Just published: “Towards a global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters” by Hans van Loon, former Secretary General of the HCCH

Hans van Loon, former Secretary General of the Hague Conference on Private International Law (HCCH), has just published an article entitled “Towards a global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters” in the *Collection of Papers of the Faculty of Law,* Niš*,* No 82, Year LVIII, 2019 (see pp. 15-36). The paper develops a lecture held at the Law Faculty.

The author has provided the following summary of his article (emphasis has been added):

The article traces the history of the “Judgments Project”, and provides background on the current negotiations at the Hague Conference on Private International Law, which have resulted in the May 2018 draft Convention, and, it is hoped, will very soon culminate in the adoption of a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. To that end, a Diplomatic Session has been convoked at the Peace Palace in The Hague (the Netherlands) from 18 June to 2 July 2019.

The article starts by recalling the interaction between, on the one hand, the *1971 Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters* and *its Supplementary Protocol*, and, on the other, the *1968 Brussels Jurisdiction and Enforcement Convention* (now: Brussels I recast). The 1968 Brussels Convention drew inspiration both from the 1971 Hague Convention and its Protocol (excluding exorbitant grounds of jurisdiction) and the 1965

Hague Choice of Court Convention. Yet, it went beyond those instruments by (1) providing uniform rules on original jurisdiction; (2) enabling recognition and enforcement generally without review of the original grounds of jurisdiction; and (3) benefitting from a mechanism of uniform interpretation by the Court of Justice of the European Union (CJEU). The success of the Brussels Convention, however, contributed to a lack of interest in the 1971 Convention, which never came off the ground. Other reasons were the 1971 Convention's alleged discriminatory effect vis-à-vis companies and persons not domiciled in Europe and the issue of bilateralisation – the 1971 Convention required for its operation a supplementary agreement between any two Contracting States, an issue that has come up again in the current negotiations.

In 1992, having considered the possibility of bilateral negotiations with EEC Member States, the USA made a proposal to the Hague Conference for a "mixed" Convention. The idea was that this instrument would provide a list of permitted grounds of jurisdiction and a list of prohibited grounds of jurisdiction, while leaving a "grey area" that would allow Contracting States to establish additional grounds of original jurisdiction and provisions on recognition and enforcement under national law. With the "mixed" Convention idea as a start, negotiations took place between 1996-2001.They ultimately led, via a preliminary draft Convention, to an "Interim text" adopted at a diplomatic conference in 2001. The dynamics of those negotiations were very much determined by the transatlantic dimension, with different, and as it turned out, incompatible strategic objectives (the US being interested in securing recognition and enforcement of its judgments in Europe, and non-discrimination regarding direct grounds of jurisdiction for US-based companies and persons, and Europe, in urging the US to reduce the reach of jurisdiction of its courts regarding Europe-based companies and persons). The resulting text left many issues unresolved, including: (1) (commercial) activity as a ground of jurisdiction (2) the use of the internet, including e-commerce, (3) the protection of weaker parties, in particular consumers and employees, (4) intellectual property (IP), (5) the issue of bilateralisation and (6) the relationship with the Brussels/Lugano texts. It was therefore decided to take a step back, and focus first, separately as with the 1965 Convention, on choice of court agreements.

The article then discusses how the 2005 Choice of Court Convention was able to avoid some of these six major issues, and how it dealt with the remaining ones.

Importantly, the Choice of Court Convention found a solution for its relationship to the Brussels/Lugano texts (it also had a substantial impact on the Brussels I recast). In fact, the 2005 Convention provides an important source of inspiration for the 2018 draft, which can be seen, for example, in the definition of its substantive scope, and its provisions on recognition and enforcement, including of judgments awarding punitive damages. However, the coming negotiations are still faced with several of the aforementioned major issues, and some new ones.

Meanwhile, however, the dynamics of the negotiations have changed. Whereas in the past the transatlantic dimension was predominant, the current negotiations have taken on a much more global character, China and other (formerly) "emerging" States having become more actively involved. In some respects, this adds to the difficulty of reaching agreement (for instance regarding IP). On the other hand, the current negotiations are limited to recognition and enforcement only. Yet, indirectly, the difference in approach to judicial jurisdiction between the US – where this is a constitutional matter, with a focus on the relationship between the *defendant and the forum* (the article discusses recent developments in the case law of the US Supreme Court on international jurisdiction) – and most other States – where the focus is on the relationship between the *subject matter of the litigation and the forum* – has reappeared in the current negotiations.

The article discusses how this is reflected in the draft, in particular in art. 5, in its provisions on contracts, torts, the internet, intellectual property and consumers and employees.

It is noted, with some regret, that as a result, the torts jurisdiction provision is very limited, indeed even narrower than its predecessor in the 2001 Interim text. It is hoped that the final text will make room for recognition and enforcement of judgments emanating from the court of the place where the injury arose, at least if the defendant could reasonably foresee that its conduct would give rise to the harm in that State. This would be important, for example, concerning civil judgments resulting from cross-border environmental litigation. Regarding IP, the May 2018 draft does not take a firm position, and it even leaves open the possibility of a complete exclusion. That would be a step back in comparison with the Choice of Court Convention, so hopefully it will be possible to avoid such a far-reaching result.

Finally, a number of other, including novel, features of the draft are highlighted.

Some concern is expressed about the addition of "situations involving infringements of security or sovereignty of [the requested] State" as a ground of refusal of recognition and enforcement (art. 7 (1) (c)), because that may invite a review of the merits of the judgment, which is in principle, rightly, prohibited (art. 4(2)). Interesting novelties include a provision which gives the requested court a certain flexibility in dealing with judgments that are subject to review in the State of origin (art. 4 (4)); the exclusion of *forum non conveniens* at the stage of recognition and enforcement (art. 14 (2)), and a tentative provision dealing with "common courts", such as the future Unified Patent Court art. 4 (5).

The article concludes by expressing the hope that the Convention will avoid the complexity of its 1971 predecessor, notably by avoiding its bilateralisation system, or at least by drafting it in such a manner that it does not make the ratification unattractive or its application unduly difficult. In any event, the Convention will fulfill a long-felt need for a global multilateral framework for the recognition and enforcement of civil and commercial judgments, and thereby contribute to the global transnational legal order.

First Meeting of the Young Private International Law Research Network

Maximilian Schulze, an assistant of Dr. Susanne Gössl, LL.M. (Tulane), University of Bonn, has kindly provided us with the following report.

On 5 April 2019, the first meeting of the newly established research network "Young Private International Law in Europe" took place at the University of Würzburg, Germany. The network intends to create a Europe-wide exchange at 'junior faculty' level (predoc/postdoc) in the context of various comparative Private International Law (PIL) projects. The first research project and meeting in Würzburg deal with the "Recognition/Acceptance of Legal Situations". This topic

was selected in view of the recent series of decisions by the CJEU regarding international name law (see, e.g. CJEU C-148/02 – *Garcia Avello*) and, most recently, same-sex marriage (CJEU C-673/16 – *Coman*)) and a parallel discussion which evolved in the context of the case law of the ECtHR, in particular regarding the recognition of adoptions, same-sex marriages and surrogacy. In order to contribute to a pan-European understanding of 'acceptance' of legal situations related to a person's status in a cross-border context to enhance the free movement of EU citizens and protect their fundamental rights regarding private and family life, the aforementioned first project of the research network compares the reception and implementation of the CJEU and ECtHR case law in 16 EU Member States (Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Spain, and Sweden).

The meeting, organised by *Susanne Lilian Gössl*, Bonn, and *Martina Melcher*, Graz, comprised a public and a workshop session. The meeting was kindly supported by the German Research Foundation (Deutsche Forschungsgemeinschaft – DFG) as well as by the prior meeting of the German "Conference for Young PIL scholars" at the University of Würzburg.

The public session

Martina Melcher and *Susanne Lilian Gössl* opened the public session with an overview of the project and outlined the results of the comparative study. Martina Melcher highlighted the aim of the project as an "academic offspring" for young scholars to facilitate their comparative law and PIL research interests by setting up a network for young scholars. Methodologically, the network selects a specific topic – in this project/meeting the "Recognition/Acceptance of Legal Situations" – on which participants first submitted national reports, which then led to a comprehensive comparative report and analysis, which will be finalized and published in 2020. Susanne Gössl further specified the network's approach on how the individual reports are to be composed. This is to take CJEU and ECtHR case law in all fields of the law where member states' awareness is high (e.g. name law, surrogacy and same-sex marriage) as a starting point and then look at the individual states' implementations, including in particular the recognition by judgments and by rules of PIL. As the network is not limited to international family law, future meetings and comparative reports will also deal with commercial law topics.

Marion Ho-Dac, Valenciennes, then set out the methodological approaches to recognition. She highlighted the increasing importance of cross-border continuity of status in view of the circulation of people and recent refugee movements. When looking at the Member States' approaches, she stressed two considerations one has to bear in mind: the legal technique of recognition and the underlying legal policy thereof. She then set of the three different approaches: traditional PIL methods, procedural recognition and alternative methods (e.g. uniform law on supranational level or a mutual recognition system at EU level). However, she concluded that none of these were perfect methods. In his responsio, *Tamás Szabados*, Budapest, doubted that legislators always have a clear methodology in mind. He exemplified this by the Hungarian PIL Act, in effect since 2018, in which no general theory of recognition is followed, although the responsible committee was aware of the recognition questions discussed.

Sarah den Haese, Gent, then referred to a 2014 academic proposal on the recognition of names that was not acted upon by the Commission and analysed its weaknesses which need addressing for a future proposal to be successful. Firstly, any proposal would require a harmonisation of conflict of laws rules. Secondly, she proposed recognition without a conflict of laws test and no control of the substantive law subject to a very narrow public policy exception only. *Tena Hoško*, Zagreb, responded by setting out the conflict rules implemented in Croatia. Although academic proposals had been submitted, the Croatian legislator did not follow them but rather opted to copy the German conflicts rule (Art. 10 EGBGB). Although she exemplified certain weaknesses in this newly implemented approach (i.e. the issues of dual citizenship and renvoi), she concluded that the new rules are a huge step forward.

The workshop session

The public session was followed by a workshop session in which the preliminary results of the draft comparative report on "Recognition/Acceptance of Legal Situations" were discussed among the project participants and a few other interested parties. The workshop contained four parts, each initiated by a short introduction summarising the major findings and followed by an in-depth discussion among the participants.

In the first part, the general awareness was addressed. In her introduction, *Giulia Vallar*, Milan, pointed out an academic awareness in many Member States that a

comprehensive overhaul of the rules of PIL is required. This awareness is also registered by the legislator, however mostly by countries that were involved in CJEU cases. She went on to set out the areas of law in which awareness for recognition is high (e.g. name law and same-sex marriages or partnerships). She concluded that based on their awareness of the issue, the analysed Member States can be subdivided into those involved in CJEU cases, those indirectly influenced by CJEU case law and those influenced by the ECtHR.

The second part, focusing to the legal methodology employed for recognition, was introduced by *Katarzyna Miksza*, Vilnius. She pointed out and illustrated the huge variety of methods of recognition detected by the draft comparative report by reference to national laws. In the subsequent discussion it was pointed out that it would be rather difficult to reconcile the different kinds of approaches to recognition.

Thirdly, the substantive requirements for recognition were discussed. In their presentation, *María Asunción Cebrián Salvat* and *Isabel Lorente Martínez*, Murcia, highlighted the (general) prohibition of a *revision au fond* as a starting point before outlining three hotspots of the public policy exception (surrogacy, same sex marriages or civil partnerships, and name law) and further challenges for recognition, in particular *fraus legis* and the legitimate expectations of the parties, in the various countries. In the subsequent discussion it was pointed out that the comparative report also shows that the public policy exception does not only function as a bar to recognition, but can, as well as human rights, require and facilitate recognition.

Finally, the formal requirements for recognition were discussed. *Florian Heindler*, Vienna, initially drew attention to the difficulty of distinguishing between formal and substantive requirements and stated the definition of the comparative report of the former as requirements relating to form (i.e. of documents) as well as procedural requirements (regarding certain additional procedural steps). Also in the subsequent discussion the challenging identification and categorisation of requirements was brought up.

In the final discussion, it was immediately agreed that the project was until now only able to scratch the surface of the issues and further work and discussions were required and promising. Therefore, a continuation of the project was agreed on and a further meeting is already being planned.

The Centre for European Policy on the Proposal for an Assignment Regulation

The Centre for European Policy (CEP) in Freiburg (Breisgau) is the European-policy think tank of the German non-profit foundation "Stiftung Ordnungspolitik". It has just released its policy brief on the Proposal COM(2018) 96 of 12 March 2018 for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims. The CEP's main conclusion reads as follows:

"The general rule, that the applicable law is that of the assignor's habitual residence, strengthens legal clarity and thus legal certainty. However, it increases transaction costs and complexity. For syndicated loans, an exception to the general rule should be added to avoid the application of various laws. To avoid legal uncertainty, the Regulation must clarify what is meant by the habitual residence 'at the material time' and should only allow overriding mandatory provisions of the law of the Member State in which the assignment has to be or has been performed. The Regulation's rules on conflict of laws overlap with those of other EU directives and regulations. This results in inconsistencies."

The full text of the policy brief is available here. See also the earlier posts on this topic by Robert Freitag and by Leonhard Hübner.

The 2nd Dialogue on International

Family Law

On 10 and 11 May 2019, the 2nd Dialogue on International Family Law took place at the University of Marburg (Germany). The dialogue serves as a forum for the exchange between high-level practitioners and academics active in the field of international family law; it is organised on an annual basis by Professors *Christine Budzikiewicz* (Marburg) and *Bettina Heiderhoff* (Münster), Dr. *Frank Klinkhammer*, a judge at the German Federal Supreme Court and an honorary professor in Marburg, and Dr. *Kerstin Niethammer-Jürgens*, a renowned family lawyer in Potsdam/Berlin. This year's meeting focused on the well-being of the child in international family law, the pending revision of the Brussels II*bis* Regulation and conflict of laws with regard to matrimonial property.

The conference was opened by Professor *Rüdiger Ernst*, a judge at the Kammergericht (Court of Appeals of Berlin), who described and analysed the various standards regarding the procedure to hear a child in international cases, with a special focus on the current state of play concerning the Brussels II*bis* Regulation. The second presentation on the well-being of the child in the procedural law of the EU (the Brussels II*bis* and the Maintenance Regulation) was given by *Bettina Heiderhoff*, who, in light of an intense scrutiny of the case-law, posed the critical question as to whether judges actually give weight to the well-being of the child in determining jurisdiction or whether they merely pay lip-service to this overarching goal. In particular, *Heiderhoff* focused on the question to which degree concerns for the well-being of children had an influence on determining their habitual residence. The second panel was started by Professor *Anatol Dutta* (University of Munich), who dealt with issues of *lis pendens* and annex jurisdiction in international family procedures – apparently, this is another area where more coherence between the various European regulations would be highly desirable. Then, Dr. *Andrea Schulz* (European Commission) analysed the new system of enforcement of judgments in the framework of the revised Brussels II*bis* Regulation, which, by abolishing *exequatur*, shows a discernible influence of the paradigm shift already achieved by Brussels I*bis*. At the moment, the English text is being finalised; it is to be expected that the revised version will be adopted by the Council of Ministers at the end of June 2019.

On the second day of the conference, Professor *Dirk Looschelders* (University of

Düsseldorf) gave a presentation on the substantive scope of the Matrimonial Property Regulation (and the Regulation on Property Aspects of Registered Partnerships). The fact that there is no common European definition of the concept of "marriage" leads to numerous difficulties of characterisation; moreover, European courts will have to develop autonomous criteria to draw the line between matrimonial property regimes and adjacent legal areas (contracts, partnerships) not governed by the Regulation. Subsequently, Dr. *Jens Scherpe* (University of Cambridge) talked about forum shopping before English courts in matrimonial property cases. He focused on determining jurisdiction, calculating alimony and maintenance under English law and the thorny issue of under which circumstances English courts will accept matrimonial contracts as binding. Finally, *Frank Klinkhammer* gave a survey on recent case-law of the Federal Supreme Court in cases involving international agreements on surrogacy, in particular regarding the Ukraine. In a recent decision of 20 March 2019 (XII ZB 530/17), the Court had decided that a child who, after being born by a Ukrainian surrogate mother, was then brought to Germany as planned by all parties did not have its first habitual residence in the Ukraine, but in Germany, which, in effect, leads to consequence that the German designated mother has no other option but to adopt the child if she wishes to establish a family relationship. This led to an intense discussion about the principle of recognition and the determination of habitual residence (again). The conference proceedings will be published by Nomos. The next dialogue will take place on 24-25 April 2020 in Münster.

Patience is a virtue – The third party effects of assignments in European Private International Law

Written by Leonhard Huebner, Institute for Comparative Law, Conflict of Laws and International Business Law (Heidelberg University)

The third-party effects of the assignment are one of the “most discussed questions of international contract law” as it concerns the “most important gap of the Rome I Regulation”. This gap is regrettable not only for dogmatic reasons, but above all for practical reasons. The factoring industry has provided more than 217 billion euros of working capital to finance more than 200,000 companies in the EU in 2017 alone. After a long struggle in March of 2018, the European Commission, therefore, published a corresponding draft regulation (COM(2018)0096; in the following Draft Regulation). Based on a recent article (ZEuP 2019, 41) the following post explores whether the Draft Regulation creates the necessary legal certainty in this economically important area of law and thus contributes to the further development of European private international law (see also this post by Robert Freitag).

Legal background and recent case law

Although Article 14 of the Rome I Regulation provides for a rule governing the question regarding which law is applicable to the voluntary assignments of claims, it is the prevailing opinion that the third party effects of assignments are not addressed within the Rome I Regulation. According to Article 27 (2) of the Rome II Regulation, the European Commission was under the obligation to submit a report concerning the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. Said report should have been published no later than 17 June 2013. In March 2018, almost nine years after the Rome I Regulation came into force, the Commission finally presented said report in form of the Draft Regulation subject to this article. The practical importance and the need for a harmonized European approach have also been demonstrated by recent case law proving the rather unsatisfactory status quo in European PIL. Two recent decisions of the Higher Regional Court of Saarbrücken (dated 8 August 2018 – 4 U 109/17) and of the Norwegian Supreme Court (see IPRax 2018, 539) gave striking examples of how the diverging requirements for the effectiveness of the assignment vis-à-vis third parties lead to different solutions within the respective PIL rules of the member states. The preliminary reference to the ECJ of the Higher Regional Court of Saarbrücken concerns a multiple assignment, while the ruling of the Norwegian Court of Justice deals with the question whether unsecured creditors of the assignor can seize the allegedly assigned claims of the assignor in insolvency (see also this post by Peter

Mankowski).

The material scope of the proposed regulation

Art. 5 of the Draft Regulation determines the material scope of application of said Draft Regulation with regard to the effectiveness of an assignment as well as its priority vis-à-vis third parties. The effectiveness vis-à-vis third parties is regularly determined by registration or publication formalities (lit. a), while priority conflicts for the assignee arise vis-à-vis various persons. Lit. b) concerns multiple assignments, while lit. c) regulates the priority over the rights of the assignor's creditors. In addition, lit. d) and e) assign priority conflicts between the assignee and the rights of the beneficiary of a contract transfer/contract assumption and a contract for the conversion of debts to the Draft Regulation.

In essence, Art. 5 of the Draft Regulation covers notification requirements to the assignee. Most legal systems require a publicity act for binding effects vis-à-vis third parties and the debtor, such as a notice of assignment to the debtor or a registration in a public register. Whereas under German law the assignment becomes effective immediately between the assignor and the assignee as well as against third parties, in other jurisdictions this only applies once the debtor has been notified of the assignment (*signification* in French law pursuant to former Art. 1690 of the Code civil or within the framework of legal assignment in the UK).

Connecting factor: habitual residence of the assignor combined with sectorial exceptions

The connecting factors employed by current national PIL rules considerably vary between the member states. In principle, three connecting factors compete with each other: the habitual residence of the assignor, the law applicable to the transfer agreement (assignment ground statute) and the law applicable to the transferred claim. Furthermore, the law at the debtor's domicile might also be considered an important factor.

Art. 4 (1) of the Draft Regulation unties this gordic knot as it specifies the law of the country in which the assignor has his habitual residence "at the relevant time" as the primary connecting factor. The goal of the European Commission is to create legal certainty and, above all, to promote cross-border trade in claims. By way of sectoral exceptions, the law of the transferred claim is to be applied if

either (i) “cash collateral” credited to an account or (ii) claims from financial instruments are transferred (Art. 4 (2) of the Draft Regulation).

A downside of the link to the law of habitual residence is its changeability, which may lead to a *conflit mobile*. By altering the connecting factor, the applicable law may also change leading to legal uncertainty. To overcome such conflict, so called meta conflict of laws rules are also provided for in the Draft Regulation. In this case, it is a matter of determining the relevant point in time in order to make a viable connection. This rule has been implemented in Art. 4 (2) of the Draft Regulation.

An unsolved problem is the determination of the “material point in time” cited in Art. 4 (1) of the Draft Regulation. Accordingly, the third parties’ effects are determined by the assignor’s habitual residence at the relevant time. However, neither a recital nor the catalogue of Art. 2 of the Draft Regulation give an adequate definition of this relevant point in time so far. It is therefore advisable to replace the term “at the relevant time” with “at the time of conclusion of the assignment contract” in the final regulation. This is also reflected in the EP’s legislative resolution of 13 February 2019 (P8_TA-PROV(2019)0086, p. 12). The advantage of this clarification would be that the same point in time would be relevant in the legal systems of the member states which follow the principle of separation as well as those which follow the principle of unity.

A step forward?

The Draft Regulation would represent a major step forward in the trade of cross-border receivables in the EU. It closes a large gap within European PIL, while at the same time aiding EU member states to partly adapt their domestic legal system accordingly. Even if the European Commission did not comply with the (unrealistic) deadline for the review cited in Art. 27 (2) of the Rome I Regulation, the legal debate made this essential progress possible demonstrating the EU’s ability to reach compromises. Although the Draft Regulation solves many problems, it may also raise new ones. That is again good news for lawyers interested in PIL. Nevertheless, the enactment of the Draft Regulation would eventually answer “one of the most frequently discussed questions of international contract law”. The old saying “patience is a virtue” would be proven right again.

This blog post is a condensed version of the author's article in ZEuP 2019, 41 et seqq. which explores the new Draft Regulation in more detail and contains comprehensive references to the relevant literature.

Anti-Semitism – Responses of Private International Law

Prof. Dr. Marc-Philippe Weller and Markus Lieberknecht, Heidelberg University, have kindly provided us with the following blog post which is a condensed abstract of the authors' article in the Juristenzeitung (JZ) 2019, p. 317 et seqq. which explores the topic in greater detail and includes comprehensive references to the relevant case law and literature.

In one of the most controversial German judgments of 2018, the Higher Regional Court of Frankfurt held that the air carrier *Kuwait Airways* could refuse transportation to an Israeli citizen living in Germany because fulfilling the contract would violate an anti-Israel boycott statute enacted by Kuwait in 1964. The Israeli citizen had validly booked a flight from Frankfurt to Bangkok with a layover in Kuwait City. However, Kuwait Airways hindered the Israeli passenger from boarding the aircraft in Frankfurt. According to the judgment of the Frankfurt Court, Kuwait Airways acted in line with the German legal framework: specific performance of the contract of carriage was deemed to be impossible because of the Kuwait boycott statute.

This judgment is wrong. Hence, it is not surprising that the decision sparked reactions in German media outlets which ranged from mere disbelief to sheer outrage.

The case demonstrates that the seemingly 'neutral' domain of Private International Law is not exempt from having to deal with delicate political matters such as the current global rise in anti-Israel and anti-Semitic sentiments. However, Private International Law is not as ill-equipped as the Frankfurt judgment seems to suggest. In fact, both Private International Law and (German)

substantive law offer a wide range of instruments to respond to anti-Semitic discrimination.

First, the article explores the term anti-Semitism in order to carve out a workable definition for legal purposes. Based on this concept and on the available empirical data, we identify three scenarios which appear particularly relevant from a private law perspective: these include, first, encroachment on the personal honor and dignity of Jewish persons; second, attempts to alienate Jewish persons economically, one example being the *Kuwait Airways* case; third, physical attacks on Jewish persons or their property.

When addressing such behavior, private law operates under the influence of a superseding framework of anti-discriminatory provisions contained in international Law, European Law and constitutional law. We attempt to show that the protection of Jewish identity constitutes an overarching paradigm of Germany's post-war legal order, a notion which finds support in the Jurisprudence of the German Federal Constitutional Court.

On a Private International Law level, this basic value of Germany's post-war legal order shapes the domestic public policy (*ordre public*). Moreover, it translates into a twofold use of overriding mandatory provisions. First, under Art. 9(3) Rome I Regulation German courts are precluded from applying foreign overriding mandatory provisions with an anti-Semitic objective, such as Kuwait's boycott statute. Although the ECJ's reading of Art. 9(3) Rome I Regulation in *Nikiforidis* does leave room to take such provisions, or their effects, into account within the applicable substantive law as purely factual circumstances or as foreign data, we argue that the result of this process must not be that provisions which violate the *ordre public* are inadvertently given effect through the 'back door' of substantive law.

Applying our findings to the case, we conclude that *Kuwait Airways* lacked grounds to invoke both legal and factual impossibility. Whereas the former is precluded under Art. 9(3) Rome I Regulation for constituting a normative application of the Kuwaiti law, the latter requires a more intricate reasoning: We argue that the passenger's right to specific performance had to be upheld under German contract law, while any purported intrusion of the Kuwaiti authorities into the performance is best dealt with at the enforcement stage. This approach is in line both with the result-driven desire to avoid granting the Kuwaiti law any

effect within the German legal order and with the doctrinal structures of German law. One could reach the same conclusion by relying on a fact pointed out by *Jan von Hein* (Freiburg University): *Kuwait Airways* is a *state* enterprise owned by Kuwait, *i.e.* the very creator of the legal impediment (the boycott statute). Hence, it should not be allowed to rely on a self-created obstacle to refuse performance.

Conversely, overriding mandatory provisions contained in German law, *e.g.* anti-discrimination statutes, can be used to ward off or modify anti-Semitic effects of a foreign *lex causae* governing the legal relation in question. We then go on to discuss the necessity, or lack thereof, of adopting a Blocking Statute specifically designed to subvert the effectiveness of foreign legislation with an anti-Semitic agenda.

Lastly, we demonstrate that, in addition to securing the right to specific performance of Israeli citizens, the substantive law provides a host of legal grounds which can serve to empower victims of anti-Semitic discrimination. These instruments range from contractual damages to possible claims based on anti-discrimination law and the law of torts, addressing all of the relevant scenarios outlined above.

Regulating International Organisations: What Role for Private International Law?

Written by Dr Rishi Gulati, LSE Fellow in Law, London School of Economics; Barrister, Victorian Bar, Australia

The regulation of public international organisations (IOs) has been brought into sharp focus following the landmark US Supreme Court ruling in *Jam v International Finance Corporation586 US (2019)* (Jam). Jam is remarkable because the virtually absolute immunities enjoyed by some important IOs have now been limited in the US (where several IOs are based), giving some hope that

access to justice for the victims of institutional action may finally become a reality. Jam has no doubt reinvigorated the debate about the regulation of IOs. This post calls for private international law to play its part in that broader debate. After briefly setting out the decision in Jam, a call for a greater role for private international law in the governance of IOs is made.

The Jam decision

The facts giving rise to the Jam litigation and the subsequent decision by the US Supreme Court has already attracted much discussion by public international lawyers, including by this author here. Only a brief summary is presently necessary. The International Finance Corporation (IFC), the private lending arm of the World Bank which is headquartered in the US entered into a loan agreement with Coastal Gujarat Power Limited, a company based in India, to finance the construction of a coal-fired power plant in Gujarat. The plaintiffs sued the IFC (including in tort) in a US Federal District Court asserting that pollution from the plant harmed the surrounding air, land, and water. The District Court found that the IFC was absolutely immune under the *US International Organisations Immunities Act 1945* (IOIA). The DC Circuit affirmed that decision. For an analysis of those decisions, see previous posts by this author here and here.

However, in its landmark ruling in Jam, the US Supreme Court reversed the decision of the court below, significantly affecting the potential scope of IO immunities. The IOIA, which applies to the IFC, grants international organizations the 'same immunity from suit…as is enjoyed by foreign governments' (22 U. S. C. §288a(b). The main issue in Jam concerned how the IOIA standard of immunity is to be interpreted. Should it be equated with the virtually absolute immunity that states enjoyed when the IOIA was enacted? Or should the IOIA standard of immunity be interpreted by reference to the restrictive immunity standard (immunity exists only with respect to non-commercial or public acts)? This latter standard is now enshrined in the *US Foreign Sovereign Immunities Act 1976* (s 1605(a)(2), FSIA). By seven votes to one (with Breyer J dissenting) the US Supreme Court has now given a definitive answer. The majority of the court concluded that the IOIA grants immunity with reference to the FSIA standard of immunity, stating:

In granting international organizations the "same immunity" from suit "as is

enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two. The statute could otherwise have simply stated that international organizations "shall enjoy absolute immunity from suit," or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of international organizations "immune from search," use such noncomparative language to define immunities in a static way…Or the statute could have specified that it was incorporating the law of foreign sovereign immunity as it existed on a particular date…Because the IOIA does neither of those things, we think the "same as" formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent (Jam, pp. 9-10).

The result is that the IFC (and similarly situated organisations) only possess immunities in respect of their non-commercial or public transactions. While the limiting of IO immunities is to be welcomed for it can only go towards enhancing access to justice for the victims of institutional conduct, the decision in Jam raises more questions than it perhaps answers.

Firstly, how can the decision in Jam be accommodated with the international law notion of IO immunities that finds its basis in the theory of 'functionalism'? The idea being that IOs need immunities to avoid an intrusion into their independence by host states/national courts. Instead of clarifying what this functional standard actually means and how it interacts with the commercial v non-commercial distinction, in Jam, the Supreme Court chose to simply engage in an exercise of statutory interpretation taking a parochial approach (Jam, p. 12). So, there now exists a schism in the international and national (at least in the US) law on IO immunities (see here). Other commentators have tried to provide some indications on how functionalism can be translated to the commercial v non-commercial distinction for the purposes of determining IO immunities, without however providing an answer that will generate any certainty. For the moment, it is simply noted that a transaction that may be within the scope of functional immunities may also be a classically commercial transaction making it difficult to precisely determine what ought to be immune.

Secondly, leaving to one side the schism between the international and national understanding of IO immunities now created, the difficulty in distinguishing between commercial and non-commercial activity itself must not be understated.

Webb and Milneshave stated that 'IOs with links to the US like the World Bank face the daunting prospect of litigation in the US Courts exploring the extent and limits of what is "commercial". In state immunity law, this exception has been broadly defined, essentially as comprising the type of activity in which private actors can engage (in contradistinction to the exercise of public power), and its outer boundaries remain unmarked.' Just like the distinction has given significant challenges in the state immunity context (whether the focus should be on the nature of the transaction or its purpose), the difficulty will be even greater in the IO context only creating further uncertainties. As Breyer J pointed out in his dissent:

> *As a result of the majority's interpretation, many of the international organizations to which the United States belongs will discover that they are now exposed to civil lawsuits based on their (U. S.-law-defined) commercial activity. And because "commercial activity" may well have a broad definition, today's holding will at the very least create uncertainty for organizations involved in finance, such as the World Bank, the Inter-American Development Bank, and the Multilateral Investment Guarantee Agency. The core functions of these organizations are at least arguably "commercial" in nature; the organizations exist to promote international development by investing in foreign companies and projects across the world…The World Bank, for example, encourages development either by guaranteeing private loans or by providing financing from its own funds if private capital is not available (Jam, p. 29).*

The justifiable concerns pointed to by Breyer J require a comprehensive response falling nothing short of treaty reform. In fact, the majority of the Supreme Court in Jam observed that treaty amendment was one method to resolve any real or perceived difficulties for IOs in so far as the scope of their immunities is concerned. In rejecting IFC's argument that most of its work of entering into loan agreements with private corporations was likely commercial activity; and the very grant of immunities becomes meaningless if it can be sued in respect of claims arising out of its core lending activities (Jam, p. 15), the court said:

The IFC's concerns are inflated. To begin, the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization's

charter can always specify a different level of immunity. The charters of many international organizations do just that…Notably, the IFC's own charter does not state that the IFC is absolutely immune from suit (Jam, pp. 17-8).

Treaty reform is obviously demanding and time-consuming. Jam nevertheless provides the impetus to pursue it with vigour. Such reform is required not only for organisations such as the IFC, but also IOs more generally.

The need for real and meaningful reform: a role for private international law

Clearly, Jam demonstrates the particular difficulties in assessing the scope of the IFC's immunities. In answering questions of IO immunities, the tension is between two values: maintaining an IO's functional independence and securing access to justice for the victims of IO action. This tension is not only manifest vis-à-vis the IFC in particular, but exists for all IOs in general. As this author discussed in another work, regardless of the subject matter of a dispute or the gravity of harm, the location of the affected party or the identity of the IO, the public visibility of a dispute or its inconspicuousness, we live in a 'denial of justice age' when it comes to the pursuit of justice against IOs. The victims (including families of the more than 9000 individuals who lost their lives) of cholera introduced in Haiti by UN peacekeepers in 2010 are still awaiting effective justice. The victims of the Srebrenica genocide of 1995 for which the UN assumed moral responsibility have not yet been compensated, with no such compensation in sight. When hundreds of Roma suffered serious harm due to lead poisoning caused by the apparent negligence of the UN Mission in Kosovo in placing vulnerable communities next to toxic mines, the UN belatedly set up a Human Rights Advisory Panel; its adverse findings have gone unenforced to this day. There are countless other disputes, including, contractual, tortious, employment and administrative, where a denial of justice is much too common.

If the balance between IO independence and access to justice is to be better and properly struck, fresh thinking is needed that underpins any reform process. Of course, each IO is different from one another, and the shape that any reforms that may take will need to be particularised to the circumstances of the concerned organisation. Nevertheless, IOs constitute international legal persons with significant commonalities, and there ought to be certain foundational reforms that are equally applicable to most if not all organisations. Private international law

can play a major role in any such foundational reform process.

Specifically, as I showed elsewhere, there exists a 'regulatory arbitrage' in the governance of IOs. This arbitrage results in victims of IO conduct slipping through legal loopholes when seeking to access justice. One manifestation of the regulatory arbitrage is provided by the law on IO immunities, including how it is interpreted and/or applied. As is much too common (see for example the Haiti Cholera Litigation), despite lack of access to justice within the institutional legal order which IOs are required to provide under international law, by and large national courts refuse to limit IO immunities interpreting functional immunities as de facto absolute. Therefore, (a) immunities that were always intended to be limited by functionalism are overextended; and (b) immunities are not made contingent on the provision of access to justice at the institutional level. The balance between perceived institutional independence and access to justice has leaned towards the former. The result is a denial of justice at multiple levels.

For some victims, Jam may ultimately correct the exploitation of this arbitrage in respect of claims pursued against organisations such as the IFC for lending by that organisation is likely to constitute commercial and therefore non-immune. However, other victims will continue to be denied justice due to ambiguous and broad wording used in constituent instruments providing for IO immunities (such as the immunities of the UN). IOs will continue to exploit the prevailing regulatory arbitrage to avoid liability. Unless the exploitation of the regulatory arbitrage is tackled, the denial of justice age cannot be brought to an end. To address this arbitrage, private international law techniques can be used to balance often competing but legitimate values. For example, conceptualising question of IO immunities in terms of 'appropriate' forum can be a useful method to coordinate the exercise of jurisdiction between the IO and national legal orders that co-exist in a pluralist legal space. Here, what should determine whether a national court ought to take jurisdiction over an IO is whether access to justice consistently with fair trial standards is available or can be adequately provided within the IO legal order? This must be determined following a specific and nuanced inquiry as opposed to a tick the box exercise (for employment claims, see a detailed study here).

Further, focusing on the rules on jurisdiction, choice of law and the recognition and enforcement of foreign judgments (the three aspects of private international law), the individual right to access justice can be secured without compromising

IO independence for private international law is perfectly suited to slice regulatory authority across legal orders with much precision. This author has called for the Hague Conference on Private International Law to initiate discussions about the negotiation of a global treaty that enshrines the private international law rules applicable between states and IOs. The regulatory framework that must govern IOs is one which involves public, institutional and private international law benefiting from each other's strengths.

Viewing the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region" as a Window onto the New Legal Hubs

Written by Matthew S. Erie, Associate Professor of Modern Chinese Studies and Fellow at St. Cross College, University of Oxford

On April 2, 2019, the Government of the Hong Kong Special Administrative Region ("HKSAR") and the Supreme People's Court of the People's Republic of China" ("Supreme People's Court") signed an Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR (hereinafter, "the Arrangement Concerning Mutual Assistance," see English translation here). This is a momentous development in the growth of international commercial arbitration in

both mainland China (also, the "PRC") and Hong Kong as it is the first time that such a mechanism has been put in place to allow Chinese courts to render interim relief to support arbitrations seated outside of the PRC.

Historically, non-Chinese parties have been concerned about doing business with Chinese parties given the lack of the ability to ensure that the status quo of the assets of the Chinese party in question is not altered pending the outcome of the arbitration and the tribunal's issuance of the final award. As a result of the Arrangement Concerning Mutual Assistance, foreign parties will have more comfort in entering into such agreements with Chinese parties; further, the attractiveness of both Hong Kong as a seat of arbitration and the PRC will be enhanced. More generally, the Arrangement Concerning Mutual Assistance demonstrates the close cooperation between legal, judicial, and arbitral authorities in the PRC and Hong Kong. The Arrangement Concerning Mutual Assistance builds on such soft law sources as the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR Pursuant to the Choice of Court Agreements Between Parties Concerned, signed on July 14, 2006, and the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR, signed on June 21, 1999. These sources of soft law position Hong Kong as a major legal hub for Chinese companies investing outside of mainland China. This is particularly so in the context of the Belt and Road Initiative, a multi-trillion dollar project affecting some two-thirds of the world's population, announced by PRC President Xi Jinping in 2013, to connect mainland China's economy with those of states throughout Eurasia.

Mainland China's soft law agreements with Hong Kong are not surprising given that Hong Kong is a "special administrative region" of the PRC, a relationship often summarized as "one country two systems." Nor is it surprising that Hong Kong should function as a legal hub for Chinese companies. Yet Hong Kong is just one of many such hubs emerging throughout a number of jurisdictions across the Eurasian landmass that are jockeying to provide legal services, and particularly dispute resolution services, to not just Chinese companies but also Japanese, Indian, and those of GCC and ASEAN states. The diversity of parties notwithstanding, with some of the largest multi-national companies in the world backed by strong central government support, China is the dominant economy of the region. China is not only creating soft law with other jurisdictions but also

onshoring disputes by building its own NLHs in Shanghai and Shenzhen. As a consequence, emergent economies in Asia are accounting for an ever-larger number of cross-border commercial disputes, and jurisdictions in Asia are building capacity to handle those disputes. Soft law, international arbitration houses, international commercial courts, business mediation, transplanted English common law procedural rules, English language, and lawtech—these are all constitutive elements of what I call "new legal hubs" ("NLHs"), one-stop shops for cross-border commercial dispute resolution, in financial centers, promoted as an official policy by nondemocratic or hybrid regimes.

Over the course of two years, I conducted ethnographic fieldwork on six NLHs in four countries, including in Hong Kong, Singapore, Dubai, Kazakhstan, and China. The result of my research, "The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution" (see here), is forthcoming in the *Virginia Journal of International Law*. The article analyses NLHs at two levels: their impact on the host states in which they are embedded and interhub connections as a form of transnational ordering. This article finds that, first, legal hubs are engines of doctrinal, procedural, and technological experimentation, but they have had limited impact on the reform of the wider jurisdictions within which they are embedded. Second, through relationships of competition and complementarity, legal hubs function to enhance normative settlement. However, many of the innovations (e.g., intrahub cross-institutional mechanisms between courts and arbitration institutions and interhub soft law such as memoranda of understanding) are untested, vulnerable to state politics, or even unlawful. Consequently, NLHs demonstrate the potential and fragility of "rule of law" in nondemocratic states that promote globalization against trends in the West.

The article begins with an introduction that defines NLHs, identifies their significance as jurisdictional carve-outs to otherwise weak legal systems of host states, and proposes an anthropology of legal hubs. Part I sets the analysis of NLHs against the backdrop of a partially deglobalizing Euro-American liberal legal order and a globalizing "Inter-Asian" one. Part II describes the methodology of "para-ethnography." Part III provides a theory of NLHs. Part IV builds on this theory to generate a continuum of NLHs. Part V assesses how NLHs and their host states affect each other, including hubs' positive spillover effects and host state pushback. Part VI examines the possibilities for interhub ordering.

Interpreting Forum Selection Clauses

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

Last week, I wrote about the interpretive rules that U.S. courts use to construe ambiguous choice-of-law clauses. Choice-of-law clauses are not, however, the only means by which contracting parties may exercise their autonomy under the rules of private international law. Parties may also select via contract the *forum* in which their disputes will be resolved. In the United States, these contractual provisions are generally known as forum selection clauses. Elsewhere in the world, such provisions are generally known as choice-of-court clauses. Since this post is largely focused on U.S. practice, I utilize the former term.

The question of whether and to what extent forum selection clauses should be enforceable is contested. It is also well beyond the scope of this post. Instead, I want to call attention to a related issue that has attracted considerably less scholarly attention. This is the issue of how to *interpret* the contractual language by which private actors exercise their autonomy to choose a forum. I explore this issue at some length in a forthcoming article. Over the past several decades, the courts in the United States have developed several interpretive rules of thumb—canons of construction, to use a fancy term—that assign meaning to ambiguous words and phrases that frequently appear in forum selection clauses. I discuss several of these interpretive rules below.

The first and most important of these interpretive rules help a court determine whether a forum selection clause is *exclusive* or *non-exclusive*. An exclusive forum selection clause requires that any litigation proceed in the named forum to the exclusion of all others. In a non-exclusive forum selection clause, by contrast, the parties merely consent to personal jurisdiction in the chosen forum or agree not to object to venue if the other party files suit in the chosen forum. Over the past few decades, U.S. courts have heard thousands of cases in which they were

called upon to distinguish exclusive clauses (sometimes described as mandatory clauses) from non-exclusive clauses (sometimes described as permissive clauses). To assist them in this task, they have developed a set of rules that I describe as the *canons relating to exclusivity*.

At the outset, it is important to emphasize that, under prevailing U.S. legal doctrine, forum selection clauses are presumptively *non-exclusive*. This rule is different from the one stated in Article 3(b) of the Hague Convention on Choice-of-Court Agreements, which provides that forum selection clauses are presumptively *exclusive*. In the United States, therefore, the presumption of non-exclusivity must be rebutted by so-called "language of exclusivity," i.e. language that signals the intent of the parties to litigate in the chosen forum and no other. If a clause states that litigation "must" proceed in the chosen forum or that the chosen forum shall have "exclusive jurisdiction" to hear the case, then the clause is exclusive. If a clause merely states that the parties "consent to jurisdiction" in the chosen forum or that they "agree not to object to venue" in the chosen forum, by comparison, the clause is non-exclusive.

Foreign actors should be aware that U.S. courts will frequently apply the canons relating to exclusivity to construe forum selection clauses selecting a foreign jurisdiction *even when* the contract contains a choice-of-law clause selecting foreign law. In one recent case, a Florida court was called upon to determine whether the following forum selection clause was exclusive or non-exclusive:

> *This Agreement shall be governed by and construed in accordance with the Laws of Malta and each party hereby submits to the jurisdiction of the Courts of Malta as regards any claim, dispute or matter arising out of or in connection with this Agreement, its implementation and effect.*

Notwithstanding the fact that the clause expressly stated that it was to be governed by the Laws of Malta, the Florida court looked exclusively to U.S. precedent to conclude that the clause was, in fact, non-exclusive, and that the suit could proceed in Florida state court. When dealing with U.S. counterparties, therefore, foreign companies are well advised to draft their forum selection clauses with an eye to U.S. interpretive rules *even when* the contract contains a choice-of-law clause selecting the law of their home jurisdiction.

The second set of interpretive rules are the *canons relating to scope*. These

canons are used to determine whether a forum selection clause applies exclusively to *contract* claims or whether it also applies to related *tort and statutory* claims. To date, U.S. courts have developed at least five different interpretive rules that purport to resolve this question and no one test has attracted majority support. The courts have, however, consistently held that forum selection clauses which state that the chosen forum shall hear all claims "relating to" the contract are broad enough to encompass tort and statutory claims with some connection to the agreement. To the extent that contracting parties want their forum selection clause to sweep broadly, therefore, they are well advised to include "relating to" language in their agreements. For readers interested in exactly how many angels can dance on the head of this particular pin, a detailed analysis of the various canons relating to scope is available here.

The third set of interpretive rules are the *canons relating to non-signatories*. These canons help the courts determine when a forum selection clause binds parties who did not actually sign the contract. Ordinarily, of course, individuals who have not signed an agreement cannot be bound by it unless they are third-party beneficiaries. In the context of forum selection clauses, however, U.S. courts have crafted a more lenient rule. Specifically, these courts have held that a non-signatory may be covered by a forum selection clause if that non-signatory is "closely related" to a signatory and it is "foreseeable" that the non-signatory would be bound. In practice, this means that parent companies, subsidiary companies, corporate directors, and agents, among others, are frequently permitted to invoke forum selection clauses set forth in *contracts they did not sign* to obtain the dismissal of cases filed outside the forum named in those clauses. Although this rule is difficult to justify under existing third-party beneficiary doctrine, U.S. courts have reasoned that it is necessary to avoid fragmented litigation proceedings and, at the end of the day, generally consistent with party expectations.

The fourth and final set of interpretive rules are the *canons relating to federal court*. In the United States, one may file a lawsuit in either state court or federal court. A recurring question in the interpretation of forum selection clauses is whether the parties wanted to litigate their disputes in state court *to the exclusion* of federal court or whether they wanted to litigate their disputes in *either* state or federal court. In order to distinguish one type of clause from the other, U.S. courts have drawn a sharp distinction between the word "of" and the

word “in.” When the parties select the “courts *of* New York,” they are deemed to have selected the state courts of New York to the exclusion of the federal courts because only state courts are “of” New York. When the parties select the “courts *in* New York,” by comparison, they are deemed to have selected either the state courts *or* the federal courts in New York because both sets of courts are physically located “in” New York.

Sophisticated parties may, of course, contract around each of the interpretive default rules discussed above by stating clearly that they want their clause to (a) be exclusive or non-exclusive, (b) apply or not apply to specific types of claims, (c) apply or not apply to non-signatories, or (d) select state courts, federal courts, or both. To date, however, many U.S. parties have failed to update their forum selection clauses to account for these rules. Chris Drahozal and I recently reviewed the forum selection clauses in 157 international supply agreements filed with the SEC between 2011 and 2015. We discovered that (i) approximately 30% of these clauses were ambiguous as to their intended scope, and (ii) none of these clauses specifically addressed the status of non-signatories. These findings—along with the results of a lawyer survey that I conducted in the summer of 2017—suggest that the feedback loop between judicial decisions *interpreting* contract language and the lawyers tasked with *drafting* contract language does not always function effectively.

Going forward, it would be fascinating to know whether any *non-U.S. courts* have developed their own interpretive rules that assign meaning to ambiguous words and phrases contained in forum selection clauses. If anyone is aware of any academic papers that have explored this issue from a non-U.S. perspective, I would be very grateful if you could bring it to my attention.

Deadline Extended! The Private

Side of Transforming the World – UN Sustainable Development Goals 2030 and the Role of Private International Law

Outline and Call for Papers



Update!

The planned public conference has to be postponed due to the Covid-19 pandemic and will now take place at the Max Planck Institute in Hamburg on **September 9-11 2021**, one year later than originally announced.

On September 10-11 2020, we will instead hold a closed online workshop among the project participants in order to feedback on the draft papers.

Deadline extended: May 17!

On 25 September 2015 the UN General Assembly unanimously adopted the Resolution Transforming our world: the 2030 Agenda for Sustainable Development. The core of the Resolution consists of 17 Sustainable Development Goals (SDGs) with 169 associated targets, and many more indicators. The SDGs build on the earlier UN Millennium Development Goals, "continuing development priorities such as poverty eradication, health, education and food security and nutrition". Yet, going "far beyond" the MDGs, they "[set] out a wide range of economic, social and environmental objectives". The SDGs add new targets, such as migration (8.8; 10.7), the rule of law and access to justice (16.3), legal identity and birth registration (16.9), and multiple "green" goals. And, more than the MDGs, they emphasize sustainability.

The SDGs have attracted significant attention. Although not undisputed – for example, regarding their assumption that economic growth may be decoupled from environmental degradation, and their lack of attention to the concerns of indigenous people – the SDGs have become a focal point for comprehensive thinking about the future of the world. This is so at least in the area of public law and public international law. With regard to private law, by contrast, there has been less attention, although the SDGs are directed not only to governments and parliaments, the UN and other international institutions, but also to "local authorities, indigenous peoples, civil society, business and the private sector, the scientific and academic community – and all people".

Certainly, public action and public law will not be enough if the goals are to be achieved. Even a spurious stroll through the SDGs demonstrates interplay with private international law (PIL). The SDGs name goals regarding **personal status and family relations**: "By 2030, provide legal identity for all, including birth registration" (16.9), or "Eliminate… forced marriage…"(5.3), both well-known themes of PIL. The SDGs focus on trade and thereby invoke **contract law** in multiple ways. On the one hand, they encourage freedom of contract when they call to "correct and prevent trade restrictions and distortions in world agricultural markets"… (2.b) or "promote the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms… as mutually agreed" (17.7). On the other hand, they insist on restrictions, for example, the "immediate and effective" eradication of forced labour, "modern slavery" and child trafficking ((8.7, 16.2); "by 2030 significantly reduce illicit financial and arms flows"…(16.4); "substantially reduce corruption and bribery in all their forms" (16.5). There is clearly also a role for **tort law**, including its application to cross-border situations, for example in order to fulfill goals regarding environmental protection and climate change.

Other targets concern not substantive private law, but **civil procedure**. Thus, the call to "ensure equal access to justice for all" (16.3) has traditionally been confined to equal treatment within one legal system. But as a global goal it invokes global equality: for instance, the ability for European victims of the Volkswagen Diesel scandal to access courts like US victims, the access to court of Latin American victims of oil pollution on a similar level to those in Alaska, and so forth. All of this has multiple implications in the sphere of cross-border civil procedure: the admissibility of global class actions and public interest actions,

judicial jurisdiction and recognition and enforcement of judgments concerning corporate social and environmental responsibility, and so on.

Finally, the SDGs have an institutional component. SDG 16 calls, among others, for "strong institutions," and it encourages cooperation. What comes into focus here, from a private international law perspective, are institutions like the Hague Conference and treaties like the Hague Conventions, but also other possible instruments of cooperation and institutionalization in the private international law realm.

All this suggests that there are plenty of reasons to examine the relationship between the SDGs and PIL. And since the 2030 Agenda explicitly calls on the private sector and the academic world to cooperate for its implementation, and time is running fast, such an examination is also timely, indeed urgent. With this in mind, Ralf Michaels**,** Verónica Ruiz Abou-Nigm and Hans van Loon are organizing a conference at the Max Planck Institute in Hamburg on **10-12 September 2020.** Speakers will systematically analyze the actual and potential role of Private International Law for each of the seventeen SDGs. The overall purpose is twofold:

(1) to raise awareness of the relations between the SDGs and private international law as it already exists around the world. Private international law is sometimes thought to deal with small, marginal issues. It will be important, for those inside and outside the discipline alike, to generate further awareness of how closely its tools and instruments, its methods and institutions, and its methodologies and techniques, are linked to the greatest challenges of our time.

(2) to explore the potential need and possibilities for private international law to respond to these challenges and to come up with concrete suggestions for adjustments, new orientations and regional or global projects. This exploration can aim to identify the need for further and/or new research agendas in specific fields; the development of new mechanisms and approaches, the usefulness of new international cooperation instruments, be it new Conventions at the Hague Conference or elsewhere, or be it new institutions.

Call for Papers

Submission deadline: May 17, 2019.

We are inviting contributions to this project. Interested applicants should submit the application by **May 17, 2019.** We ask you to **identify which of the 17 development goals you want to address**, which (if any) work you have already done in that area, and, in a few paragraphs (up to a **maximum of 500 words**), what you intend to focus on. **We plan to select participants and invite them by the end of May 2019.** Selected participants would be expected to come to Hamburg to present research findings in the conference, and to provide a **full draft paper by the end of June 2020** (in advance of the conference), for discussion and subsequent publication as part of an edited collection to be published after the conference. We expect to be able to fund all travel and accommodation costs. If you are interested, please send your brief application to Britta Arp (@sekretariat-michaels@mpipriv.de) in Hamburg. Please title your email "SDG2030 and PIL," and your document "SDG2030 and PIL_lastname". We look forward to hearing from you.

Ralf Michaels, Director, Max Planck Institute for Comparative and International Private Law, Hamburg;

Verónica Ruiz Abou-Nigm, Senior Lecturer in International Private Law, University of Edinburgh;

Hans van Loon, former Secretary General of the Hague Conference.