Reform of Singapore's Foreign Judgment Rules

On 3rd October, the amendments to the Reciprocal Enforcement of Foreign Judgments Act ("REFJA") came into force. REFJA is based on the UK Foreign Judgments (Reciprocal Enforcement) Act 1933, but in this recent round of amendments has deviated in some significant ways from the 1933 Act. The limitation to judgments from "superior courts" has been removed. Foreign interlocutory orders such as freezing orders and foreign non-money judgments now fall within the scope of REFJA. So too do judicial settlements, which are defined in identical terms to the definition contained in the Choice of Court Agreements Act 2016 (which enacted the Hague Convention on Choice of Court Agreements into Singapore law).

In relation to non-money judgments, such judgments may only be enforced if the Singapore court is satisfied that enforcement of the judgment would be "just and convenient". According to the Parliamentary Debates, it may not be "just and convenient" to allow registration of a non-money judgment under the amended REFJA if to do so would give rise to practical difficulties or issues of policy and convenience. The Act gives the court the discretion to make an order for the registration of the monetary equivalent of the relief if this is the case.

An interlocutory judgment need not be "final and conclusive" for the purposes of registration under REFJA. The intention underlying this expansion is to allow Singapore courts to enforce foreign interlocutory orders such as asset freezing orders. This plugs a hole as currently *Mareva* injunctions are not regarded as free-standing relief under Singapore law. It has recently been held by the Court of Appeal that the Singapore court would only grant Mareva injunctions in aid of foreign proceedings if: (i) the Singapore court has personal jurisdiction over the defendant and (ii) the plaintiff has a reasonable accrued cause of action against the defendant in Singapore (*Bi Xiaoqing v China Medical Technologies Inc* [2019] SGCA 50).

New grounds of refusal of registration or to set aside registration have been added: if the judgment has been discharged (eg, in the event of bankruptcy of the judgment debtor), the damages are non-compensatory in nature, and if the notice

of the registration had not been served on the judgment debtor, or the notice of registration was defective.

It is made clear that the court of origin would not be deemed to have had jurisdiction in an action *in personam* if the defendant voluntarily appeared in the proceedings solely to invite the court in its discretion not to exercise its jurisdiction in the proceedings. *Henry v Geoprosco* [1976] QB 726 would thus not apply for the purposes of REFJA although its continued applicability at common law is ambiguous (see *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088).

All along, only judgments from the superior courts of Hong Kong SAR have been registrable under REFJA. The intention now is to repeal the Reciprocal Enforcement of Commonwealth Judgments Act ("RECJA"; based on the UK Administration of Justice Act 1920) and to transfer the countries which are gazetted under RECJA to the amended REFJA. The Bill to repeal RECJA has been passed by Parliament.

The amended REFJA may be found here: https://sso.agc.gov.sg/Act/REFJA1959

Party autonomy in infringement of copyright: Beijing IP Court Judgement in the Drunken Lotus

China is one of few countries that permits the parties to choose the applicable law governing cross-border infringement of intellectual property disputes. Article 50 of the Chinese Law Applicable to Foreign-Related Civil Relations 2010 (Conflicts Act) provides that the parties could choose Chinese law (*lex fori*) after dispute has arisen to derogate from the default applicable law, i.e. *lex loci protectionis*, in IP infringement disputes.

This choice of law rule was applied by the Beijing IP Court in its 2017 decision on Xiang Weiren v Peng Lichong ("Drunken Lotus"), (2015) Jing Zhi Min Zhong Zi 1814. The claimant published his painting "Drunken Lotus" in 2007. In 2014, the defendant exhibited his artwork entitled "Fairy in Lotus" in Mosco and Berlin, which allegedly had infringed the claimant's copyrights. Although the parties did not enter into an explicit choice of law agreement, both parties submitted their legal arguments based on Chinese Copyright Law, which was deemed an "implied" *ex post* choice of Chinese law. Beijing IP Court thus applied Chinese law to govern the infringement dispute.

This case reveals a number of interesting points. Party autonomy may provide a practical alternative to *lex loci protectionis* in infringements occurring in multiple jurisdictions. In the Drunken Lotus case, applying *lex loci protectionis* would result in the application of two foreign laws, Russian and German law, respectively to the infringement occurred in Russia and Germany. In the even worse scenario, where a copyright is infringed in the internet, the territoriality nature of copyrights may result in multiple, similar but independent, infringements occurring in all countries where the online information is accessed, causing more difficulties for the claimant to enforce their rights based on multiple applicable laws.

However, there may be no convincing argument to limit the choice to the *lex fori*. If party autonomy is justifiable in IP infringement, which is controversial, it would be appropriate for the parties to choose any law. The only justification of such a limitation probably sterns from judicial efficiency and pragmatism. It would be more convenient for the court to apply its own law. Also in practice, it is very common that when the litigation is brought in China and especially where both parties are Chinese, the parties naturally rely on Chinese law to support their claims or defences without being aware of the potential choice of law questions. It renders "implied" *ex post* choice exist very frequently and make it legitimate for Chinese court to apply Chinese law in most circumstances. It is also likely that allowing the parties to choose the *lex fori* could be an attractive reason for the claimants, especially those in multi-jurisdiction infringement disputes, to bring the action in China, granting Chinese court a competitive advantage versus other competent jurisdictions.

Furthermore, the Chinese law only permits party autonomy in infringement of IPRs. Any issues concerning substance of IPRs, including ownership, content,

scope and validation, are exempt from party autonomy (Art 48 of Contracts Act). These issues are usually classified as the proprietary perspective of IPRs, exclusively subject to the *lex protectionis* to the exclusion of party autonomy. However, before a court could properly consider the infringement issue, it is inevitable to know at least the content and scope of the disputed IPR in order to ascertain parties' rights and obligations. In other words, the substance and infringement of IPRs are two different, but closely related, issues. Applying party autonomy means the court should apply two different laws, one for the substance and the other infringement, causing *depacage*. The necessity to decide the content of IPRs may largely reduce the single law advantage brought by party autonomy in multi-jurisdictional infringements. In the Drunken Lotus case, Chinese court simply applied Chinese law to both the content and infringement issues, without properly considering substance and infringement classification.

Law Shopping in Relation to Data Processing in the Context of Employment: The Dark Side of the EU System for Criminal Judicial Cooperation?

This post was written by Ms Martina Mantovani, Research Fellow at the Max Planck Institute Luxembourg. The author is grateful to her colleague, Ms Adriani Dori, for pointing out the tweet.

On 26th September 2019, Dutch MEP Sophie in 't Veld announced through her Twitter account the lodging of a question for written answer to the EU Commission, prompting the opening of an investigation (and, eventually, of infringement proceedings) in relation to a commercial use of the European Criminal Record Information System (ECRIS). A cornerstone of judicial

cooperation in criminal matters, this network is allegedly being exploited by a commercial company operating on the European market (hereinafter name, for the purposes of this entry, The Company), in order to provide, against payment, a speedy and efficient service to actual or prospective employers, wishing to access the criminal records of current employees or prospect hires.

Commercial activities of this kind raise a number of questions concerning, first and foremost, the lawfulness of the use of the ECRIS network beyond its institutional purpose, as well as the potential liability under EU law of the national authorities which are (more or less knowingly) fostering such practices. Moreover, as specifically concerns the topic of interest of this blog, such commercial practices exemplify how law shopping, stemming from the lack of coordination of Member States' data protection laws, can be turned into a veritable profit-seeking commercial endeavor. As it is, these commercial practices are made possible not only by the specific legislation instituting the ECRIS, but also due to the legal uncertainty and fragmentation fostered by the GDPR. In fact, this Regulation leaves rooms for maneuver for Member States' legislators to specify its provisions in relation to, *inter alia*, the processing of personal data in the context of employment (art 88), without nonetheless providing for either a guiding criterion or an explicit uniform rule to delimit or coordinate the geographical scope of application of national provisions enacted on this basis. This contributes to creating a situation whereby advantage might be taken of the uncertainty relating to the applicable data protection regime, to the detriment of the fundamental right to data protection of actual or prospective employees.

The ECRIS: institutional mission and open concerns.

The ECRIS is based on two separate but related pieces of legislation, Council Framework Decision 2009/315/JHA and Council Decision 2009/316/JHA, as well as on a separate data protection framework, previously set out by Council Framework Decision 2008/977/JHA, now repealed and replaced by Directive (EU) 2016/680. The intuitional mission of the ECRIS consists in providing competent public authorities from one Member States with access to information from the criminal records of nationals of other Member States. By facilitating the exchange of information from criminal records, this network aims at informing the authorities responsible for the criminal justice system of the background of a person subject to legal proceedings, so that his/her previous convictions can be taken into account to adapt the decision to the individual situation (Recital 15 of

Council Framework Decision 2009/315/JHA). The ECRIS additionally aims at ensuring that a person convicted of a sexual offence against children will no longer be able to conceal this conviction or disqualification with a view to performing professional activity related to supervision of children in another Member State (Recital 12 of Council Framework Decision 2009/315/JHA, in conjunction with article 10(3) of Directive 2011/93/EU). In current law, ECRIS applications for accessing extracts from criminal records can be filed by judicial or competent administrative authorities, such as bodies authorized to vet persons for sensitive employment or firearms ownership. In such cases, these applications must be submitted with the central authority of the Member State to which the applicant authority belongs. This central authority may (and not *shall*) submit the request to the central authority of another Member State in accordance with its national law. In addition, access requests can also be filed by the person concerned for information on own criminal records. In this case, the central authority of the Member State in which the request is made may, in accordance with its national law, submit a request to the central authority of another Member State for information and related data to be extracted from its criminal record, provided the person concerned is or was a resident or a national of either the requesting or the requested Member State. In relation to information extracted via the ECRIS for any purposes other than that of criminal proceedings, a Statewatch Report of 2011 already expressed serious concerns, noting that while the European Data Protection Supervisor recommended that requests of this kind should have only be allowed "under exceptional circumstances", the Council Framework Decision did not finally introduce such a stringent limitation. Moreover, since, under current article 7, the requested central authority shall reply to such requests *in accordance with its national law*, this piece of legislation provides "*an opportunity for the widespread cross-border exchange of information extracted from criminal records for a variety of purposes unrelated to criminal proceedings*". That same Report additionally stresses the huge potential for "information shopping" that may thus arise, insofar as applicants who are not able to obtain information on an individual from that person's home Member State, may access it via another Member State which also holds the information and has less stringent data protection legislation.

New commercial practices.

It is within this framework that the new commercial practices lying at the heart of

Ms Sophie in 't Veld's question must be understood. The commercial services in question are provided by The Company, expressly identified in the MEP's interrogation. On its website, The Company takes great care to specify that, while it may have a name which closely echoes the EU system, it remains a private company offering commercial services and that "*the purpose of this similarity is to highlight [it uses] the EU structures to access information on criminal records*". According to the same source, the services provided aim at addressing a widespread need of employers from Europe and rest of the world, who wish to ensure that their employees have no criminal background. Having remarked that said employers often struggle to perform background checks in a compliant manner, with legislation varying across the European Union rendering such a check "*complicated, time consuming or impossible*", The Company proposes an innovative solution. According to its website, it "discovered" that by resorting to a EU program called European Criminal Records Information System, it is "*able to address all of those concerns and offer easy and compliant access to state-issued EU criminal records certificates*". The FAQs further specify how this procedure works in practice. They confirm that all certificates are obtained from central criminal registers of EU Member States. What makes the service provided "unique" is that The Company is declaredly streamlining all access requests through the ECRIS central authority of just one Member State, who requests criminal information from its European counterparts on The Company's behalf. According to both The Company's website and MEP Sophie in 't Veld's interrogation, the National Criminal Register of this Country "*play[s] a role of a middleman in the flow of documentation and requests the information from the central register of the destined country*". While The Company claims that "*the application is made with the applicant's full awareness and explicit consent*", the MEP stresses "*it is not clear whether the person whose records are obtained has given explicit consent*". In fact, it must be acknowledged that the website's wording is rather ambiguous, being unclear whether the expression "*the applicant*" refers to the employer seeking the company's services, or to the persons whose criminal records are being accessed. The way in which The Company (which, incidentally, has UK phone number and which, according its website's FAQ's, seems to direct its services primarily to employers operating in the UK and Ireland) is effectively resorting to a foreign National Criminal Register for accessing the ECRIS remains a mystery. In fact, The Company cannot certainly be counted among either the administrative or the judicial authorities admitted to filing a request under Council Framework Decision 2009/315/JHA.

Two highly speculative guesses might be made. A first possibility might be that the National Criminal Register allegedly playing the role of middleman might be misapplying the Framework Decision by submitting requests filed by non-legitimate applicants (as MEP in 't Veld seems to imply, by appealing to the principle of mutual trust and by envisioning the possibility of opening infringement proceedings). As it is, the form for access requests used by said National Criminal Register does not strictly require, according to its letter, that person filing the request shall be the same person whose criminal records need to be obtained, although it contains the explicit warning that "obtaining unauthorized information about a person from the National Criminal Register is punishable by a fine, restriction of liberty or imprisonment up to 2 years". A second possibility is that the company might be exploiting individual access requests, which – it must be stressed – could concern only "residents or nationals *of the requesting or requested Member State"* (article 6§2 of Council Framework Decision 2009/315/JHA). In such cases, one might imagine that, after being approached by the employer, The Company would transmit the aforementioned form to the employee/prospect hire, who would personally sign the form, thus explicitly consenting to the procedure. From the standpoint of data protection law, however, such an approach would not be less problematic. As repeatedly confirmed by the Article 29 Working Party, an employer which processes personal data (even within the framework of a recruitment process) qualifies as a controller of the employee/prospect hire personal data, having moreover very limited possibilities to rely on the employee's express consent as a lawful basis for their processing. Furthermore, such approach remains even more controversial if account is taken of the fact that it may be purposefully used to circumvent the more restrictive data protection provisions in matters of employment enacted by another Member State.

The Member State's law applicable to the processing of personal data in the context of employment.

Albeit having been promoted by the EU Commission as "a single, pan-European law for data protection", the new GDPR fails to level out all legislative differences in the Member States' data protection laws. As mentioned above, it provides in fact a margin of maneuver for Member States to specify its rules, including for the processing of special categories of personal data. To that extent, it does not exclude Member State law that sets out the circumstances for specific processing

situations, including determining more precisely the conditions under which the processing of personal data is lawful (recital 10). In this vein, its article 88 provides that "Member States *may*, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of recruitment […]". Commercial practices such as those signaled by Ms in 't Veld seem to thrive on this situation of persisting legal uncertainty and fragmentation. In fact, some Member States' data protection legislation expressly prohibits the use of individual access requests to criminal record in connection with the recruitment of an employee, except for very exceptional circumstances. Nonetheless, such legislative measures are often rendered toothless at the international level, either because the legislator limited – more or less willingly – their reach to the domestic domain, or because their geographical scope of application, left undefined by the relevant GDPR-complementing law, remains highly ambiguous. This is precisely what happens in relation to the British and the Irish Data Protection Acts, expressly mentioned by The Company's website.

- *The UK Data Protection Act 2018*

This law, meant to adapt the UK data protection regime to the GDPR, provides, under its *Section 184*, that:

"it is an offence for a person ("P1") to require another person to provide P1 with, or give P1 access to, a relevant record in connection with— (a)the recruitment of an employee by P1; (b)the continued employment of a person by P1; or (c)a contract for the provision of services to P1." According to *Schedule 18* of the same law, *"relevant record" means—* […] *(b)a relevant record relating to a conviction or caution …*[which] *(a)has been or is to be obtained by a data subject in the exercise of a data subject access right from a person listed in sub-paragraph (2), and (b)contains information relating to a conviction or caution.* The Company is well aware of these restrictions, which are expressly reported on its website (reference is made to Section 56 of the Data Protection Act (DPA) 2015, corresponding to Section 184 of the new DPA 2018). Nonetheless, it is further clarified that "[*The Company] do[es] not make any requests under section [184] of the DPA, therefore [being] not limited by [it]*" and that, consequently, it might even be "*safer*", as a UK-based employer, to resort to its services. And this might admittedly be true, since the prohibition set out by Section 184 solely concerns

records obtained by a data subject in the exercise his/her access right from one of the UK-based authorities listed in §3(2) of Schedule 18, and not by a foreign Criminal Register. Nonetheless, despite the apparent lawfulness of the whole process, the fact remains that the use (or abuse?) of an EU system, established to address specific needs of the judicial cooperation in criminal matters, becomes, in practice, the tool for enabling a UK-established employer to access employees' personal data which he could not lawfully access domestically. This goes explicitly against the declared ratio and aim of Section 184 of the UK Data Protection Act. As clarified by the Explanatory Notes, this provision aims at thwarting conducts which may give the employer access to records which they would not otherwise have been entitled. There are, in fact, established legal routes for employers and public service providers to carry out background checks, which do not rely on them obtaining information via subject access requests. Disclosure and Barring Service (DBS) checks can in fact be performed *locally* only by one responsible organizations registered with DBS and according to the procedure and guarantees set out by British law.

- *The Irish Data Protection Act 2018*

The other relevant national GDPR-complementing provision is Section 4 of this law, entitled "obligation not to require data subject to exercise right of access under Data Protection Regulation and Directive in certain circumstances". This provision prohibits a person from requiring, in connection with the recruitment of an individual as an employee or his continued employment, that individual to exercise his rights of access to own criminal records, or to supply the employer with data obtained as a result of such a request. Again, The Company's website specifies that the services provided are not based on requests under Section 4 of the Irish law, and that this provision does not consequently constitute a limitation, thus making the use of their services "safer" for employers. It must be noted, however, that as opposed to the British provision, Section 4 does not limit the scope of the prohibition to records obtained by requesting access to Irish authorities. Therefore, the extent to which the processing of employees' personal data, including their criminal records, will be covered by Section 4 of the Irish Data Protection Act will finally depend on the identification of the scope of application of this Act *as a whole*. The problem with the Irish Data Protection Act (and with many other national GDPR-complementing laws, such as, *inter alia,* the Italian and the Spanish legislations) is that it does not explicitly define its

geographical reach, thus fostering uncertainty as to the range of factual situations effectively covered and governed by its complementing provisions. This omission has been maintained in the final text of the Irish Data Protection Act despite the contrary advice given, during the drafting process, by the Irish Law Society. This pointed to such a lacuna as a potential source of ambiguity, for both individuals and controllers/processors, with regard to the remit and applicability of that piece of legislation. In particular, clarity as to what entities the Data Protection Act 2018 applies would have been especially desirous "given the number of corporations processing personal data on a large scale in Ireland and the likely queries that might otherwise arise and require judicial clarification".

The need for better coordination of national data protection laws in the context of employment.

Following Ms in 't Veld's question, the EU Commission will eventually investigate whether such a use of the ECRIS system is compliant with EU law, and whether the National Criminal Register in question is lawfully taking action on the basis of applications filed by/or with the help of The Company. In any event, the objective difficulties that may be encountered, in current law, in deciding over the lawfulness of commercial practices this kind, which might be merely taking advantage of pre-existing legislative loopholes and gaps, are a clear cry for better coordination of the Member States' data protection laws enacted on the basis of the opening clauses enshrined in the GDPR. In a related paper, which is forthcoming in the *Rivista italiana di diritto internazionale privato e processuale*, this author tries and demonstrate that this problem is of an overarching nature, not being limited to the rather specific issues of, on the one side, the parochial approach adopted by the UK Parliament in defining the reach of its provision on forced access to criminal records for employment purposes and, on the other side, the silence kept by many national legislators concerning the geographical reach of their domestic data protection law. As it is, the entire European regime on data protection is deeply and adversely affected by a generalized lack of coordination of the spatial reach of domestic GDPR-complementing provisions. Lacking any uniform solution at EU level (set out either by the GDPR itself or by other existing instruments) the delimitation of the scope of application of national GDPR-complementing provisions is in fact left to unilateral and uncoordinated initiatives of domestic legislators. The review of existing national legislation evidences the variety of techniques and connecting factors employed for these purposes by the

several Member States, which is liable to generate endemic risks of over- and under-regulations, and, above all, gaps of legal protection which are perfectly exemplified by, but not limited to, the commercial practices arisen in relation to the use of the ECRIS.

The Role of Private International Law Academia in Latin America

Written by Alexia Pato, Senior Research Fellow at the University of Bonn
On 10 September 2019, I had the immense pleasure to attend a Conference on the role of private international law (PIL) academia in Latin America (LATAM), which took place in the fast-paced environment of the Max Planck Institute for Comparative and International Private Law (MPI) in Hamburg. The Conference was organised and chaired by **Ralf Michaels** and **Verónica Ruiz Abou-Nigm**. I thank them both for their warm welcome and congratulate them for the success of the Conference, which honours the long-standing PIL tradition in LATAM and encourages collaborative learning beyond borders.

This well-structured event encompassed two roundtables: whereas the first one dealt with PIL culture in LATAM, the second one discussed the impact of PIL schools of thought. Speakers of both roundtables prepared short handouts and submitted research questions to the audience, which created a fertile ground for interactions. The following paragraphs summarise the content of the presentations, as well as the follow-up discussions.

The PIL Culture in LATAM

The first roundtable discussed the specific features of academia in LATAM. In particular, **María Mercedes Albornoz** highlighted that many PIL scholars cumulate academic and professional positions. This might be unfortunate, as the time dedicated to research tends to decrease. A call for more interactions

between PIL scholars around the world was made, in order to foster the exchange of ideas and the search for solutions to global concerns. This could be achieved through, e.g. the introduction of double university degrees or visiting programs for professors.

In that respect, the specific role of both the MPI and the Uruguayan Institute of Private International Law (IUDIP) was emphasised by Gonzalo Lorenzo Idiarte and Jan Peter Schmidt. First, **Gonzalo Lorenzo Idiarte** explained the key role of law Institutes in promoting scientific activities. Additionally, they help universities to deal with the increasingly higher number of students and the corresponding teaching workload. In particular, the IUDIP is active in organising academic events – such as conferences and reports – and regularly drafts PIL texts. The IUDIP is trying to acquire more visibility and encourage scholars to visit.

As for the MPI, **Jan Peter Schmidt** pointed out that the Institute has contributed to fruitful academic exchanges. On the one hand, many PIL scholars in LATAM visited the MPI and hence, participated to the diffusion of Latin American PIL in Europe. They often helped the MPI in its role of providing legal opinions to German courts on the application of foreign, Latin American law. Indeed, scholars are of utmost importance, as they provide access to "remote" literature and court decisions. On the other hand, renown PIL experts, such as Jürgen Samtleben, Paul Heinrich Neuhaus and Jürgen Basedow, reinforced the links of the MPI with LATAM countries.

Finally, **Inez Lopes** insisted on the role of ASADIP (*Asociación Americana de Derecho Internacional Privado*), which gives LATAM countries a voice at the global level. The influence of such an association is potentially huge. Vertically, it can assist LATAM countries in implementing international conventions and advise governments. Horizontally, since ASADIP takes part in several international organisations – such as the HCCH, UNIDROIT, UNCITRAL and OAS – it has a chance to participate in the decision-making process.

The language in which scientific works should be written was extensively discussed with the audience. In particular, should LATAM scholars publish in English? On the one hand, it was highlighted that English is a language that enables Latin American PIL to gain a global dimension. Indeed, the diffusion of knowledge in a globalised setting mainly takes place in that language. On the other hand, legal English describes the law of common law countries. Therefore,

using English to describe PIL in LATAM could be perceived as a cultural mismatch.

The Impact of PIL Schools of Thought in LATAM

The second roundtable highlighted the fundamental role of scholars in drafting PIL acts and conventions. In Argentina, Ramírez, Vargas Guillemette and Alfonsín fostered the development of PIL, thanks to their rather avant-gardist ideas, as **Cecilia Fresnedo de Aguirre** explained. More recently, outstanding scholars contributed to the elaboration of PIL rules within the framework of international organisations, such as the HCCH, UNIDROIT and the OAS.

Although academia boosts the creation of PIL, parliaments tend to blatantly disregard PIL issues and texts. For example, Gonzalo Lorenzo Idiarte and Cecilia Fresnedo de Aguirre explained the challenging legislative path of the Uruguayan General Private International Law Bill. Academics drafted this text and presented it to the parliament, which rejected it three times (!). Its approval is still pending at the time I write those lines.

In Venezuela, the same trend is observable, as **Javier Ochoa Muñoz** explained. The Venezuelan Private International Law Bill was first drafted in 1965 but only approved in 1999, thanks to the work and energy of Tatiana Maekelt. Here too, an academic supported the development of PIL. Additionally, Tatiana Maekelt encouraged the creation of the ASADIP in 2007 and set up a successful Master Program in Private International and Comparative Law.

At the regional level, the Inter-American Specialized Conferences on Private International Law (CIDIP), organised under the auspices of the OAS, played an important role in the codification and harmonisation of PIL in LATAM. Today, however, this process stalls and, as a consequence, **Valesca Raizer Borges Moschen** asked if and how the role of the OAS should be redefined. She noted the increasing role of the Inter-American Juridical Committee and the preference for the creation of flexible PIL instruments.

Since international codifications came to a standstill, **Sebastián Paredes** explained that, in the recent years, LATAM countries have engaged in individual, uncoordinated efforts to codify and modernise their PIL rules. This certainly created coordination issues and further complicated the quest for harmonised solutions to collective problems.

Finally, in his closing speech, **Jürgen Samtleben** talked about his first steps as a PIL academic in LATAM. He delighted the audience with many anecdotes and a touch of humour.

Legal Aid Reform in the Netherlands: An Update

Written by Jos Hoevenaars, Erasmus University Rotterdam (postdoc researcher ERC project Building EU Civil Justice)

An earlier post reported on the volatile situation of legal aid reform in the Netherlands in which I discussed the plans by Dutch Minister of Legal Protection Sander Dekker for the overhaul of the Dutch system for subsidized legal aid. The Dutch Bar Association is now once again sounding the alarm about the social advocacy. Pro Deo lawyers are paid so little in legal aid that more and more of them consider quitting or already have thrown in the towel. Since 2015, a reported 350 lawyers have already quit and 70% of the remaining lawyers says they consider stopping if the situation doesn't change.

The general dean of the bar has therefore sent an urgent letter to Minister Dekker in which the Minister is being criticised for experimenting with new forms of justice administration and systemic changes to the legal aid scheme while effectively ignoring the acute problems that persist today.

The 2017 Van der Meer report already concluded that the Dutch system for subsidized legal aid, in which lawyers are awarded compensation based on a point-system, suffers from 'overdue maintenance' and that the actual time spent by lawyers no longer corresponds at all to the number of points awarded.

The reasons for this are diverse, but the report indicates that legislation and regulations have become much more complex, that those seeking justice are more demanding and that public administration is creating more legal conflicts than ever before. It also emphasized that the compensation for legal aid in the law of

persons and family law is the most out of step. As concluded by Herman van der Meer, the president of the Court of Appeal in Amsterdam, and chair of the Committee, the award system still relies on standards of two decades ago: “If you look at family law, for example, it was quite common at the time of a divorce for the children and the house to go to the wife and for the husband to pay alimony. This is no longer the case these days. As a result, the judge, and therefore also the lawyer, has a lot more work to do with a case.”

The critique voiced by the Bar Association today, although perhaps more pressing now, is not new. In the past year the Dutch Association Pro Deo Lawyers (VSAN) has repeatedly and openly criticized the Minister’s reform plans, especially his sole focus on long-term goals while failing to address acute existing problems. According to VSAN, the new system in which there will be experimented with so-called legal assistance packages, will become an irresponsible system of trial and error, to the detriment of those seeking justice. The volatile situation has on several occasions lead to punctuality actions by pro deo lawyers, and again the bar is threatening such actions, or even general strikes if the Minister fails to address their concerns. In the words of the Dean: “If this call doesn’t work, the minister is actually saying that he doesn’t care.”

It is clear that the complex portfolio of the overhaul of the Dutch legal aid system will not go by unnoticed and continues to cause resistance and critique.

Views and News from the 8th Journal of Private International Law Conference 2019 in Munich

From 12 to 14 September 2019, the Journal of Private International Law held its 8th Conference at the University of Munich, perfectly hosted and organized by our Munich-based colleague Anatol Dutta. Nearly 150 colleagues gathered from all over the world, amongst them many of the Conflictoflaws.net editors.

This was the perfect occasion to meet for us for dinner on the first evening. Some of our editors had never met personally before, and all of those present could exchange views and news on PIL as well as on the blog.

The bottom line of the meeting certainly was: onwards and upwards with our blog – it is worth it! The PIL community will have many occasions to get together in the near future, inter alia in Aarhus in May 2020. We will keep you posted!

For now, however, we are presenting to you our views and news from the Munich conference. The following short observations should give you some impressions of the fantastic panels and presentations. These are not meant to be a comprehensive conference report, all the more so, because there is one in the pipeline for the blog by Christiane von Bary, Research Fellow with Anatol.

Here we go:

Plenary Sessions (Friday)

Matthias Weller

The first of the plenary sessions was opened by Matthias Lehmann, University of Bonn, Germany. He presented on the complex relations between "Regulation, Global Governance and Private International Law" with a view to: "Squaring the Triangle". First of all, Lehmann explained the respective peculiarities of each of the poles of this triangle: PIL as an area of law that, as a reaction to cross-border legal relationships, is primarily rights-driven, based on a notion of equivalence of the selected laws, ideally resulting in multilateral connecting factors. And regulatory law as a reaction to public interests, managed by administrative agencies under a principally unilateral approach by territorially limited administrative acts or mandatory rules. Finally, both areas of law working together to achieve global governance of the respective subject-matters such as e.g. securities antitrust, data protection, environmental or cultural property protection law. Indeed, in all of these areas, the public-private divide is increasingly blurred (see also e.g. Burkhard Hess, The Private-Public Law Divide in International Dispute Resolution, Collected Courses of the Hague Academy of International Law 388, Boston 2018, http://dx.doi.org/10.1163/1875-8096_pplrdc_ej.9789004361201.C02). Lehmann

then referred to central techniques of private international law to deal with regulatory rules such as e.g. Articles 3(3) and (4) or 9 of the Rome I Regulation and Article 14(2) of the Rome II Regulation. He also referred to Currie's governmental interest analysis and Ehrenzweig's local data theory, to a certain extent reflected by e.g. Article 17 Rome II Regulation. Lehmann pleaded in favour of overcoming (more strongly) the "public law taboo". As a consequence, a more sophisticated approach for the application of public law in cross-border settings would be needed, as Lehmann further explained, e.g., by making use of auto-limitations or by creating parallel connecting factors for public and private law aspects of the respective subject-matter. Lehmann presented Article 6(3) of the Rome II Regulation for antitrust matters as an example. All of that should be coordinated to serve the public interest. Under such an approach, the question may of course arise as to what extent notions of private enforcement come into play (on this aspect see e.g. Hannah Buxbaum, Regulation and Private Enforcement in a Global Economy: Strategies for Managing Conflict, Collected Courses of the Academy 399, Boston 2019, https://conflictoflaws.de/2019/out-now-hannah-l-buxbaum-public-regulation-and-private-enforcement-in-a-global-economy-strategies-for-managing-conflict/).

In the following session, Ralf Michaels, Hamburg, and Verónica Ruiz Abou-Nigm, Edinburgh, posed the question "Is Private International Law International?". The presenters envisaged a kind of "invisible college" along the lines of Oscar Schachter, The Invisible College of International Lawyers, 72 Nw. U. L. Rev. 217 (1977 – 1978), perhaps in contrast to the somewhat disillusioned "Divisible College of International Lawyers" by Anthea Roberts, Is International Law International?, Oxford University Press 2017, Chapter 1 – another contribution to which the presenters made reference. Against this background, the "Private International Law for Laypersons Project" (PILL) was explained, on the premise that any non-PIL lawyer counts as a layperson in this sense. Within the project, interviews with PIL lawyers were conducted, including questions like "what belongs to PIL" or "what is the question of PIL". All of that and more should result in (re-) building a truly international community, after phases of division and "parochialization" during the conflicts revolution in the USA, as well as later in EU PIL. Such a community may meaningfully devote itself to both a deep analysis of foundations as well as to working on practical solutions for cross-border settings. Otherwise, it was suggested, diplomatic conferences such those at The Hague on PIL projects and its preparatory works would suffer too much from a

lack of common language for successful discourse and negotiation. The audience was pleased to be informed that a conference like the one on which this post is reporting may well count as an almost ideal “invisible college”.

Máire Ní Shúilleabháin, Dublin, presented on “Habitual Residence in Private International Law: Core Elements and Contextual Variability”. According to her analysis of the respective EU instruments and the case law, the term “habitual residence” strongly depends on its context, and these contextual elements are not sufficiently taken into consideration, which in turn leads to “mechanical” and irrational results. As an example, she referred to the English case of *Marinos v. Marinos* [2007] EWHC 2047 (see e.g. https://www.familylawweek.co.uk/site.aspx?i=ed907) a divorce proceeding under the Brussels II bis Regulation between a Greek husband and an English wife in which the question arose whether there could be two places of habitual residence. Shúilleabháin then identified a set of “context dependent elements” of the notion of habitual residence such as e.g. exclusivity, voluntariness, absence of any habitual residence etc., that should be applied as appears appropriate in differing normative contexts (e.g. divorce, child abduction, succession etc.).

Finally, Dicky Tsang, Hong Kong, gave a fascinating presentation about an ongoing empirical review of Chinese court practice in respect of choice of law. The underlying assumption of the project is, as was explained by the presenter, that Chinese courts do not apply foreign law, at least as long as there is no agreement on the choice of foreign law by the parties. Tsang introduced the audience to the respective steps of Chinese legislation on PIL over the years and could indeed show that not more than around 1.3% of all the cases reviewed with a foreign element so far applied foreign law and, to date, all of these cases relied on a choice of law agreement. Tsang called for improvement and considered new guiding principles by the Supreme People’s Court of China (SPC), which are guidelines for interpretation of an authoritative character. Such guidelines could bring about a more appropriate interpretation of openly-worded connecting factors such as e.g. the characteristic performance or the closest connection.

Giesela Rühl

The first of the Friday afternoon plenary sessions was devoted to an unprecedented and largely unexplored topic: Women in Private International Law. In fact, while gender issues have been studied widely in other disciplines, there is

a striking gap in the private international law literature. Is this because the field has been predominantly shaped by men (in both scholarship, jurisprudence and practice)? Or is this because private international law, as a discipline, does not need a gender / feminist perspective, because it is, traditionally, understood to be neutral and detached from substantive policies and values?

The impressive panel of five female private international law scholars – Roxana Banu (University of Western Ontario, Canada), Mary Keyes (Griffith University, Queensland, Australia), Horatia Muir Watt (Ecole de droit Sciences-po, Paris, France), Yuko Nishitani (Kyoto University, Japan) and Marta Pertegás Sender (University of Antwerp, Belgium, and University of Maastricht, The Netherlands) – set out to answer these and related questions. And, in so doing, they did a remarkable job in demonstrating that private international law is not – and has never been – gender neutral. Roxana Banu and Mary Keyes, for example, showed how gender archetypes shaped traditional private international law, notably in the use of connecting factors in family law. And Horatia Muir Watt, Yuko Nishitani and Marta Pertegás Sender demonstrated how a feminist perspective, including through critical theory, can shed new light on private international law and help to better understand our discipline.

After the session attendants agreed that they had just witnessed something very special, something that might well one day be remembered as the birthdate of gender studies / feminist legal theory in private international law. In any event, the panel made clear that gender and feminist issues belong on the agenda of private international law. It is, therefore, to be hoped that after this conference scholars from across the board (women and men) will jump on the bandwagon to embark on a challenging journey that promises unexpected and fascinating insights into an old discipline.

Saloni Khanderia

The second of the Friday afternoon sessions comprised of a mixed range of contemporary issues that have been attracting considerable attention among policy-makers at the transnational level. The first two discussions chiefly concerned the challenges involved in the recognition and enforcement of foreign judgments in other jurisdictions. Adeline Chong from the Singapore Management University asserted that there were certain commonalities in the rules on the subject among the member countries, in which divergences were in terms of

interpretation rather than principle. While there some other significant differences, namely the requirement of reciprocity and the status of foreign non-monetary judgments, she argued that the harmonisation of conflict-of-law rules on the recognition and enforcement of foreign judgments among the ASEAN countries was feasible. In doing so, Chong illustrated the application of the rules in Indonesia, Thailand, Singapore, Malaysia, Laos, Myanmar and India, to name a few.

In a related vein, Nadia de Araujo and Marcelo De Nardi from PUC-Rio / UNISINOS Brazil, focused their discussion on the significance of the Hague Judgments Project on the development of the Brazilian law on the recognising and enforcement of foreign judgments. Based on a survey conducted by De Araujo and De Nardi among arbitrators, judges and academics, the study depicted the broad ranging benefits for the jurisdiction in ratifying the Hague Conference's Draft Convention on the Recognition and Enforcement of Civil and Commercial Judgments after its coming into effect. The third presentation in the session pertained to the Control of Foreign Direct Investments and Private International Law where Peter Mankowski from the University of Hamburg drew attention to the implications of the Rome Regulation (EU) 2019/452 for the screening of FDI into the Union. The fourth and last presentation of the Plenary session in the afternoon by Gerald Mäsch from the University of Münster was devoted to the complexities in the ascertainment of the applicable law to a Decentralised Autonomous Organisation.

Rui Dias

As was already discussed by *Saloni Khanderia*, the third presentation in the session pertained to the Control of Foreign Direct Investments (FDI) and Private International Law. The following lines add some additional thoughts to this session where Peter Mankowski from the University of Hamburg drew attention to Regulation (EU) 2019/452, on the basis of which the notion of FDI was defined (see Art. 2 pt. (1)). While in the past FDIs were widely welcome, with many host States even supporting FDIs through substantial subsidisation of private foreign investors, we seem to be witnessing a change in perspective with the growing presence and importance of State funds, state owned enterprises and enterprises instrumentalised for State purposes. Needless to say, trade wars and political antagonisms play an important role in this context. That is why some counter reactions are taking place, in the form of a rising level of control, namely in

regards to key industries and strategic industries of host States.

After giving a concise but broad panorama of existing control regimes in national laws, Professor Mankowski addressed Regulation (EU) 2019/452 as a European framework setting a uniform screening template, even though the content of this screening will hinge on national laws. The last part of the presentation analysed the subject from the perspective of PIL, noting how FDI control law is typically a case of internationally mandatory laws, as defined in Art. 9(1) of the Rome I Regulation. Whereas there seems to be a clear case for the application of a Member State's own *lois de police* as a host State, according to Art. 9(2), the application of other State's law is more doubtful, given Art. 9(3) of the Rome I Regulation, where questions arise in the determination of the place of performance, particularly in share deals, as well as in the assessment of the fulfilment of the illegality requirement, after an actual interdiction is in place.

The fourth and last presentation of the Plenary session in the afternoon, by Gerald Mäsch from the University of Münster, was devoted to the complexities in the ascertainment of the applicable law to a DAO, an abbreviation for Decentralised Autonomous Organisation. Professor Mäsch explained how a DAO literally lived in the ether, meaning on the blockchain of Ethereum, one of bitcoin's rival crypto currencies. Interested investors sent digital coins to the fund and voted on whether money should be put in a given project, so that funds would flow automatically to that project after the approval of a proposal.

The fact that decision-making took place in cyberspace, totally decentralized, under no corporate structure, where governance rules were automated and enforced using software, in particular smart contract code, raises difficult localization issues, and thus puzzle even the most skilful private international lawyers. In fact, it is not clear which law should be applicable to ae DAO: an exercise of characterization might lead us to identify a partnership, a company (but where is the seat or the place of incorporation of this ethereal entity?), or even a contract (even though Art. 1 (2) f of the Rome I Regulation might leave it out of its scope of application). If for the actual, original DAO a trust company was incorporated in Switzerland, not every future DAO will have the same specifics, which leaves us all with the defying question: are there law-free corners in cyber space?

Parallel Sessions (Thursday and Saturday)

On Thursday as well as on Saturday, there was a large number of parallel sessions, and we collected the following selected views and news:

Corporate Social Responsibility

Adeline Chong

This session dealt with a very timely topic given greater awareness on issues such as climate change and the exploitation of workers in developing countries. Three papers explored the relationship between private international law and corporate social responsibility (CSR). The first paper by Bastian Brunk of the University of Freiburg looked at "Private International Law for Corporate Social Responsibility" and focussed particularly on violations of human rights. Brunk discussed the modes by which the CSR agenda could be implemented (eg, by international soft law regulation) and grappled with issues arising from the fact that CSR is not a separate category in the conflict of laws. The second paper by Nguyen Thu Thuy of Nagoya University considered transnational corporations and environmental damages in Vietnam. Vietnamese law has provisions dealing with environmental pollution, but enforcement of the law is not robust. Vietnamese law also does not have any rules dealing with the piercing of the corporate veil which may enable local victims to sue non-Vietnamese parent companies. She suggested several ways in which the law could be reformed to ensure better protection for local residents against environmental pollution by transnational corporations. The last paper was by Eduardo Alvarez-Armas of Brunel Law School. He considered the significant case of *Lliuya v RWE* in which a Peruvian farmer sued RWE, a German energy company, in Germany, claiming that RWE's contributions to global warming contributed to the melting of a glacial lake near his home. Alvarez-Armas highlighted the impact of Article 17 of the Rome II Regulation on climate change litigation, which may enable defendants to escape or reduce their liability. A lively discussion followed the papers raising thought-provoking questions such as the extent to which each of us, as fellow contributors to climate change, ought to be held responsible, and the proper balance to be struck between the rights of victims of climate change and the rights of energy corporations who are, after all, producing a necessary resource.

Child Abduction

Apostolos Anthimos

In one of the morning sessions, chaired by Prof. Nishitani, Kyoto University, Child Abduction was scrutinized from a different perspective by Prof. Lazic, Utrecht University & T.M.C. Asser Institute, and Dr. Jolly, South Asian University New Delhi. Prof. Lazic elaborated on the expected repercussions of the forthcoming Regulation 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction
(Brussels II bis Recast), whereas Dr. Jolly focussed on the situation in her jurisdiction, explaining the reasons why India has still not ratified the Hague Convention.

In the ensuing discussion, Prof. Beaumont expressed in an adamant fashion his reservations in regards to the added value of Chapter III (Articles 22-29) of the new Regulation. Practical aspects of the interdependence between relocation and child abduction were also debated, on the occasion of a very recent ruling of the Greek Supreme Court on the matter.

ADR

Apostolos Anthimos

The noon session, chaired by Prof. de Araujo, Pontifical Catholic University, Brazil, included four presentations on ADR issues. *Dr. Lederer,* Hogan Lovells, Munich, presented the recent efforts of the EU in the field of ODR. Dr. Meidanis, Meidanis Seremetakis & Associates, Athens, and Ms. Saito, Kobe University, examined the issue of the recognition and enforcement of mediation settlement agreements in the EU and the Hague Judgments Convention respectively. Finally, Dr. Walker, Warwick University, focussed on the interrelationship between ADR & Hague Children's Conventions. In addition, she reported on the treatment of the subject matter from a UK perspective.

The nature of MSA (Mediated Settlement Agreements) monopolized the ensuing discussion. Interesting interventions and insightful views were voiced by Prof. Pertegás Sender, Maastricht University, and Prof. Hau, Munich University.

"Technology 1"

Ivana Kunda

Technology was one of the common denominators for the presentation in the last Thursday term for parallel sessions. Chaired by Prof. Matthias Weller, University of Bonn, this session touched upon three different technology-related topics. The first one, presented by the author of these lines, attempted to raise awareness about the lack of PIL in the EU Digital Single Market strategy. This being said, the development on the PIL plane are increasingly related to digital environment, and especially internet, which is intrinsically cross-border. Following the chair's question, the conclusion was that an integral approach is warranted particularly because the traditional connecting factors often lead to illogical results or are impossible to apply altogether. This has been confirmed also by Prof. Koji Takahashi, Doshisha University, who analysed in depth the issue of Blockchain-based crypto-assets from the PIL perspective. He discussed contractual issues, in particular difficulties related to characterisation and characteristic performance, and tort and quasi-delicts focusing on the constant problems of localisation. He was reluctant to accept localisation of the platform's by the owners' headquarters, as suggested from the audience in the course of discussion. Further, he pointed to the property-related dilemmas in the context of bankruptcy which came into spotlight due to the Tokyo District Court case *Mt. Gox*, and restitution claim subsequent to theft. Last speaker Dr. Marko Jovanovic, University of Belgrade, reopened the issue of online defamation, providing a fresh look at some policy aspects thereof. He rejected the link to the tortfeasor arguing that will result in statute shopping. He also addressed the pros and cons of the place where the damage occurs, place of the victim's habitual residence, and the centre of interest of the victim (borrowed it from the jurisdiction area, what is the already practiced by the Dutch courts as prof. Aukje van Hoek, University of Amsterdam, commented). One of the points raised concerned also the role of the private acts of harmonisation, which the online platforms seem to be relying on.

"Jurisdiction V"

Ekaterina Pannebakker

The last and actually fifth parallel session on Jurisdiction, chaired by Alexander Layton QC, started with an overview of the new PIL rules in Japan, South Korea and China, including the Japanese Civil procedure law of 2012, Korean Private International Law act of 2018, the Legal Assistance project in Japan and others. In her overview, Eonsuk Kim from Bunkyo Gakuin University, Tokyo, traced down the borrowings between these countries' PIL laws and – most interestingly – the

influence of the uniform EU PIL rules on the developments of PIL in these countries. Thereafter, Alexander Layton QC, in his capacity as the chair of the session, presented the paper prepared by Dr. Ling Zhu from Hong Kong Polytechnic University, who could not attend the conference. Dr. Ling Zhu's contribution addressed the conflicts between the jurisdiction of the maritime Courts and the People's Courts in China. Finally, it was my own turn to zoom in on the nuances in the definition of the autonomous concept of 'habitual residence of the child' in the rules on jurisdiction in matters of parental responsibility of Brussels IIa.

The "Jurisdiction" Track of the Conference ("Jurisdiction I to V")

Tobias Lutzi

Many of the parallel sessions were held together by a common thread, allowing participants to put together a relatively coherent line of panels, if they so wished. This concept certainly worked very well as far as the "jurisdiction" track of the conference was concerned, which connected a series of five panels in total. They created highly stimulating discussions and a genuinely fruitful exchange of ideas between panelists and members of the audience, many of whom consequently found themselves in the same room more often than not.

The discussion was particularly lively in those panels that managed to bring together multiple papers engaging with the same or similar questions, such as the two panels on jurisdictions clauses (which offered theoretical analysis (Brooke Marshall, who took a deep dive into the possible conceptual bases, and Elena Rodriguez Pineau), new angles (Sharar Avraham-Giller and Rui Dias, who addressed the particularities of intra-corporate litigation), and numerous national perspectives (Inez Lopes, Valesca Raizer, Tugce Nimet Yasar, and Biset Sena Gunes) or the panel on the Brussels Ia Regulation (combining a discussion of recent trends in its interpretation by the CJEU (Michiel Poesen, regarding Art 7(1), and Laura van Bochove, regarding Art 7(2)) with somewhat more basic questions as to its interplay with national law (my own paper).

Two further panels then added a large variety of additional aspects and ideas, including *inter alia* a discussion of the need for, and adequacy of, the so-called gateways for service-out jurisdiction in English law (Ardavan Arzandeh), the new Israeli legislation on international jurisdiction (Iris Canor), the apparent

convergence of international discussions in Japan and Korea (Eonsuk Kim), the elusive concept of the habitual residence of the child in the Brussels IIa Regulation (Ekaterina Pannebakker), and the future work of the HCCH with regard to "direct" jurisdiction (Eva Jueptner; as opposed to "indirect" jurisdiction in the sense of the 2019 Convention).

It is hardly surprising that this wide panorama of international jurisdiction featured many cases and controversies that had also been discussed on this blog, including, for example, the Canadian Supreme Court's decision in *Haaretz.com v Goldhar* (https://conflictoflaws.de/2018/supreme-court-of-canada-israel-not-ontario-is-forum-conveniens-for-libel-proceedings/) (discussed by Stephen Pitel), the UK Supreme Court's decision in *Brownlie v Four Seasons* (https://conflictoflaws.de/2018/uksc-on-traditional-rules-of-jurisdiction-brownlie-v-four-seasons-holdings-incorporated/) (discussed by Ardavan Arzandeh) or the European Court of Justice's decisions in *Feniks* (https://conflictoflaws.de/2018/forcing-a-square-peg-into-a-round-hole-the-actio-pauliana-and-the-brussels-ia-regulation/) (discussed by Michiel Poesen) and *Schrems* (https://conflictoflaws.de/2018/fifty-shades-of-facebook-blue-ecj-renders-decision-on-consumer-jurisdiction-and-assigned-claims-in-case-c-49816-schrems-v-facebook/) (discussed by Laura van Bochove).

Outlook

The 8th Conference of the Journal of Private International Law again was a great success, both scholarly as well as socially. The next conference in 2021 will be hosted by one of the blog's editors Adeline Chong in Singapore. We are looking forward to it!

AMS Neve: An Unfortunate

Extension of the 'Targeting' Criterion to Jurisdiction for EU Trademarks

written by Tobias Lutzi

Last week's decision by the CJEU in Case C-172/18 *AMS Neve* has rightly received a lot of attention from IP lawyers (see the comments by Eleonora Rosati on IPKat; Terence Cassar et al. on Lexology; James Nurton on ipwatchdog.com; see also Geert van Calster on gavclaw.com). As it adds another piece to the puzzle of international jurisdiction for online infringements of IP rights, it also seems suitable for discussion on this blog.

The EU Framework of International Jurisdiction for Online Infringements of IP rights

The rules on international jurisdiction established by EU instruments differ depending on the specific type of IP right in question.

Jurisdiction for infringements of IP rights that are protected through national law (even where it has been harmonised by EU Directives) is governed by the general rule in Art 7(2) of the Brussels Ia Regulation. Accordingly, both the courts of the place of the causal event – understood as the place where the relevant technical process has been activated (Case C-523/10 *Wintersteiger*, [34]–[35], [37]) – and the courts of the place of the damage – understood as the place of registration (for trademarks: *Wintersteiger*, [28]) or access (for copyright: Case C-441/13 *Hejduk*, [34]), limited to the damage caused within the forum (*Hejduk*, [36]) – can be seised.

The wide range of courts that this approach makes available to potential claimants in internet cases has however been somewhat balanced out through an additional *substantive* requirement. Starting with Case C-324/09 *L'Oréal*, [64], the Court of Justice has repeatedly found an IP right in a given member state to be infringed only where the online activity in question had been directed or 'targeted' at consumers in that member state. The Court has also made clear, though, that this requirement is to be distinguished from the requirements for

jurisdiction under Art 7(2) Brussels Ia, which could still be based on the mere accessibility of a website, regardless of where it was targeted (see Case C-170/12 *Pinckney,* [41]–[44]).

Turning to the second group of IP rights, those that are protected under 'uniform' EU instruments, the rules of the Brussels Ia Regulation are displaced by the more specific rules contained in the relevant instrument. Under Art 97(1) of the EU Trademark Regulation 207/2009 (now Art 125(1) of Regulation 2017/1001) for instance, jurisdiction is vested in the courts of the member state in which the defendant is domiciled; in addition, certain actions, including actions over infringements, can also be brought in the courts of the member state in which 'the act of infringement' has been committed or threatened pursuant to Art 97(5) (now Art 125(5)). While this latter criterion may have appeared to simply refer to the place of the causal event of Art 7(2) Brussels Ia in light of the Court of Justice's decision in Case C-360/12 *Coty Germany*, [34] (an interpretation recently adopted by the German Federal Court (BGH 9 Nov 2017 – I ZR 164/16)), the Court of Justice had never specified its interpretation in cases of online infringements.

The Decision in AMS Neve

This changed with the reference in *AMS Neve.* The CJEU was asked to interpret Art 97(5) of Regulation 207/2009 in the context of a dispute between the UK-based holders of an EU trademark and a Spanish company that had allegedly offered imitations of the protected products to consumers in the UK (and elsewhere) over the internet. While the Intellectual Property and Enterprise Court (which is part of the High Court) had held that it had no jurisdiction because the 'place of infringement' referred to in Art 97(5) was the place in which the relevant technical process had been activated, i.e. Spain, ([2016] EWHC 2563 (IPEC)), the Court of Appeal (Kitchen LJ and Lewison LJ) was not persuaded that this conclusion necessarily followed from the CJEU's case law and submitted the question to the CJEU for a preliminary ruling ([2018] EWCA Civ 86).

The Court of Justice has indeed confirmed these doubts and, held that the 'place of infringement' in Art 97(5) must be understood as 'the Member State within which the consumers or traders to whom that advertising and those offers for sale are directed are located' (*AMS Neve*, [65]). To arrive at this conclusion the Court had to drastically limit the scope of the relevant section in *Coty* (see *AMS Neve*,

[44]) and to extend the substantive criterion of 'targeting' established in *L'Oréal* (which the Court has since relied on in numerous contexts, typically involving internet activities: see Case C-191/15 *VKI*, [43], [75]–[77]) to the question of international jurisdiction, at least as far as the Trademark Regulation is concerned.

In addition to improving the protection of trademark owners (see *AMS Neve*, [59] and [63]), the decision seems to rely on two considerations.

First, unlike a general instrument on jurisdiction such as the Brussels Ia Regulation, Regulation 207/2009 defines itself the relevant infringements (in Art 9), which include acts of advertising and offers for sale (see *AMS Neve*, [54]). Therefore, even though the wording of Art 97(5) does not make any reference to a requirement of targeting (as Eleonora Rosati rightly notes), there may at least be some indirect reference to the concept.

Second, and more importantly, Art 97 is followed by Art 98, which specifies the territorial scope of jurisdiction based on Art 97; it distinguishes between full jurisdiction (of the courts of the member state of the defendant's domicile, Art 98(1)) and territorially limited jurisdiction (of the courts of the place of infringement, Art 98(2)). This distinction, which is reminiscent of the Court's decision in Case C-68/93 *Shevill* and the following case law, indeed seems to provide a strong argument not to limit Art 97(5) to the place of the causal act, where a territorial limitation would make rather little sense.

Still, it seems questionable if the Court's decision in *AMS Neve* does not run counter to the idea of vesting jurisdiction in clearly identifiable courts so as to reduce the risk of irreconcilable decisions. As the Court acknowledges (see *AMS Neve*, [42]), its interpretation of Art 97(5) allows the holder of an EU Trademark to bring multiple actions against an alleged online infringer, which would not fall under constitute *lis pendens* as they would concern different subject matters (i.e. infringements in different member states).

The Court of Justice appears to have attached more significance to these concerns when interpreting Art 8(2) Rome II in Joined Cases C-24/16 and C-25/16 *Nintendo*, which similarly refers to the country 'in which the act of infringement was committed.' In this regard, the court had explained that

> *the correct approach for identifying the event giving rise to the damage is not*

> *to refer to each alleged act of infringement, but to make an overall assessment of that defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened. (Nintendo, [103])*

It is unfortunate that this reasoning has not been extended to Art 97(5) of the Trademark Regulation.

Just released: HCCH Documentary on the Adoption of the 2019 HCCH Judgments Convention.

The HCCH just released a short documentary on the adoption of the 2019 HCCH Judgments Convention.

Shot during the 22nd Diplomatic Session of the HCCH, which took place in June / July 2019, this documentary gives unprecedented insights into the finalisation of the negotiations of this game changing treaty. Follow the delegates during the negotiations and join them at the ceremonial signing of the Convention on 2 July 2019.

This documentary is also a unique opportunity to hear the Secretary General, Dr Christophe Bernasconi; the Chair of the Commission of the Diplomatic Session on the Judgments Convention, David Goddard QC; as well as H. E. Maria Teresa Infante, Ambassador of the Republic of Chile to the Kingdom of the Netherlands; and Professor Elizabeth Pangalangan, University of the Philippines, share first hand their experiences and impressions during the Diplomatic Session, and explain the key elements of the 2019 HCCH Judgments Convention as well as the benefits it will offer.

The video is now available on the HCCH's YouTube channel

(https://youtu.be/DTlle58s64s).

https://youtu.be/DTlle58s64s

A Short History of the Choice-of-Law Clause

Written by John Coyle, the Reef C. Ivey II Distinguished Professor of Law, Associate Professor of Law at the University of North Carolina School of Law

The choice-of-law clause is now omnipresent. A recent study found that these clauses can be found in 75 percent of material agreements executed by large public companies in the United States. The popularity of such clauses in contemporary practice raises several questions. When did choice-of-law clauses first appear? Have they always been popular? Has the manner in which they are drafted changed over time? Surprisingly, the existing literature provides few answers.

In this post, I try to answer some of these questions. The post is based on my recent paper, *A Short History of the Choice-of-Law Clause,* which will be published in 2020 by the Colorado Law Review. The paper seeks, among other things, to determine the *prevalence* of choice-of-law clauses in U.S. contracts at different historical moments. The paper also attempts to determine how the *language* in these same clauses has evolved over time.

Prevalence

The paper first traces the rise of the choice-of-law clause in the United States

over the course of the 19th and 20th centuries. It shows how these clauses were first adopted in the late 19th century by companies operating in a small number of industries – life insurance companies, transportation companies, and mortgage lenders – doing extensive business across state lines. These clauses soon migrated to other types of agreements, including prenuptial agreements, licensing agreements, and sales agreements. One can find examples of clauses in each of these types of agreements in cases decided between 1900 and 1920. It is challenging, however, to estimate what percentage of *all* U.S. contracts contained a choice-of-law clause at points in the distant past. To calculate this number accurately, one would need to know, first, the total number of contracts executed in a given year, and second, how many of these contracts contained choice-of-law clauses. From the vantage point of 2019, it is simply not possible to gather this information.

It is possible, however, to obtain a rough sense for the prevalence of such clauses by looking to books of form contracts. In an era before photocopiers – let alone computers and word processors – lawyers would routinely consult form books containing samples of many different types of contracts when called upon to draft a particular type of agreement. General form books typically contained hundreds of agreements, organized by type, that could be quickly and cost-effectively deployed by the contract drafter when the need arose. Since these books provide a historical record of what provisions were typically included from specific types of agreements at a particular time, they offer a potential means by which scholars can get a general sense for the prevalence of the choice-of-law clause in a particular era. One need only select a well-known form book from a given year, count the number of contracts in the form book, and determine what percentage of those contracts contain choice-of-law clauses.

Using this approach, I reviewed more than two dozen form books with the aid of several research assistants. The earliest form book dated to 1860. The contracts in that book contained not a single choice-of-law clause. The most recent form book dated to 2019. Sixty-nine percent of the contracts in this book contained a choice-of-law clause. The bulk of our time and attention was spent on form books

published between these years. With respect to each book, we recorded the total number of contracts contained therein as well as the number of those contracts that contained a choice-of-law clause. When our work was done, it became clear that the choice-of-law clauses were infrequently used until the early 1960s, as demonstrated on the following chart.



While the clause was *known* to prior generations of contract drafters, it was not widely *used* until 1960. This is the year in which the clause truly began its long march to ubiquity.

There are many possible explanations for why the choice-of-law clause gained traction at this particular historical moment. One possibility is that the enactment of the Uniform Commercial Code (UCC) spurred more parties to write choice-of-law clauses into their agreements. Significantly, the draft UCC contained a provision that specifically directed courts to enforce choice-of-law clauses in commercial contracts when certain conditions were met. Although the UCC was first published in 1952, it was substantially revised in 1956 and was not enacted by most states until the early 1960s. It may not be a coincidence that one sees an uptick in the number of choice-of-law clauses appearing in form books at the same moment when many states were in the process of enacting a statute that directed their courts to enforce these provisions.

Language

The second part of the paper chronicles the changing language in choice-of-law clauses. This inquiry also presents certain methodological challenges. It is obviously impossible to review and inspect every choice-of-law clause used in the tens of millions of U.S. contracts that entered into force over the past 150 years. In order to overcome these challenges, I turned to a somewhat unusual source –

published cases. Over a period of several years, I worked with more than a dozen research assistants to comb through such cases in search of choice-of-law clauses. Whenever we found a clause referenced in a case, we inputted that clause – along with the year the contract containing the clause was executed and the type of contract at issue – to a spreadsheet. When the work was complete, I had collected 3,104 choice-of-law clauses written into contracts between 1869 and 2000 that selected the law of a U.S. jurisdiction. We then set about analyzing the language in these clauses. In conducting this analysis, I ignored the choice of jurisdiction (e.g., New York or England). I was concerned exclusively with the other words in the clause (e.g., made, performed, interpreted, construed, governed, related to, conflict-of-laws rules, etc.).

This inquiry generated a number of interesting insights. First, I found that the Conflicts Revolution in the United States had little to no impact on the way that choice-of-law clauses were drafted. The proportion of clauses referencing the place where the contract was made or the place where it was to be performed remained constant between 1940 and 2000. Second, I found that while the proportion of clauses containing the words "interpreted" or "construed" similarly remained constant during this same time frame, the proportion of clauses that containing the word "governed" rose from 40 percent in the 1960s to 55 percent in the 1970s to 68 percent in the 1980s to 73 percent in the 1990s. It is likely that this increase was driven in part by court decisions rendered in the late 1970s suggesting that the word "govern" was broader than the word "interpret" or "construe" in the context of a choice-of-law clause.

Third, I found that it can be extremely difficult to predict when contract drafters will revise their choice-of-law clauses. In contemporary practice, one routinely comes across clauses that carve out the conflicts law of the chosen jurisdiction. ("This Agreement shall be governed by the laws of the State of New York, *excluding its conflicts principles*.") This addition constitutes a relatively recent innovation; the earliest example of such a provision appears in a case decided in 1970. In the 1980s, roughly 8 percent of the clauses in the sample contained this language. By the 1990s, the number had risen to 18 percent. While there is no real harm in adding this language to one's choice-of-law clause, the overwhelming

practice among U.S. courts is to read this language into the clause even when it is absent. Its relatively rapid diffusion is thus surprising.

Conversely, very few contract drafters revised their clauses during this same time period to select the tort and statutory law of the chosen jurisdiction. This omission is baffling. U.S. courts have long held that contracting parties have the power to select the tort and statutory law of a particular jurisdiction in their choice-of-law clauses. It stands to reason that large corporations (and other actors in a position to dictate terms) would have raced to add such language to their clauses to lock in a wider range of their home jurisdiction's law to be invoked in future disputes. The clauses in the sample, however, indicate that the proportion of clauses containing such language held constant at 1 percent to 2 percent throughout the 1970s, 1980s, and 1990s. The failure of this particular innovation to catch on during the relevant time period is likewise surprising.

Conclusion

The foregoing history looks to contract practice as it relates to choice-of-law clauses in the United States. There is no reason, however, why scholars in other nations could not deploy some of the same research methods to see if the choice-of-law clauses in their local contracts exhibit a similar trajectory. (Among other things, my paper contains a detailed discussion of methods.) Most well-resourced law libraries contain old form books that could be productively mined to determined when these provisions came into vogue across a range of jurisdictions. A review of such books could shed welcome light on the evolution of the choice-of-law clause over time across many different jurisdictions.

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The long tentacles of the Helms-Burton Act in Europe

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On 2 September, the First Instance Court number 24 of Palma de Mallorca (Spain) issued an *auto* (interlocutory decision) staying proceedings commenced against Meliá Hotels International S.A., one of the biggest Spanish hotel chains, on grounds of immunity from jurisdiction, act of state doctrine and lack of international jurisdiction.

The claimant was Central Santa Lucía L.C., a US company which considers itself the successor of two Cuban corporations: Santa Lucía Company S.A. and Sánchez Hermanos. These two legal entities owned a sugar plantation and other pieces of land in Cuba. Following the revolution of 1959 in this country, those properties were expropriated by Law 890 of 1960. The expropriated land under discussion – known as *Playa Esmeralda* – is now owned by Gaviota S.A. a corporation of the Cuban State. The Cuban Government authorized Meliá to manage and exploit the land for touristic purposes and Meliá now owns two hotels on that landplot. The claimants contended that Meliá was conscious of the illegitimacy of the expropriation but had nevertheless sought to profit from it. This is apparently the first such claim in Europe and the decision staying the proceedings can still be appealed.

The claim was based on the argument that, since what the claimant describes as "confiscation" had been contrary to international law, it was null and void and the US company – as successor of the original Cuban proprietors – should still be considered the rightful owner of the land. Meliá was now in possession of the land and was profiting from it in bad faith, conscious of the illegitimacy of the property title of the Cuban state. The claimant contended that under article 455 of the Spanish Civil Code, possessors in bad faith must hand over not only the profits of their illegitimate exploitation but any other fruits that the legitimate possessor

could have obtained.

This claim filed by the US company was against a legal entity domiciled in Spain. Therefore and under normal circumstances, the Spanish court would have had jurisdiction. However, the Spanish court understood that it did not. First of all, article 21 of the Spanish Judiciary Law (*Ley Orgánica del Poder Judicial*) and article 4 of Organic Law 16/2015 on immunities of foreign states establish that Spanish courts shall not have jurisdiction against individuals, entities and assets which enjoy immunity from jurisdiction, as provided by Spanish law and Public International Law. The Cuban State and the property owned by its company – Gaviota – were therefore and in principle protected by the rules on immunity but the Cuban State had actually not been named as a respondent in the claim and its object was not the expropriated property itself but the profits from its exploitation. The decision does not explain why the property of a commercial corporation owned by the Cuban State – as opposed to the State itself – also enjoys immunity.

The decision goes on to say that Spain subscribes to a limited understanding of immunity from jurisdiction (articles 9 to 16 of Organic Law 16/2015), so that claims arising from the commercial relations between Gaviota and Meliá for the touristic development of the land – *acta iure gestionis* – might not be covered by immunity. Nevertheless, the Spanish court understood that the true basis for the claim were not the relations between Gaviota and Meliá – commercial or otherwise – but the alleged illegitimacy of the expropriation – *acta iure imperii* –, the property title that Cuba now has over the land and any responsibility incurred by Meliá for illegitimately profiting from the situation. Santa Lucía could only have a right to the illegitimate profits if it was considered the rightful owner and this entailed a discussion about a truly sovereign act: the expropriation.

Therefore, it can be said that the court's rationale is actually more akin to the act of state doctrine of English and US law, whereby courts should refuse to hear cases where they are called to question the conduct of foreign governments or acts of any sovereign entity within their own territory. For a finding that Meliá had illegitimately profited from Santa Lucía's disgrace, not only the knowledge of the expropriation by the Spanish company but the illegality of the expropriation itself would have had to be discussed before the Mallorca court.

Additionally, the court explains that Spanish courts do not have jurisdiction to

hear claims concerning property rights – ownership or possession, in this case – over immovable assets located outside Spain. The court wrongly considers that EU Regulation 1215/2012 is applicable to this case. However, the immovable property under discussion is located outside the EU, so the Regulation actually does not apply. Similarly and as indicated above, the court considers that article 455 of the Spanish Civil Code is applicable, notwithstanding the fact that article 10.1 of the same norm establishes that the law applicable to property rights will be the law of the place where they are located.

This decision and this claim by Cubans "exiled" in the US arrives after the US announced the end of the suspension of Title III of the 1996 Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (aka Helms–Burton Act), which effectively opens the door to lawsuits in the US by providing a right of action for all US nationals (i.e. including naturalized Cubans and their descendants) whose property was taken by the Cuban Government after the revolution. Such claims can be directed against anybody – regardless of nationality – who "profits" from, "traffics" with or otherwise has an "interest" in such property.

European Union officials have recently voiced their concern for these potential lawsuits against European investors in Cuba and have reminded that some countermeasures were already foreseen when the law was passed in 1996. Several members of the European Commission have also warned the US Government that the EU may launch a case before the WTO and that it already has in place a "blocking statute" which bans the recognition and enforcement of any of the resulting US judgements against European companies and that also allows them to recover in EU courts any losses caused by claims under Title III, against assets that US claimants may have in the EU. The Spanish Government has also set up a special committee to study these risks, given the important commercial interests of Spanish companies in the Caribbean island. In this regard, Miami lawyers confirm that many families of Cuban origin are now requesting legal advice. The swift way in which the Spanish case here discussed has been decided may be an incentive for those families to claim in the US – and not in Europe – under the newly activated Helms-Burton act.