The U.S. Arbitration-Litigation Paradox

The U.S. Supreme Court is well-known for its liberal pro-arbitration policy. In *The Arbitration-Litigation Paradox*, forthcoming in the Vanderbilt Law Review, I argue that the U.S. Supreme Court's supposedly pro-arbitration stance isn't as pro-arbitration as it seems. This is because the Court's hostility to litigation gets in the way of courts' ability to support arbitration—especially international commercial arbitration.

This is the arbitration-litigation paradox in the United States: On one hand, the U.S. Supreme Court's hostility to litigation *seems* to complement its pro-arbitration policy. Rising barriers to U.S. court access in general, and in particular in transnational cases (as I have explored elsewhere), seems consistent with a U.S. Supreme Court that embraces arbitration as an efficient method for enforcing disputes. Often, enforcement of arbitration clauses in these cases leads to closing off access to courts, as Myriam Gilles and others have documented.

But there's a problem. As is perhaps obvious to experts, arbitration relies on courts—for enforcing arbitration agreements and awards, and for helping pending arbitration do what it needs to do. So closing off access to courts can close access to the litigation *that supports* arbitration. And indeed, recent Supreme Court cases narrowing U.S. courts' personal jurisdiction over foreign defendants have been applied to bar arbitral award enforcement actions. Courts have also relied on forum non conveniens to dismiss award-enforcement actions.

That's one way in which trends that limit litigation can have negative effects on the system of arbitration. But there's another way that the Court's hostility to litigation interacts with its pro-arbitration stance, and that's in the arbitration cases themselves.

The Supreme Court has a busy arbitration docket, but rarely hears international commercial arbitration cases. Instead, it hears domestic arbitration cases in which it often states that the "essence" of arbitration is that it is speedy, inexpensive, individualized, and efficient—everything that litigation is not.

(As an aside, this description of the stark distinction between arbitration and

litigation is widely stated, but it's a caricature. The increasingly judicialized example of international commercial arbitration shows this is demonstrably false. As practiced today, international commercial arbitration can be neither fast, nor cheap, nor informal.)

But in the United States, arbitration law is mostly trans-substantive. That means that decisions involving consumer or employment contracts often apply equally to the next case involving insurance contracts or international commercial contracts.

In the paper, I argue that the Court's tendency to focus on arbitration's "essential" characteristics, and to enforce these artificial distinctions between arbitration and litigation, can be harmful for the next case involving international commercial arbitration. It could undermine the likelihood of enforcement of arbitration awards where the arbitral procedure resembled litigation or deviated from the Court's vision of the "essential virtues" of arbitration.

To prevent this result, I argue that any revisions of the U.S. Federal Arbitration Act should pay special attention not only to fixing the rules about consumer and employment arbitration, but also to making sure that international commercial arbitration is properly supported. In the meantime, lower federal courts should pay no heed to the Supreme Court's seeming devotion to enforcing false distinctions between arbitration and litigation, particularly in the international commercial context.

In 2018, the Dutch Supreme Court found a Spanish judgment applicable in the Netherlands, based on the Hague Convention on

the International Protection of Adults. Minor detail: neither the Netherlands nor Spain is a party to this Convention.

Written by Dr. Anneloes Kuiper, Assistant Professor at Utrecht University, the Netherlands

In 2018, the Dutch Supreme Court found a Spanish judgment applicable in the Netherlands, based on the Hague Convention on the International Protection of Adults. Minor detail: neither the Netherlands nor Spain is a party to this Convention.

Applicant in this case filed legal claims before a Dutch court of first instance in 2012. In 2013, a Spanish Court put Applicant under 'tutela' and appointed her son (and applicant in appeal) as her 'tutor'. Defendants claimed that, from that moment on, Applicant was incompetent to (further) appeal the case and that the tutor was not (timely) authorized by the Dutch courts to act on Applicant's behalf. One of the questions before the Supreme Court was whether the decision by the Spanish Court must be acknowledged in the Netherlands.

In its judgment, the Dutch Supreme Court points out that the Convention was signed, but not ratified by the Netherlands. Nevertheless, article 10:115 in the Dutch Civil Code is (already) reserved for the application of the Convention. Furthermore, the Secretary of the Department of Justice has explained that the reasons for not ratifying the Convention are of a financial nature: execution of the Convention requires time and resources, while encouraging the 'anticipatory application' of the HCIPA seems to be working just as well. Because legislator and government seem to support the (anticipatory) application of the Convention, the Supreme Court does as well and, for the same reasons, has no objection to applying the Convention when the State whose ruling is under discussion is not a party to the treaty either (i.e. Spain).

This 'anticipatory application' was – although as such unknown in the Vienna Convention on the Law of Treaties – used before in the Netherlands. While in

1986 the Rome Convention was not yet into force, the Dutch Supreme Court applied article 4 Rome Convention in an anticipatory way to determine the applicable law in a French-Dutch purchase-agreement. In this case, the Supreme Court established two criteria for anticipatory application, presuming it concerns a multilateral treaty with the purpose of establishing uniform rules of international private law:

1. No essential difference exists between the international treaty rule and the customary law that has been developed under Dutch law;
2. the treaty is to be expected to come into force in the near future.

In 2018, the Supreme Court seems to follow these criteria. These criteria have pro's and con's, I'll name one of each. The application of a signed international treaty is off course to be encouraged, and the Vienna Convention states that after signature, no actions should be taken that go against the subject and purpose of the treaty. Problem is, if every State applies a treaty 'anticipatory' in a way that is not too much different from its own national law – criterion 1 – the treaty will be applied in as many different ways as there are States party to it. Should it take some time before the treaty comes into force, there won't be much 'uniform rules' left.

The decision ECLI:NL:HR:2018:147 (in Dutch) is available here.

The Netherlands Commercial Court holds its first hearing!

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

Only six weeks after its establishment, the Netherlands Commercial Court (NCC) held its first hearing today, 18 February 2019 (see our previous post on the creation of the NCC). The NCC's maiden case *Elavon Financial Services DAC* v.

IPS Holding B.V. and others was heard in summary proceedings and concerned an application for court permission to sell pledged shares (see here). The application was filed on 11 February and the NCC set the hearing date one week later, thereby demonstrating its commitment to offer a fast and efficient forum for international commercial disputes.

The parties' contract entailed a choice of forum clause in favour of the court in Amsterdam. However, according to the new Article 30r (1) of the Dutch Code of Civil Procedure and Article 1.3.1. of the NCC Rules an action may be initiated in the NCC if the Amsterdam District Court has jurisdiction to hear the action and the parties have expressly agreed in writing to litigate in English before the NCC. Lacking an agreement in the initial contract, the parties in *Elavon Financial Services DAC* v. *IPS Holding B.V.* subsequently agreed by separate agreement to bring their case before the newly established chamber and thus to litigate in English, bearing the NCC's much higher, when compared to the regular Dutch courts, fees. Unlike other international commercial courts which during their first years of functioning were 'fed' with cases transferred from other domestic courts or chambers, the fact that the parties in the present case directly chose the NCC is a positive sign for the court's future case flow.

As we have reported on this blog before, the NCC is a specialized chamber of the Amsterdam District Court, established on 1 January 2019. It has jurisdiction in international civil and commercial disputes, on the basis of a choice of court agreement. The entire proceedings are in English, including the pronouncement of the judgment. Judges have been selected from the Netherlands on the basis of their extensive experience with international commercial cases and English language skills. The Netherlands Commercial Court of Appeal (NCCA) complements the NCC on appeal. Information on the NCC, a presentation of the court and the Rules of Procedure are available on the website of the Dutch judiciary. It advertises the court well, referring to "the reputation of the Dutch judiciary, which is ranked among the most efficient, reliable and transparent worldwide. And the Netherlands – and Amsterdam in particular – are a prime location for business, and a gateway to Europe." Since a number of years, the Dutch civil justice system has been ranked no. 1 in the WJP Rule of Law Index.

In part triggered by the uncertainties of Brexit and the impact this may have on the enforcement of English judgments in Europe in particular, more and more EU Member States have established or are about to establish international

commercial courts with a view to accommodating and attracting high-value commercial disputes (see also our previous posts here and here). Notable similar initiatives in Europe are the 'Frankfurt Justice Initiative' (for previous posts see here and here) and the Brussels International Business Court (see here). While international commercial courts are mushrooming in Europe, a proposal for a European Commercial Court has also come to the fore so as to effectively compete with similar courts outside Europe (see here and here).

The complexity of the post Brexit era for English LLPs and foreign legal professionals in EU Member States: a French perspective

Written by Sophie Hunter, University of London (SOAS)

In light of the turmoil in the UK Parliament since the start of 2019, the only certain thing about Brexit is that everything is uncertain. The Law Society of England and Wales has warned that "if the UK's relationship with the rest of the EU were to change as the result of significant renegotiations, or the UK choosing to give up its membership, the effects would be felt throughout the legal profession." As a result of Brexit, British firms and professionals will no longer be subject to European directives anymore. This foreshadows a great deal of complexity. Since British legal entities occupy a central place within the European legal market, stakes are high for both British and European lawyers. A quick overview of the challenges faced by English LLPs in France and the Paris Bar demonstrates a high level of complexity that, is not and, should be considered more carefully by politicians.

Currently, 1872 foreign lawyers from 92 different citizenships are registered at the Paris Bar, according to a report by Dominic Jensen, 181 are British citizens, out of which 72 are registered under their original professional titles pursuant to

the European Directive 98/5/CE (70 solicitors and 2 barristers). From 61 foreign legal entities established in France, the majority are English limited liability partnerships (LLP) which employ 1,600 lawyers. Some American law firms rely on the LLP structure as a strategy to establish themselves within the European legal market. According to the European Directive 98/5/CE, foreign legal entities of one Member State can be registered at the Bar of another Member State. The consequences of Brexit will be radical. Because the UK will no longer be part of the EU, foreign legal entities subject to English Law and established in EU Member States will no longer be recognized by the Bar of the host state, and thus will no longer be entitled to do business within its jurisdictions. For the Paris Bar, stakes are high since no other European capital has experienced such an important implementation of British and American law firms.

With the deadline of Brexit looming closer, no one has raised the topic of foreign lawyers and the exercise of their right to practice in European jurisdictions, in spite of numerous calls from The Law Society of England and Wales. While the UK is advocating for mutual recognition of professional qualifications, the French Bar led by Florent Loyseu de Grandmaison has drafted a report outlining various ways to solve this problem. According to a new ordinance published in April 2018, a foreign legal consultant can register with the Paris Bar to practice international law and any other type of law he or she is registered for, with the exception of European law and the law of Member States. The main concern of LLPs will focus primarily on how to continue to practice in France with little disruptions. LLPs owned by English solicitors will need to establish French legal entities owned and managed according to French and European Law. Most likely, English LLPs established in France will benefit from a new legal structure called AARPI, which stands for French limited partnership and mirrors the structure of LLPs. However it is not fully implemented within French legislation yet.

In a tensed climate between the UK and the EU, the fate of foreign legal consultants and entities seem more than ever uncertain. The example of France demonstrates, first, a high degree of complexity in the legislation that prevents LLPs to easily transpose their structure into the jurisdiction post Brexit, and a lack of preparation from both LLPs and the host state to face the practical consequences of Brexit. The UK and EU Member States will need to show a great deal of flexibility to quickly adapt legislation to incorporate English LLPs within their jurisdictions. Therefore, the fear of The Law Society of England and Wales

which has repeatedly warned the UK government of the consequences of a "no deal" seem justified. Regardless of whether Brexit is implemented or postponed on March 29, finding an appropriate answer to the dilemma faced by foreign legal professionals and LLPs across the continent should be a priority on the agenda.

The Aftermath of the CJEU's Kuhn Judgment – Hellas triumphans in Vienna. Really.

Written by Stephan Walter, Research Fellow at the Institute for German and International Civil Procedure Law, University of Bonn, Germany

Claims brought by creditors of Greek state bonds against Greece in connection with the 2012 haircut do not fall under the substantive scope of the Brussels Ibis Regulation because they stem from the exercise of public authority. Hence, they cannot be regarded as civil and commercial matters in the sense of Article 1(1) Brussels Ibis Regulation. This is the essence of the CJEU's *Kuhn* judgment (of 15 November 2018, Case C-308/17, ECLI:EU:C:2018:911), which was already discussed on this blog.

In said blog post, it was rightly pointed out that the judgment could be nothing but a Pyrrhic victory for Greece. Not least the – now possible – application of national (sometimes exorbitant) jurisdictional rules was considered to have the potential to backfire. This was, however, only the case, if Greece was not granted immunity in the first place. In short: the fallout of the CJEU's judgment was hardly predictable.

A recent decision rendered by the Austrian Supreme Court of Justice (*Oberster Gerichtshof*, OGH) introduces some clarity – at least with regard to litigation in Austria. The decision (of 22 January 2019, docket no. 10 Ob 103/18x) concerned the case that gave rise to the preliminary reference.

In a first step, the OGH held that Greece does indeed enjoy immunity from the Austrian jurisdiction. This is a major change of case law. Unlike the German Federal Court of Justice (*Bundesgerichtshof*, BGH), the OGH repeatedly held the opposite (most recently six days after (!) the CJEU's *Kuhn* judgment in a decision of 21 November 2018, docket no. 6 Ob 164/18p). While, in principle, there is nothing wrong with changing the case law, it is somewhat astonishing that the OGH did this in a very superficial fashion (one sentence). In fact, the court merely backed up its claim with a reference to the CJEU's *Kuhn* judgment, although this judgment was not concerned with the question of immunity but solely the substantive scope of the Brussels Ibis Regulation. Because of the severe consequences of the OGH's new approach, it is incomprehensible that the OGH did not discuss why the CJEU's holding applies to the issue of state immunity as well.

Ironically, the OGH declared itself – by virtue of section 42(3) of the Austrian Law on Jurisdiction (*Jurisdiktionsnorm*, JN) in conjunction with section 528(2) no. 2 of the Austrian Code of Civil Procedure (*Zivilprozessordnung*, ZPO) – bound by the finding of the court of previous instance that Greece did not enjoy immunity because the court of second instance upheld said finding.

Consequently, the OGH examined if Austrian courts had international jurisdiction based on the Austrian autonomous rules on jurisdiction. According to section 99 JN, jurisdiction can be established by the presence of assets in Austria (comparable to section 23 German Code of Civil Procedure). However, the OGH declined jurisdiction based on section 99 JN because the claimant had not relied upon this head of jurisdiction during the court proceedings. Therefore, the OGH found that Austrian courts had no international jurisdiction and dismissed the claim. This reasoning is hardly convincing. It is true that Austrian courts are – in principle – bound by the statement of the claimant when they examine their jurisdiction (see section 41(2) JN) and that the claimant did not rely upon section 99 JN. However, up until now, the OGH always applied the Brussels Ibis Regulation to claims in connection with the haircut. The court never – not even in the preliminary reference – questioned the applicability of the Regulation. Hence, one is inclined to ask: why should a claimant rely on the autonomous rules on jurisdiction if it is standing case law that they do not apply? Why did the OGH not remit the matter to the lower instance court, giving the claimant at least the chance to rely on section 99 JN (or Austrian autonomous rules on jurisdiction in

general)? Is this not a prime example of a denial of justice? Be that as it may, the court's one-sentence (!) reasoning leaves at least a bitter taste.

What's the bottom line? Thanks to the *Kuhn* judgment, Greece now enjoys immunity from Austrian jurisdiction regarding claims in connection with the 2012 haircut. Consequently, Austria's (exorbitant) section 99 JN is out of the equation. Therefore, the OGH has turned Greece's Pyrrhic victory in the CJEU's Kuhn judgment into a clear victory. While the OGH's reasoning is far from bulletproof, the door to the Austrian courts has closed.

The decision (in German) can be accessed here.

Is there a need for international conventions on legal parentage (incl. international surrogacy arrangements)?

The Experts' Group on Parentage / Surrogacy of the Hague Conference on Private International Law (HCCH) has answered in the affirmative.

At its fifth meeting earlier this year, the Experts' Group agreed that it would be feasible to develop both:

- a general private international law instrument on the recognition of foreign judicial decisions on legal parentage; and
- a separate protocol on the recognition of foreign judicial decisions on legal parentage arising from international surrogacy arrangements (abbreviated as "ISA").

As announced on the HCCH website, the Experts' Group will recommend to the governance body of the HCCH (*i.e.* Council on General Affairs and Policy) during its meeting in March 2019 that "work continue with a view to preparing proposals

for inclusion in future instruments relating to the recognition of judicial decisions." The Council will have the last word.

In my opinion, there are many reasons for drafting two separate instruments, which may range from legal to political as these are very sensitive topics. One that particularly struck me relates to the indirect grounds of jurisdiction when considering the recognition of such decisions:

"Most Experts concluded that the indirect grounds previously identified in the context of general legal parentage would not work in ISA cases, and instead supported the **State of birth of the child as the primary connecting factor in an ISA case** as this would provide certainty and predictability. A qualifier to that connecting factor (such as the habitual residence of the person giving birth to the child) might be necessary to guarantee sufficient proximity, as well as to prevent and combat trafficking of persons and law evasion." See also para 25 of the Report.

Please note that these instruments would deal with the *recognition* and not with the enforcement of foreign judicial decisions given the nature of decisions on legal parentage. See in contrast my previous post on the HCCH draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

The HCCH news item is available here.

The full report is available here.

Sweden: New rules on non-recognition of underage marriages

Written by Prof. Maarit Jänterä-Jareborg, Uppsala University, Sweden

On 1 January 2019, new restrictions came into force in Sweden's private international law legislation in respect of marriages validly concluded abroad. The

revised rules are found in the Act (1904:26 p. 1) on Certain International Relationships on Marriage and Guardianship, Chapter 1 § 8a, as amended by SFS 2018:1973. The content of the new legislation is, briefly, the following: no marriage shall be recognised in Sweden if the spouses or either one of them was under the age of 18 years at the time of the marriage. By way of exception, this rule may be set aside once both parties are above 18 years of age, if there are exceptional reasons to recognise the marriage.

The law reform is in line with a recent European trend, carried out in e.g., Germany, Denmark and Norway, to protect children from marrying and, one could claim, to 'spare' people who married as a child (or with a child) from their marriage.[1] The requirement of 18 years of age has been introduced not only as the minimum marriage age for concluding a marriage in the State's own territory, i.e., as a kind of an internationally mandatory rule, but also as a condition for the recognition of a foreign marriage.

The new Swedish legislation constitutes perhaps the most extreme example on how to combat the phenomenon of child marriages. The marriage's invalidity in Sweden does not require a connecting factor to Sweden at the time of the marriage, or that the spouses are underage upon arrival to Sweden. Theoretically, the spouses may arrive to Sweden decades after marrying, and find out that their marriage is not recognised in Sweden. The later majority of the persons involved does not repair this original defect. The only solution, if both (still) wish to be married to each other, will be to (re)marry!

It remains to be seen whether the position taken in the Government Bill, claiming that the new law conforms with EU primary law and the ECHR, is proportionate and within Sweden's margin of appreciation, will be shared by the CJEU and the ECtHR. Swedish Parliament, in any case, shared this view and did not consider that EU citizens' free movement within the EU required exempting underage spouses from the rule of non-recognition. The new law applies to marriages concluded as of 1 January 2019. It does not affect the legal validity of marriages concluded before that date.

To understand the effects of the Swedish law reform, the following needs to be emphasised. One of the special characteristics of Swedish family procedure law is that is does not provide for decrees on marriage annulment or the invalidity of a marriage. Divorce and death are in Sweden the only ways of dissolving a

marriage! This position has applied since 1 January 1974, when the right to immediate divorce became the tool to dissolve any marriage concluded in Sweden against a legal obstacle to the marriage, e.g., a spouse's still existing marriage or duress to marry. A *foreign* marriage not recognised in Sweden is, however, invalid directly by force of Swedish private international law legislation. It follows that it cannot be dissolved by divorce – as it does not exist as a marriage in the eyes of Swedish law. It does not either produce any of the legal effects of marriage, such as the right to maintenance or property rights. It does not qualify as a marriage obstacle, with the result that both 'spouses' are free to marry each other or anyone else.

What, then, is the impact of the legislation's exception enabling, in exceptional circumstances, to set aside the rule of non-recognition? This is an assessment which is aimed to take place *ad hoc,*usually in cases where the 'marriage's' validity is of relevance as a preliminary issue, whereby each competent authority makes an independent evaluation. It is required that non-recognition must produce exceptional hardships for the parties (or their children). The solution is legally uncertain and unpredictable and has been subject to heavy criticism by Sweden's leading jurists.

The 2019 law reform follows a series of reforms carried out in Sweden since 2004. According to the established main rule, a marriage validly concluded in the State of celebration or regarded as valid in States where the parties were habitually resident or nationals at the time of the marriage, is recognised in Sweden, Chapter 1 § 7 of the 1904 Act. Since a law reform carried out in 2004, an underage marriage is, nevertheless, invalid directly by force of law in Sweden, if either spouse had a connection to Sweden through habitual residence or nationality at the time of the marriage. (The 2019 law reform takes a step further, in this respect.) Recognition can, in addition, be refused with reference to the *ordre public*exception of the 1904 Act, Chapter 7 § 4. The position taken in Swedish case law is that *ordre public*captures*any*marriage concluded before both parties were 15 years of age. Forced marriages do not qualify for recognition in Sweden, since the 2004 reform. The same applies to marriages by proxy, since 2014, but only on condition that either party to the marriage had a connection to Sweden through habitual residence of nationality at the time of the marriage.

The 2019 legislation differs in several respects from the proposals preceding it, for example the proposed innovation of focusing on the underage of a spouse at

the time of either spouse's arrival to Sweden. A government-initiated inquiry is currently pending in Sweden, the intention being to introduce rules on non-recognition of polygamous marriages validly concluded abroad.

[1] See M. JÄNTERÄ-JAREBORG, 'Non-recognition of Child Marriages: Sacrificing the Global for the Local in the Aftermath of the 2015 "Refugee Crisis"', in: G. DOUGLAS, M. MURCH, V. STEPHENS (eds), *International and National Perspectives on Child and Family Law, Essays in Honour of Nigel Lowe*, Intersentia 2018, pp. 267-281.

HCCH Revised Draft Explanatory Report (version of December 2018) on the Judgments Convention is available on the HCCH website

A revised Draft Explanatory Report (version of December 2018) on the *HCCH Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* is available in both English and French on the Hague Conference website.

In my opinion, particularly complex topics in this Draft Explanatory Report include intellectual property (IP) rights (in particular, Art. 5(3) of the draft Convention– there are several provisions dealing with IP rights in addition to this Article) and the relationship of the draft Convention with other international instruments (Art. 24 of the Draft Convention). Some of the text is in square brackets, which means that such text has tentatively been inserted due perhaps to a lack of consensus at the Special Commission meetings, and thus a final decision will be taken at the Diplomatic Session scheduled for the summer 2019.

With regard to intellectual property rights, the draft Convention distinguishes between IP rights that require to be granted or registered (such as patents, registered trademarks, registered industrial designs and granted plant breeders' rights) and those that do not require grant or registration (*i.e.* copyrights and related rights, unregistered trademarks, and unregistered industrial designs – this is a closed list for these specific rights). See paragraph 238 of the Draft Explanatory Report.

The draft Convention's approach to IP rights, which is based on the territoriality principle, is set out very clearly in paragraph 235 of the Draft Explanatory Report. In particular, the draft Convention reflects a compromise according to which the State of Origin of the judgment will coincide with the *lex loci protectionis i.e.*, the law of the State for which protection is sought, so as to avoid the application of foreign law to these rights (see also paragraph 236).

With respect to the relationship of the draft Convention with other international instruments, it is important to note that this draft Convention will cover, among many other things, non-exclusive choice of court agreements so as to give preference to the application of the *HCCH Hague Convention of 30 June 2005 on Choice of Court Agreements* to exclusive choice of court agreements. See paragraphs 220-225 and 410-430 of the Draft Explanatory Report.

The latest information about the Judgments Project is available here.

After the Romans: Private International Law Post Brexit

Written by Michael McParland, QC, 39 Essex Chambers, London

On 10 December 2018 the Ministry of Justice published a draft statutory instrument with the pithy title of "*The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2018*". This indicates the current intended changes to retained EU private international

law of obligations post Brexit.

These draft 2018 regulations are made in the exercise of the powers conferred by section 8(1) of, and paragraph 21(b) of Schedule 7 to, the European Union (Withdrawal) Act 2018 in order to "*address failures of retained EU law to operate effectively and other deficiencies… arising from the withdrawal of the UK from the European Union*". It is intended they will come into force on exit day.

Part 2 contains amendments to existing primary legislation in the UK. These include amendments to the Contracts (Applicable Law) Act 1990, the UK statute that implemented the 1980 Rome Convention on the law applicable to contractual obligations. The Explanatory Memorandum now declares that "*the United Kingdom will no longer be a contracting party* [to the Rome Convention]*after exit day*". This is modestly surprising, given that the Rome Convention was not actually part of the Community *acquis*in the first place (see **Michael McParland, *"The Rome I Regulation on the Law Applicable to Contractual Obligations",*** para. 1.99). But the current desire to disentangle the UK entirely from any vestiges of things European appears to be overwhelming. Consequently, the draft 2018 regulations convert the most of the rules found into the Rome Convention into UK domestic law, and declare that they will continue to apply them to contracts entered into between 1st April 1991 and 16th December 2009 in the same way as they have done since the arrival of the Rome I Regulation. Further amendments are also made to the Prescription and Limitation (Scotland) Act 1973 and the Private International (Miscellaneous Provisions) Act 1995, the pre-Rome II statute which contains the UK's rules on choice of law in tort and delict.

Part 3 deals with amendments to secondary legislation which had been originally created to deal with the coming into force of the Rome I and Rome II Regulations.

Part 4 is entitled "*Amendment of retained EU Law*", this new legal category that will see EU law as at the date of the UK's departure from the EU transposed into domestic law. Part 4 deals with the proposed substantive amendments to the enacted text of both the Rome I and Rome II Regulation which are considered necessary or appropriate to take account of the UK ceasing to be an EU Member State. The full impact of the changes will have to be considered in detail against the original texts, but some brief comments can be made.

Some changes are mere housekeeping. For example, in the "universal application" provisions found in Article 2 (Rome I) and Article 3 (Rome II) which declares that "any law specified by this Regulation shall be applied whether or not it is the law of a Member State", are to be amended with reference to "a Member State" being replaced with "*the United Kingdom or a part of the United Kingdom*".

Others involve updating references to rules found in Directives to their current equivalent sin UK domestic law. So, for example, Article 4(1)(h) of the Rome I Regulation currently provides for the applicable law in the absence of choice for:

> *(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.*

The draft regulations will now replace the reference to "by Article 4(1), point (17) of Directive 2004/39/EC" with "… *in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001"* which as a footnote notes is S.I.2001/544, though the relevant Schedule 2 was substituted by S.I. 2006/3384 and this itself was subsequently amended by the Financial Services and Market Act 2000 (Regulated Activities) (Amendment) S.I. 2017/488 (which took effect from 1 April 2017 and which includes a whole raft of definitional changes).

Other changes deal with the fact that exit day will formally cut the UK's version of these Regulations off from any future changes made by the EU legislator to either of those Regulations.

Part 4 of the Regulation also revokes Regulation EC No. 662/2009 which established the procedure for the negotiation and conclusion of agreements between EU Member States and third countries on the law applicable to contractual and non-contractual obligations (see ***McParland***, para. 2.100).

Potentially more interesting changes are made to the Rome II Regulation, especially in relation to Article 6(3)(b) (unfair competition and acts restricting free competition), and Article 8 (infringement of intellectual property rights).

The changes to the Rome I Regulation and their implications will feature in the second edition to my book on the subject which I am currently working on.

The Ministry of Justice's web-site can be accessed here.

The renaissance of the Blocking Statute

Written by Markus Lieberknecht, Institute for Comparative Law, Conflict of Laws and International Business Law (Heidelberg)

Quite a literal "conflict of laws" has recently arisen when the EU reactivated its Blocking Statute in an attempt to deflect the effects of U.S. embargo provisions against Iran. As a result, European parties doing business with Iran are now confronted with a dilemma where compliance with either regime necessitates a breach of the other. This post explores some implications of the Blocking Statute from a private international law perspective.

Past and present of the Blocking Statute

The European Blocking Statute (Regulation (EC) 2271/96) was originally enacted in 1996 as a counter-measure to the American "Helms-Burton Act" which, at the time, compromised European trade relations with Cuba. Along with WTO and NAFTA proceedings, the Blocking Statute provided sufficient leverage to strike a compromise with the Clinton administration. The controversial parts of the "Helms-Burton Act" were shelved and the few remaining pieces of legislation otherwise covered by the Blocking Statute ceased to be relevant over time. The Blocking Statute formally stayed in force but, for want of any legislation to block, remained in a legislative limbo until 8 May 2015.

On this day, President Trump announced his decision to withdraw the U.S. from the Iran nuclear deal (Joint Comprehensive Plan of Action – JCPOA) and to fully

restore the U.S. trade sanctions against Iran. In particular, this entailed reinstating the so-called secondary sanctions which apply to European entities without ties to the U.S. This decision, albeit hardly unexpected, was met with sharp dissent in Europe. Not only was the JCPOA viewed by many as a remarkable diplomatic achievement, but secondary sanctions were seen as an illicit attempt to regulate European-Iranian trade relations without a genuine link to the U.S. The EU, claiming that this practice violated international law, immediately declared its intention to protect European businesses from the extraterritorial reach of the U.S. sanctions. In order to make good on this promise, an all but forgotten instrument of European private international law was swiftly dusted off and updated: The Blocking Statute.

Protection by prohibition

The centerpiece of the Blocking Statute is its Art. 5 which prohibits affected Parties from complying with the relevant U.S. legislation. Depending on the Member State, a breach of this provision can be sanctioned with potentially unlimited criminal or administrative fines.

The disapproval enshrined in Art. 5 Blocking Statute – or, arguably, in the Blocking Statute as a whole – amounts to a specification of the European *ordre public*. Regarding the ever-present issue of overriding mandatory provisions, it rules out the possibility to give legal effect to the U.S. sanctions in question. This is either because the Blocking Statute, as *lex specialis,*supersedes Art. 9 Rome I Regulation altogether or because it has binding effect on the courts' discretion under Art. 9 (3) Rome I Regulation. However, given the narrow scope of Art. 9 (3) Rome I Regulation, this means ruling out a possibility which was hardly measurable in the first place. After all, Iran-related contracts with a place of performance located in the U.S. as required by Art. 9 (3) Rome I Regulation are, if at all realistically conceivable, extremely rare. What is more, German courts have refrained from applying U.S. sanctions under Art. 9 (3) Rome I Regulation based on the notion that they are superseded by the EU's own framework of restrictions on trade with Iran. Thus, there were plenty of reasons to deny legal effect before the recent update of the Blocking Statute.

Under the ECJ's *Nikiforidis* doctrine, the relevant sanctions are precluded from being applied as legal rules, but not from being considered as facts under substantive law. In this context, Art. 5 of the Blocking Statute will provide clear,

albeit very one-sided, guidance for a number of issues. For instance, parties will not be able to contractually limit the scope of performance to what is permissible under relevant U.S. provisions, nor can they successfully claim a right to withhold performance or terminate contracts based on the justified fear of penalties imposed by U.S. authorities.

The “catch-22” situation

It does not require much number-crunching to see that to many globally operating companies, succumbing to U.S. pressure will seem like the the most, or even only, reasonable choice. The portfolio of U.S. penalties includes a denial of further access to the U.S. market and criminal liability of the natural persons involved. U.S. authorities are not shy on using these measures either, as recently evidenced by the spectacular arrest of Huawei’s CFO in Canada on charges of breaching sanctions against Iran. Thus, opting for a breach of the Blocking Statute and accepting the resulting fine under the Member State’s domestic law may strike many companies as a pragmatic choice.

Nonetheless, this decision would entail an intentional breach of European law. Executives, who may also face personal liability for unlawful decisions, are thus faced with a tough compliance dilemma; whichever choice they make can be sanctioned by either U.S. or European authorities. Given this delicate situation, they may happily accept any economic pretext to quietly wind down operations in Iran without express reference to the U.S. sanctions.

Both the Blocking Statute and the U.S. regulation allow for hardship exemptions. U.S. courts may also consider foreign government pressure as grounds for exculpation under the so-called foreign sovereign compulsion doctrine. While it may, therefore, be possible to navigate between both regimes, it appears unlikely that either side will be particularly generous in granting exemptions in order not to undermine the effectiveness of their regulation. After all, the Blocking Statute is in essence designed around the idea to create counter-pressure at the expense of European companies and the U.S. will hardly be inclined to play their part in making this mechanism work.

The clawback claim

Art. 6 of the Blocking Statute contains a so-called “clawback claim”. This provision enables parties to recover all damages resulting from the application of

the U.S. sanctions in question from the person who caused them. What looks like a promising way to subvert the effect of the U.S. sanctions at first glance, quickly loses much of its appeal when looking more closely. In particular, the “claw back” provides no grounds to recover the most prevalent item of damages in this context, namely penalties imposed by U.S. authorities for breach of sanctions. Although the substantive requirements of Art. 6 Blocking Statute would evidently be met, any claim brought against the U.S. or its entities to remedy what is clearly an act of state would not be actionable in courts due to the doctrine of state immunity.

Thus, the claim is limited to disputes between private parties. The most realistic scenario here is that parties may hold each other liable for complying with U.S. sanctions and, in turn, violating the Blocking Statute. This means that, for instance, companies backing out of delivery chains or financing arrangements may be held liable for the resulting damages of every other party involved in the transaction. Due to the tort-like nature of the claim, this liability would even extend beyond the direct contractual relationships. Functionally, the “clawback” constitutes a private enforcement mechanism of the prohibition enshrined in Art. 5 Blocking Statute. It is, however, much less convincing as an instrument to protect all aggrieved parties from the repercussions of U.S. sanctions.

Conclusion

The renaissance of the Blocking Statute proves the difficulty of blocking the effects of foreign laws in a globalized world. The affected parties were promised protection but received an additional prohibition, arguably multiplying their compliance concerns rather than resolving them. Denying legal effects within the European legal framework is a relatively easy task and, given the narrow scope of Art. 9 Rome I Regulation, not far from the default situation. In contrast, legal instruments which can undermine the factual influence of foreign laws without unintended side effects are yet to be invented. The true purpose of the Blocking Statutes is a political one, namely serving as a bargaining chip vis-à-vis the U.S. and an attempt to assure Iran that the European Union is not jumping ship on the JCPOA. However, this largely symbolic value will hardly console the affected parties whose legal and economic difficulties remain very much real.

This blog post is a condensed version of the author's article in IPRax 2018, 573 et seqq. which explores the Blocking Statute's private law implications in more detail and contains comprehensive references to the relevant literature.