer limits by European Union law. Rejecting a public policy violation in the sense of Article 21 Rome I Regulation (and comparable provisions in EU PIL) puts this decision in a (small) series of decisions of Member State courts, compared to almost none that actually assessed a violation. Nevertheless, it is remarkable that the court of appeal gave leave for a second appeal on the grounds that the questions on Article 21 Rome I Regulation would be of fundamental relevance („von grundsätzlicher Bedeutung"). Otherwise, the case could not have reached the Federal Court of Justice, as complaints against not giving leave are only admissible beyond a value of the appeal of EUR 20.000, and the total sum of the claim here was not more than approximately EUR 1.300.

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# Brussels IIa, habitual residence and forum necessitatis

Even after Brussels IIb's coming into force (that we reported on last week), the Court of Justice of the EU issued its judgment in case C-501/20. The case remains relevant, also under the new Regulation. The Court had the opportunity to not only add to its case law on habitual residence, but also to clarify three other matters: first, the Regulation's and the Maintenance Regulation's relation to the Vienna Convention on the Law of Treaties, specifically with regard to diplomatic immunity; second, the Brussels IIa's relation to domestic bases of jurisdiction; and third (and related to the second point), the *forum necessitatis.*

The case concerned the divorce and related disputes between a Spanish national and a Portuguese national. The couple had two children, who had dual Spanish-Portuguese nationality. The family lived first in Guinea-Bissau and later in Togo. The parents were posted at these places as EU delegates of the European Commission. They separated factually while still living in Togo. The mother then brought divorce proceedings, including the issues of parental responsibility and maintenance, in Spain. This court had to decide on its jurisdiction, which raised various issues.

Concerning the **habitual residence**, which is the first stop to determine jurisdiction (Art. 3 and 8 of Brussels IIa and Art. 3 of the Maintenance Regulation), the Court reiterated the two main factors to determine the habitual residence of adults: "first, the intention of the person concerned to establish the habitual centre of his or her interests in a particular place and, second, a presence which is sufficiently stable in the Member State concerned" (para 44, referring to its case C-289/20 interpreting the Rome III Regulation on the law applicable to divorce proceedings). The Court added that the definition of habitual residence in the Brussels IIa and Maintenance Regulations should be "guided by the same principles and characterised by the same elements" (para 53). (The Court here did not refer to Rome III, but the same is true as we know from previous case law.) Both factors of habitual residence were absent in this case. First, there was no intention to move back to Spain. Second, the parents were physically absent from Spain for this period (except for the birth of the children and periods of leave). Therefore, they could not have been habitually resident in this Member State.

Concerning the habitual residence of the children, the Court referred to the factors in its previous case law, including the duration, regularity, conditions and reasons for the child's stay, the child's nationality, school and family and social relationships (para 73). To establish a habitual residence, it is essential that the child is physically present in this Member State (para 75). The mother's nationality and the pace where she lived prior to her marriage (and prior to the child's birth) are not relevant (para 76). The child's nationality and the place where they are born, are relevant but not decisive (para 77).

Any **diplomatic immunity** cannot change this conclusion, as the Spanish court does not have jurisdiction (paras 61 and following). Even though Recital 14 states that "[t]his Regulation should have effect without prejudice to the application of

public international law concerning diplomatic immunities," this refers to a situation where a court in a EU Member State would have jurisdiction but cannot exercise it due to diplomatic immunity. In short, the existence of diplomatic immunity cannot grant jurisdiction.

The **residual jurisdiction** under Arts 6 and 7 of Brussels IIa, and specifically the situation that factual scenario that arose in this case, have long caused confusion. The legislator attempted to rectify this in Brussels IIb (Art. 6). The problem was that Art. 6 stated that if a spouse who is habitually resident in or a national of a Member State, may only be sued on the bases of jurisdiction in the Regulation, while Art. 7 referred to domestic bases of jurisdiction where no court in an EU Member State has jurisdiction. So, what is to be done where a spouse is a national of an EU Member State (Portugal in this instance) but there are no available bases of jurisdiction in the Regulation (as neither of the spouses are habitually resident in the EU and they do not have a common EU nationality)? Which provision should prevail? The Court found that Art. 7, and thus domestic bases of jurisdiction, cannot be used in this case; only the residual bases of jurisdiction of the Member State of the defendant's nationality can come into play (Portugal in this instance). See also the Opinion of Advocate-General Szpunar.

The same contradiction does not exist in the case of jurisdiction over children: Art. 14 simply states that where no court in a Member State has jurisdiction on the basis of the Regulation, domestic jurisdiction rules apply. Thus, Spanish residual bases of jurisdiction could be used concerning the parental responsibility.

The Maintenance Regulation does not have such reference to domestic bases of jurisdiction, but contains a complete harmonisation of jurisdiction, for all situations. It is in this context that there is also a ***forum necessitatis***: if no court in a Member State has jurisdiction and it would be impossible or cannot reasonably expected of the parties to bring the proceedings in the third State to which the dispute is connected, a court in a Member State may, on an exceptional basis, hear the case (Art. 7). The Court explained that this can only come into play if no court in a Member State has jurisdiction, also not on the basis of the link of the case to the status or parental responsibility, and also not on the basis of the choice of the parties (para 101 and following). If this is the case, it is not required that the parties first attempt to institute proceedings in the third State, but the court "cannot rely solely on general circumstances relating to deficiencies in the

judicial system of the third State, without analysing the consequences that those circumstances might have for the individual case" (para 112).