The renaissance of the Blocking Statute

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

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

Past and present of the Blocking Statute

The European Blocking Statute (Regulation (EC) 2271/96) was originally enacted in 1996 as a counter-measure to the American "Helms-Burton Act" which, at the time, compromised European trade relations with Cuba.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

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

and updated: The Blocking Statute.

Protection by prohibition

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

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

Under the ECJ's *Nikiforidis* doctrine, the relevant sanctions are precluded from being applied as legal rules, but not from being considered as facts under substantive law. In this context, Art. 5 of the Blocking Statute will provide clear, albeit very one-sided, guidance for a number of issues. For instance, parties will not be able to contractually limit the scope of performance to what is permissible under relevant U.S. provisions, nor can they successfully claim a right to withhold performance or terminate contracts based on the justified fear of penalties imposed by U.S. authorities.

The "catch-22" situation

It does not require much number-crunching to see that to many globally operating companies, succumbing to U.S. pressure will seem like the the most, or even only, reasonable choice. The portfolio of U.S. penalties includes a denial of further

access to the U.S. market and criminal liability of the natural persons involved. U.S. authorities are not shy on using these measures either, as recently evidenced by the spectacular arrest of Huawei's CFO in Canada on charges of breaching sanctions against Iran. Thus, opting for a breach of the Blocking Statute and accepting the resulting fine under the Member State's domestic law may strike many companies as a pragmatic choice.

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

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

The clawback claim

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

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

Conclusion

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

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

Service of documents in the European Judicial Space: on the Commission's proposal for amending Regulation 1393/2007

Guest post by Dr. Stefano Dominelli of the University of Milan

In recent times, the European Commission has investigated the possibility of amending Regulation 1393/2007 on the service of judicial and extra-judicial documents between Member States. Such instrument has already settled some issues practitioners encountered under the application of the previous legal framework, in particular related to the administrative cooperation regime, the linguistic exception to service, and direct service by registered mail – or equivalent measure.

The need for a proper functioning of the cross-border service of documents mechanisms is properly highlighted in the Commission's proposal, and new rules are suggested to further implement the system.

A recent volume, *Current and future perspectives on cross-border service of documents*, by Stefano Dominelli (Univ. of Milan, Dep. of International, Legal, Historical and Political Studies), explores and addresses the Commission's proposals.

The functioning of Regulation 1393/2007 is in the first place reconstructed by the author in particular by taking into consideration the case law of a number of Member States. It is against this background that the proposed amendments are commented.

Amongst the numerous points, the book dwells upon proposed new art. 3a, and its possible impact. Acknowledging technical evolutions, communication and exchange of documents between transmitting and receiving agencies in the diverse Member States should in the future strongly rely on e-transmission. According to proposed new art. 3a, only if electronic transmission is not possible due to an unforeseen and exceptional disruption of the decentralised IT system,

transmission shall be carried out by the swiftest possible alternative means. The author advises caution in the matter, as the Commission itself argues in the explanatory memorandum of the proposal that modern channels of communication are in practice not used due to old habits, legal obstacles, and lack of interoperability of the national IT systems. In this sense, the work proposes that, at least for time being, a transition to e-transmission between agencies should be encouraged as an alternative method of transmission, rather as being the only available option.

A number of proposals are made as regards the right of the addressee to refuse service on linguistic grounds. In the first place, with a solution supported in the volume, a new Annex to the Regulation should clearly set out the means and methods of the addressee to refuse service, a matter that is currently not expressly dealt with by the regulation.

The time frame for the addressee to refuse service based on linguistic grounds should become two weeks, rather than one, a solution that is strongly endorsed by the author of the volume as it is deemed to be a more satisfying point of balance between the opposing interests of the prospective plaintiff and the defendant.

Nonetheless, the work highlights that some issues that have emerged in the case law still are not addressed in the Commission's proposal. In the first place, conflict of laws and international civil procedure issues are not referenced in the text, even though questions as the competent court before which violations of the rules on service can be invoked or which court has to investigate on the legitimate refusal to service based on linguistic grounds, have consistently been addressed by judges.

Additionally, the Commission's proposal gives to this day no clear indication on the refusal to service based on linguistic grounds when the addressee is a corporation, a matter that, according to the author, should deserve at least some guidance in the recitals of the instrument.

The volume can be freely downloaded at https://ssrn.com/abstract=3259980

The Hague Convention on the International Protection of Adults – A position paper by experts involved in the ELI Adults' Project

The European Law Institute (ELI) has launched in 2017 a project on *The Protection of Adults in International Situations*.

The adults to which the project refers are persons aged 18 or more who are not in a position to protect their interests due to an impairment or insufficiency of their personal faculties.

The project purports to elaborate on the resolution of 1 June 2017 whereby the European Parliament, among other things, called on the European Commission to submit 'a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity'.

The Commission has made known that it does not plan to submit such a proposal in the near future. At this stage, the Commission's primary objective is rather the ratification of the Hague Convention of 13 January 2000 on the International Protection of Adults by the Member States that have not yet done so.

The ELI project builds on the idea that the Convention, which is currently in force for twelve States (ten of which are also Member States of the Union), generally provides appropriate answers to the issues raised by the protection of adults in situations with a foreign element. That said, the team of experts charged with the project has taken the view that it would be desirable for the Union to legislate on the matter, in a manner consistent with the Convention, with the aim of improving the operation of the latter among the Member States.

The ultimate goal of the project is to lay down the text of the measure(s) that the

Union might take for that purpose.

While the project is still in progress, a position paper has been issued on 3 December 2018, signed by some of the members of the project team, to illustrate the main views emerged so far from the discussion.

The paper suggests that the Union should consider the adoption of measures aimed, *inter alia*, to:

(*i*) enable the adult concerned, subject to appropriate safeguards, to choose in advance, at a time when he or she is capable, the Member State whose courts should have jurisdiction over his or her protection: this should include the power to supervise guardians, persons appointed by court or by the adult (by way of a power of attorney), or having power *ex lege* to take care of the adult's affairs;

(*ii*) enlarge the scope of the adult's choice of law, so that he or she can also choose at least the law of the present or a future habitual residence, in addition to the choices currently permitted under Article 15 of the Hague Convention of 2000;

(*iii*) outline the relationship between the rules in the Hague Convention of 2000 and the rules of private international law that apply in neighbouring areas of law (such as the law of contract, maintenance, capacity, succession, protection against violence, property law, agency);

(*iv*) specify the requirements of formal and material validity of the choice of the law applicable to a private mandate, including the creation and exercise (and supervision by the courts) of such mandates;

(*v*) address the practical implications of a private mandate being submitted (by virtue of a choice of law, as the case may be) to the law of a State whose legislation fails to include provisions on the creation or supervision on such mandates, e.g. by creating a "fall-back" rule in cases of choice of the "wrong" law, which does not cover the matters addressed (or at least applying Article 15(1) of the Hague Convention of 2000);

(*vi*) extend the protection of third parties beyond the scope of Article 17 of the Hague Convention of 2000 to the content of the applicable law, and possibly also to lack of capacity (or clarifying that the latter question is covered by Article 13(1)

or the Rome I Regulation);

(*vii*) make it easier for those representing and/or assisting an adult, including under a private mandate, to provide evidence of the existence and scope of their authority in a Member State other than the Member State where such authority has been granted or confirmed, by creating a European Certificate of Powers of Representation of an Adult (taking into account the experience developed with the European Certificate of Succession);

(*viii*) clarify and make more complete the obligations and procedures under Articles 22, 23 and 25 of the Convention in order to ensure 'simple and rapid procedures' for the recognition and enforcement of foreign measures; further reflection is needed to determine whether, and subject to which safeguards, the suppression of exequatur would be useful and appropriate for measures of protection issued in a Member State;

(*ix*) facilitate and encourage the use of mediation or conciliation.

The ELI project will form the object of a short presentation in the framework of a conference on *The Cross-border Protection of Vulnerable Adults* that will take place in Brussels on 5, 6 and 7 December 2018, jointly organised by the European Commission and the Permanent Bureau of the Hague Conference on Private International Law.

Blockchain Networks and European Private International Law

Written by Anton S. Zimmermann, Institute for Comparative Law, Conflict of Laws and International Business Law (Heidelberg)

Blockchain technology and its offspring have recently attracted considerable

attention in both media and scholarship. Its decentralised nature raises several legal questions. Among these are, for example, the challenges that blockchain technology poses to data protection laws and the threats it creates with regard to the effective enforcement of legal claims.

This post sheds light on issues of private international law relating to blockchain networks from a European perspective.

The concept of blockchain technology and its fields of application

Blockchain technology – put simply – involves two fundamental concepts. *Firstly*, data is written into so-called "blocks". Each block of data is connected to its respective predecessor using so-called "hashes" that are calculated for each individual block. Consequently, each block does not only include its own hash but also the hash of its predecessor, thereby fixating consecutive blocks to one another. The result is a chain of blocks – hence the name blockchain. *Secondly*, the entire blockchain is decentrally stored by the networks' members. Whenever a transaction concerning the blockchain is requested, it isn't processed by just one member. On the contrary: several members check the transaction and afterwards share their result with the other members in what can best be described as a voting mechanism: From among potentially different results provided by different members, the result considered correct by the majority prevails. This mechanism bears the advantage that any attempt to tamper with data contained in a blockchain is without consequence as long as only the minority of members is affected.

The potential fields of application for blockchain technology are manifold and far from being comprehensively explored. For example, blockchain technology can replace a banking system in the context of cryptocurrencies such as Bitcoin or it can be used to de-personalize monitoring and sanctioning of non-performance within a contractual relation. In short: Blockchain technology is an option whenever data is to be stored unalterably in a certain order without a (potentially costly) centralised monitoring entity.

Applicable rules of private international law

The first issue regarding blockchain technology and private international law concerns the applicable conflict rules. Blockchain technology involves a technical

voting mechanism and, hence, requires a certain degree of cooperation between the members of the network. One might, therefore, be tempted to assume that blockchain networks constitute some kind of company. If this were indeed the case, the written conflict rules, especially those of the Rome I Regulation, would not be applicable (cf. Art. 1(1) lit. f) Rome I Regulation) and the unwritten conflict rules relating to international companies would claim application instead. However, this approach presupposes that the factual cooperation within a blockchain network suffices to create a company in the sense of European private international law. This is, however, not the case. The constitution of blockchain networks is only cooperative in a technical way, not in a legal one. The network is not necessarily based on a (written or unwritten) cooperation agreement and, therefore, lacks an essential prequisite of a company. Consequently, the determination of the law applicable to blockchain technology is not necessarily a question of international company law. Parties are, however, not precluded from creating a company statute that reflects the decentral structures of blockchain technology, whereas the mere decision to engage in a blockchain network does not suffice to create such a company.

Thus, the private international law of blockchain technology must also take into account the Rome I Regulation as well as the Rome II Regulation. Unfortunately, blockchain networks *per se* are not suitable as connecting factors: *firstly*, a *de*centralised network naturally escapes the classical European principle of territorial proximity. *Secondly*, the use of blockchain technology is usually not an end in itself but functionally subordinate to the purpose of another act, e.g. a contract, a company or a tort. This factor should, however, not be seen as a problem, but as a hint at a potential solution: although a *super*ordinate act may render a blockchain network insufficient to determine the substantive law, the superordinate act itself can serve as a connecting factor.

The following two examples illustrate the proposed method of accessory connection and show that the European legal framework relating to private international law is capable to cope with several questions raised by novel phenomena such as blockchain technology. The remaining questions have to be dealt with on the basis of the principle of proximity.

First scenario: blockchain networks within centralised

contracts

Blockchain technology often serves to achieve the goal of a centralised act. In this case, legal questions regarding the use, misuse and abuse of blockchain technology, e.g. access rights and permissions to write regarding data contained in a blockchain, should be governed by the substantive law governing the superordinate act.

To give an example: The parties of a supply chain decide to implement a blockchain in order to collectively store data concerning (1) when and in what quantity products arrive at their warehouse and (2) certificates of quality checks performed by them. As a result, production routes and quality control become more transparent and cost-efficient along the supply chain. Blockchain technology can thus be used e.g. to ensure the authenticity of drugs, food safety etc. The legal questions regarding the smart contract should in this scenario be governed by the substantive law governing the respective purchase agreement between the parties in question. The choice of law rules of the Rome I Regulation, hence, also determine the substantive law regarding the question how blockchain technology may or may not be used in the context of the purchase agreement. The application of blockchain technology becomes a part of the respective contract.

If one were to apply the substantive law governing the contract only to the contract itself but not to blockchain technology, one would create unjust distinctions: The applicable law should not depend on whether the parties pay an employee to regularly check on their warehouse and issue certificates in print, or whether they employ blockchain technology, achieving the same result.

Second scenario: blockchain networks within *de*centralised companies

The scenario described above shows that the decentralised nature of blockchain networks does not necessarily require special connecting criteria. This is a consequence of the networks' primarily serving function to the respective superordinate entity.

Difficulties arise when parties agree on a company statute whose content reflects the decentralisation of blockchain technology. In this scenario, there is a decentral company that utilises only decentral technology as its foundation. A much-discussed case of this kind was "The DAO", a former company based on

blockchain technology. The DAO's establishment was financed by investors providing financial resources in exchange for so-called tokens. These tokens can be described as the digital counterpart of shares and hence as an expression of the respective investor's voting rights. Within the resulting investment community, voting rights were exercised in order to decide on investment proposals. The results of the votes were implemented automatically. The company thus consisted only of the investors and information technology but had no management body, no administrative apparatus, and no statutory seat.

Hence, the DAO did not only lack a territorial connection on the level of information technology, but also on the level of the companies' legal constitution: it neither had an administrative seat nor a statutory seat. The connecting factors usually applied to determine the law applicable to companies were, therefore, ineffective. Because the DAO was a company, it was also exempt from the scope of the Rome I Regulation (cf. Art. 1 (2) lit. f. Rome I Regulation).

This vacuum of traditional conflict rules necessitates the development of new ones. There is no other valid connecting factor that could result in a uniform *lex societatis*: Especially the habitual residence or nationality of the majority of members is arbitrary as the company is built on a concept of decentralism and territorial detachment. Moreover, possible membership changes would lead to an intertemporally fluctuating statute whose current status could hardly be determined. The lack of a uniform connecting factor raises the question whether or not the ideal of a uniform *lex societatis*can be upheld. The fact that members of the DAO do not provide a feasible uniform connecting factor suggests a fragmentation of the applicable law (*dépeçage*).

Assuming that there is no uniform *lex societatis* for the DAO and that the applicable substantive law has to be fragmented, acts by the company become conceivable connecting factors. One might, for example, assume that preliminary questions concerning the company, i.e. its legal capacity, are subject to the substantive law that would govern the act in question. If the DAO enters into a contract that – given its validity – is governed by German substantive law according to Art. 4 of the Rome I-Regulation, German law should also determine the legal capacity of the DAO with respect to this particular contract. One might object that the Rome I-Regulation exempts both companies and legal capacity from its scope of application. This, however, only means that the Regulation is *not binding* within those fields. As the conflict rules of International company law do

not lead to conceivable results, the principle of proximity has to be the guiding factor in the search for a new unwritten conflict rule. As the closest territorial connections of decentral organisations are their respective acts, e.g. contracts, the principle of proximity suggests that the respective act is what determines the closest connection of the company. The resulting conflict rule states an accessory subjection of the *lex societatis* to the law governing the company's respective acts. While the proposed solution does indeed lead to an *indirect* application of the Rome I Regulation, it nonetheless constitutes a self-reliant, unwritten conflict rule which is consequently not precluded by the catalogue of exemptions contained in the Rome I Regulation.

This fragmentation of applicable laws turns a membership in the DAO into a risky und legally uncertain endeavour, as – neglecting the tremendous practical and legal problems of the enforcement of claims – different legal orders impose different requirements for legal capacity, limitation of liability and other privileges.

Concluding thoughts

Blockchain technology is a novel phenomenon, but it does – in most cases – not necessitate new connecting factors or conflict rules. If, however, the legal entity in question mirrors the decentralised structure of a blockchain network, the legal assessment becomes more complicated.

In those cases, the usually uniform*lex societatis*has to be fragmented which leads to a high chance of personal liability of the members. Whether or not one accepts this fragmentation largely depends on the definition of the hierarchy of technical-economic progress and the *lex lata*. In my opinion, technical developments may and should act as an impetus to *legislators*for legislative amendments but should not prevail over the existing rules of law. Those who desire legal advantages – such as a limitation of liability or even a uniform statute – must in exchange fulfil and adhere to the laws' requirements.

This post is based on A. Zimmermann, Blockchain-Netzwerke und Internationales Privatrecht – oder: der Sitz dezentraler Rechtsverhältnisse, published in IPRax 2018, 568 ff. containing references to further literature.

Private International Law, Labour conditions of Hungarian truck drivers, and beyond

Written by Veerle Van Den Eeckhout

On 23 November 2018 the Dutch Supreme Court referred a question for preliminary ruling to the CJEU in a case with regard to labour conditions of Hungarian truck drivers, particularly with regard to the Posting of Workers Directive, 96/71/EC (see here for the Dutch version, see here for the decision of the same day).

The preliminary question will certainly attract the attention of many who have a particular interest in the specific theme of labour conditions of mobile East European workers – a theme in which rules of Private International Law matter.

The case, and its theme, might also be significant in a broader sense: it could be seen as taking place against the backdrop of discussions about the status quo of Private International Law, about current evolutions within Private International Law and the future of Private International Law, about the so-called "neutrality" of Private International Law.

These current evolutions and discussions might be analysed from the perspective of the "instrumentalization" of Private International Law. Questions about the instrumentalization of Private International Law might, ultimately, be framed as questions about the role and potential of the discipline of Private International Law with regard to social justice and global justice. Such questions arise with regard to the regulation of themes that are often put forward as hot topics in discussions about globalization (global / transnational) and social justice. Various case studies could illustrate this, in particular the theme of Corporate Social Responsibility, the theme of labour migration/labour exploitation, the theme of migration law (in the broad sense of the word – including e.g. also social security claims) in its interaction with Private International Law. The cases might concern

both the regional-European setting (where legal arguments such as European freedoms arise) and the global setting (where legal arguments such as European freedoms do not arise as such).

When carrying out such an analysis, current developments – such as: recent developments regarding employee protection (recent revision of the Posting Directive, "Ryanair", …), recent developments regarding consumer protection (in various shapes and forms), recent attention for the interaction between migration law/refugee law and Private International Law, etc. – might be taken into account. Such an analysis could be placed in a context of current calls to the discipline of Private International Law to play a more prominent role cq to exercise the role it deserves or should exercise cq "to do its bit" (see here for more on this).

Put this way, the preliminary question of the Dutch Supreme Court interests the European road transport, but the interest for this case might also go beyond the particular characteristics and merits of this case and might even go beyond the specific theme.

On 13 December Fieke van Overbeeke will defend her phd thesis at the University of Antwerp on the exact topic of this preliminary question (under the supervision of Thalia Kruger and Herwig Verschueren). Fieke analysed the law applicable to the employment contracts of lorry drivers in the light of the Rome I Regulation and the Posting of Workers Directive.

"The Nature and Enforcement of Choice of Law Agreements" (2018) 14 Journal of Private International Law 500-531

This blog post presents a condensed version of Dr Mukarrum Ahmed's (Lancaster University) article in the December 2018 issue of the Journal of Private

International Law. The blog post includes specific references to the actual journal article to enable the reader to branch off into the detailed discussion. The journal article is a companion publication to the author's recent book titled The Nature and Enforcement of Choice of Court Agreements: A Comparative Study (Oxford, Hart Publishing 2017).

The article examines the fundamental juridical nature, classification and enforcement of choice of law agreements in international commercial contracts. At the outset, it is observed that choice of law considerations are relegated to a secondary position in international civil and commercial litigation before the English courts as compared to international jurisdictional and procedural issues. (See pages 501-503 of the article) Significantly, the inherent dialectic between the *substantive* law paradigm and the *internationalist* paradigm of party autonomy is harnessed to provide us with the necessary analytical framework to examine the various conceptions of such agreements and aid us in determining the most appropriate classification of a choice of law agreement. (See pages 504-508 of the article and Ralf Michaels, 'Party Autonomy in Private International Law – A New Paradigm without a Solid Foundation?' (2013) 15 *Japanese Yearbook of Private International Law* 282) In binary terms, we are offered a choice between choice of law agreements as mere "factual" agreements on the one hand or as promises on the other. However, a more integrated and sophisticated understanding of the emerging *transnationalist* paradigm of party autonomy will guide us towards a conception of choice of law agreements as contracts, albeit contracts that do not give rise to promises *inter partes*. This coherent understanding of both the law of contract and choice of law has significant ramifications for the enforcement of choice of law agreements. It is argued that the agreement of the parties on choice of law will be successful in contracting out of the default choice of law norms of the forum and selecting the applicable law but cannot be enforced by an action for "breach" of contract.

It is argued that the emerging *transnationalist* paradigm of party autonomy supports a conception of choice of law agreements which borrows from both the *internationalist* and *substantive* law paradigms of party autonomy but cannot be comprehensively justified by either. This assimilated and coherent understanding of choice of law and the law of contract has led to the conclusion that the choice of law clause is a procedural contract but a contract nonetheless. (See Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in*

the Conflict of Laws (Brill Nijhoff 2015) 145 and Maria Hook, *The Choice of Law Contract* (Oxford, Hart Publishing 2016) Chapter 2)

Professor Briggs' promissory analysis of choice of law agreements is a seminal contribution to legal scholarship. (See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) Chapter 11) However, it is unlikely that the parallel existence of choice of law agreements as privately enforceable agreements will attract the attention of the CJEU and the EU legislature. The common law judicial authority coupled with the preponderance of opposing academic opinion has meant that the conventional "declaratory" classification of choice of law agreements has prevailed over the "promissory" approach. (See pages 508-517 of the article; *Ace Insurance v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (Brereton J); *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry* (*The Lucky Lady*) [2013] EWHC 328 (Comm), [2013] 2 Lloyd's Rep 104, [2013] 2 CLC 461 (Andrew Smith J)) In assessing the relevance and significance of attributing an obligation to adhere to the chosen law in a choice of law agreement, the *internationalist* paradigm's understanding of the fundamental nature of private international law rules and their inherent function has helped develop the counterargument.

If the choice of law regime of the forum is conceptualised as a set of secondary rules for the allocation of regulatory authority, the descriptive, normative and interpretive narrative of the promissory perspective loses its perceived dominance and coherence as it fails to yield a complete and satisfactory justification for what we really understand by those rules. In the mantle of secondary power conferring rules as opposed to primary conduct regulating rules, choice of law rules perform a very significant public function of allocating regulatory authority. From this perspective, it is misplaced and misconceived to interpret choice of law clauses as promissory in essence. The promissory justification does not adequately account for the authorisation of party autonomy by the choice of law rules of the forum, the supervening application of the laws of the forum and other states and ultimate forum control. (See pages 517-524 of the article) Moreover, the pragmatic attractiveness of anti-suit injunctions and claims for damages for breach of choice of law agreements may be unsound in principle from the standpoint of a truly multilateral conception of private international law based on mutual trust or a strong notion of comity. An international private international law will always seek to promote civil judicial cooperation between legal systems rather than

encourage the clash of sovereign legal orders by interfering with the jurisdiction, judgments and choice of law apparatus of foreign courts. (See pages 524-529 of the article)

To reiterate, the more reconciled *transnationalist* paradigm of party autonomy strikes a balance between the competing demands of the *internationalist* and the *substantive* law paradigms. It is argued that a conception of a choice of law agreement as a contract, albeit one that does not give rise to any promises *inter partes* provides an appropriate solution.

On the one hand, the choice of law agreement is a legally binding contract as opposed to a mere "factual" agreement. On the other hand, the function of this agreement is not to regulate private law rights and obligations *inter partes*: it is to contract out of the forum's default choice of law norms and to select the applicable law. Such a contract will not contradict the intrinsic logic of choice of law rules because the international allocative function remains paramount and is not compromised in any way by promises *inter partes*. The fact that the choice of law agreement is a contract which only gives rise to procedural consequences does not mean that it is not a contract *per se*. (See pages 530-531 of the article)

The saga of the Greek State bonds and their haircut: Hellas triumphans in Luxemburg. Really?

By Prof. Dr. Peter Mankowski, University of Hamburg

The Greek State financial crisis has sent waves of political turmoil throughout the Eurozone and is certainly going to continue. It has provided much enrichment for International Procedural Law, yet not for the creditors of Greek State bonds. 'Haircut' has become an all too familiar notion and part of the Common Book of Prayers of State bonds. Some creditors, particularly from Germany and Austria, were not content with having their hair cut involuntarily and put it to the judicial

test. Greece has thrown every hurdle in their way which she could possibly muster: service, immunity, lack of international jurisdiction. The service issue was sorted out by the CJEU in *Fahnenbrock* (Joined Cases C-226/13 et al., ECLI:EU:C:2015:383), already back in 2015. The German BGH and the Austrian OGH took fairly different approaches, the former granting immunity to Greece because of the haircut, the latter proceeding towards examining the heads of international jurisdiction under the Brussels Ibis Regulation. Quite consequently, the OGH referred some question concerning Art. 7 (1) Brussels Ibis Regulation to the CJEU. In its recent *Kuhn* decision (of 15 November 2018, Case C-308/17, ECLI:EU:C:2018:911), the CJEU answered that the entire Brussels Ibis Regulation would not be applicable by virtue of its Art. 1 (1) 2nd sentence since the CJEU believed the haircut to constitute an *actum iure imperii*. Rapporteur was the newly (only six days before) promoted Vice President *Rosario Silva de Lapuerta* from Spain. The core of the judgment is surprisingly succinct, not too say: short, comprising only some ten paragraphs:

> *34 Thus, the Court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of that regulation, it is otherwise where the public authority is acting in the exercise of its public powers (judgment of 15 February 2007, Lechouritou and Others, C?292/05, EU:C:2007:102, paragraph 31 and the case-law cited).*
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> *35 That applies, namely, to disputes resulting from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals (judgment of 15 February 2007, Lechouritou and Others, C?292/05, EU:C:2007:102, paragraph 34).*
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> *36 As regards the dispute in the main proceedings, it must, consequently, be established whether its origin stems from the acts of the Hellenic Republic, which arise from the exercise of public authority.*
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> *37 As stated by the Advocate General in points 62 et seq. of his Opinion, the manifestation of that exercise is the result of both the nature and the modalities of the changes to the contractual relationship between the Greek State and the holders of the securities at issue in the main proceedings and the exceptional context in which those changes took place.*

38 Those securities, following the adoption of Law 4050/2012 by the Greek legislator and the retroactive introduction of a CAC according to that law, were replaced by new securities with a much lower nominal value. Such a substitution of securities was not provided for in the initial borrowing terms or in the Greek law in force at the time that the securities subject to those conditions were issued.

39 Thus, that retroactive introduction of a CAC allowed the Hellenic Republic to impose on all of the holders of securities a substantial amendment to the financial terms of those securities, including on those that would have sought to oppose that amendment.

40 Furthermore, the unprecedented reliance on the retroactive inclusion of a CAC and the resulting amendment to the financial terms took place in an exceptional context, in the circumstances of a serious financial crisis. They were namely dictated by the necessity, within the framework of an intergovernmental assistance mechanism, to restructure the Greek State's public debt and to prevent the risk of failure of the restructuring plan of that debt, to avoid that State failing to pay and to ensure the financial stability of the euro area. By declarations of 21 July and 26 October 2011, the euro area Heads of State or Government affirmed that, regarding the participation of the private sector, the situation of the Hellenic Republic called for an exceptional solution.

41 The exceptional nature of that situation also results from the fact that, according to Article 12(3) of the EMS Treaty, CACs are to be included, as of 1 January 2013, in all new euro area government securities with maturity above one year, in a way which ensures that their legal impact be identical.

42 It follows that, having regard to the exceptional character of the conditions and the circumstances surrounding the adoption of Law 4050/2012, according to which the initial borrowing terms of the sovereign bonds at issue in the main proceedings were unilaterally and retroactively amended by the introduction of a CAC, and to the public interest objective that it pursues, the origin of the dispute in the main proceeding stems from the manifestation of public authority and results from the acts of the Greek State in the exercise of that public authority, in such a way that that dispute does not fall within 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012.

> *43 In those circumstances, the answer to the question referred is that Article 1(1) of Regulation No 1215/2012 is to be interpreted as meaning that a dispute, such as that at issue in the main proceedings, relating to an action brought by a natural person having acquired bonds issued by a Member State, against that State and seeking to contest the exchange of those bonds with bonds of a lower value, imposed on that natural person by the effect of a law adopted in exceptional circumstances by the national legislator, according to which those terms were unilaterally and retroactively amended by the introduction of a CAC allowing a majority of holders of the relevant bonds to impose that exchange on the minority, does not fall within 'civil and commercial matters' within the meaning of that article.*

This mirrors sometimes to the letter the core of the opinion delivered by A-G *Bot* from France (delivered on 4 July 2018, ECLI:EU:C:2018:528 paras. 62-76). Only rarely the CJEU has argued in such an openly political manner when deciding issues of the Brussels I/Ibis regime. The underlying *ratio* is evident: Greece must not fall for otherwise the Eurozone in its entirety is feared to break down. The individual creditors' particular interests are sacrificed for the common good of Greece, the Eurozone and the EU. (The so called Troika including the EU was mainly responsible for the introduction of the haircut into Greek law by demanding the reduction of Greece's public debt.)

Yet a second, more technical thought appears necessary: Hellas might have triumphed in the concrete case. But the victory she scored might turn out to be a Pyrrhic victory. Declaring Art. 1 (2) 2nd sentence Brussels Ibis Regulation operational wipes out for instance jurisdiction under Art. 7 (1) Brussels Ibis Regulation – but it also wipes out Art. 5 Brussels Ibis Regulation. Greece as the defendant is left to the possibly tender mercy of the *national* jurisdiction rules of her EU partner States once one is prepared to proceed to the realm of international jurisdiction. Hence, as to the admissibility of the claims all boils down to the question whether Greece enjoys immunity for her haircut administered. *Kuhn* in fact reduces the number of defenses available to Greece by one.

Legal Aid Reform in the Netherlands: LASPO 2.0?

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

Early November, the Dutch Minister of Legal Protection Sander Dekker presented his plans for the overhaul of the Dutch system for subsidized legal aid. In his letter of 9 November 2018 to Parliament Dekker cites the increasing costs of subsidized legal aid over the past two decades (42% in 17 years) as one of the primary reasons underlying the need for reform.

The proposed intervention in legal aid follows after years of research and debate. Last year, the Van der Meer Committee, the third committee in 10 years, concluded that the legal aid system is functioning well, but that it was suffering from 'overdue maintenance' and that especially the fees for legal aid professionals are no longer up to date. Currently, lawyers miss out on about 28 per cent of the hours they work on legal aid cases. According to said Committee, an additional 127 million euros would be needed annually to compensate for that gap in income. Such an increase in expenditure seems off the table given that the coalition agreement of the current government stipulates that 'the legal aid system will be revised within the current budgetary framework'. A budget that has come under additional pressure due to recent failed attempts at digitizing Dutch procedure under the Quality and Innovation Program (KEI) (see this blogpost).

Strikingly, these reform plans coincide with alarming criticism from the Dutch judiciary as to the current state of affairs in the Dutch justice system. On 8 November, in an unprecedented move, a group of concerned judges and counsellors sent a letter to Parliament expressing their concerns about the conditions under which they have to work and the perceived threat to the future independence of the judiciary and in which they denounce the exclusive focus on finances.

Those with an international outlook will recognise these suggested reforms as part of an international trend in constricting public spending on the civil justice system in general and subsidized legal aid specifically. Especially the fairly recent reforms in England and Wales following the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) of 2012 may provide a cautioning example for other jurisdictions.

The proposed changes to the Dutch legal aid system, as well as the rhetoric used to justify such reforms, closely resembles developments in the English civil justice system over the past two decades. As Dame Hazel Genn analysed in 2008, looking back at the beginning of transformative changes in England and Wales proposed in the infamous *Woolf report* on Access to Justice in 1995: "On the one hand the report seeks to break down barriers to justice, while on the other it sends a clear message that diversion and settlement is the goal, that courts exist only as a last resort and, perhaps, as a symbol of failure." Similarly, the current Dutch government has as one of its aims to stimulate out-of-court dispute resolution, and the proposed reforms are geared significantly towards pre-judicial triage, (online) information and advice, and out-of-court settlement.

In many ways the problem analysis presented by the Minister mirrors those made in England at the end of the 20th Century: the ever-increasing cost of legal aid (now over 400 million annually) is seen as unsustainable and perverse incentives in the current system encourage misuse by lawyers. However, the Minister also looks closer to home and concludes that the government is the counterparty in the majority (about 60 percent) of the cases in which subsidized legal aid is used. Most of these cases include criminal law and asylum law, but also (almost 11 percent) other administrative procedures with government bodies and municipalities. This is often based on complex legislation, or legislation in which much of the details are deliberately left to practice, with court proceedings as a result. The implicit call for de-judicialization is therefore accompanied by a call for de-juridification.

If the discussed English reforms are any gauge of what we can expect in the Netherlands, those with their eye on the access to justice ball are paying attention. The reforms in England included drastic cuts to legal aid, which saw entire categories of litigants, especially in family law, suddenly unable to access legal aid. As a result the English system today is filled with litigants without legal

representation.

While such a dramatic increase in litigants in person is not likely to present itself in the Netherlands – the Dutch system has mandatory legal representation for all but sub-district courts – the reforms are bound to leave some portions of potential justice-seekers out in the cold. The Minister's proposal includes the creation of so-called 'legal aid packages' aimed at a more holistic approach to legal issues, and with much more focus on self-reliance of the citizen, seemingly underplaying the fact that those citizens that rely on legal aid are generally less self-reliant.

What may provide a sense of cautious optimism is that the proposal includes a commitment to ongoing and iterative review of the measures and experiments that are part of the overhaul. In that sense, the proposed reforms to the Dutch system, at least as far as legal aid is concerned, do not seem to be destined to make the mistake made in other jurisdictions, where sweeping reforms were implemented in the absence of any research or understanding of the dynamics of civil justice.

Much hinges on the degree to which this commitment finds meaningful and consequential follow-up. The proposed reforms will be discussed in the Dutch Parliament on 19 November 2018

More information on this topic? Don't hesitate to contact us (hoevenaars@law.eur.nl).

Policy discussions on ADR/ODR in France: towards greater regulation for the Legaltech?

Current policy discussions on ADR/ODR in France: towards greater regulation for the *Legaltech*?

By Alexandre Biard, Erasmus University Rotterdam (postdoc researcher ERC project Building EU Civil Justice)

In April 2018, the French government published a new draft legislation aimed at reforming and modernizing the French Justice system (*Projet de loi de programmation 2018-2022 et de réforme pour la Justice*). Among other things, the proposal is likely to trigger some significant changes in the French ADR/ODR landscape, and may have important consequences for the future development of the *legaltech*. The proposal is currently discussed before the French Parliament and Senate. The following elements should be noted:

- **A generalisation of compulsory mediation** (*tentative de médiation obligatoire*) for small claims (Article 2 of the draft legislation). It should be noted that France has already launched several pilot projects with the intent to experiment compulsory mediation in several areas, including in family law and for certain administrative matters.
- **A new certification scheme for ODR platforms** (Article 3 of the draft legislation). As a result of the European Directive 2013/11/EU (the Consumer ADR Directive), France has already established a certification scheme applying to consumer ADR providers. Consumer ADR entities seeking certification must show compliance with several quality criteria listed in the Consumer ADR Directive, and transposed in France by Ordinance 2015-1033 of 20 August 2015 and two additional implementing decrees. A new *ad hoc* public entity – Commission d'Evaluation et de Contrôle de la Médiation de la Consommation (CECMC) closely linked to the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF, a branch of the Ministry of Economy) is in charge of certifying consumer ADR providers. CECMC must also verify that Consumer ADR providers comply with the quality criteria listed in the Directive and the national legislation on an on-going basis. Under the new draft legislation, the proposed certification scheme will apply to all ODR systems. While noticing the development of ODR services, a previous draft legislation of 25 October 2017 suggested to introduce a certification scheme for private ODR platforms, and, in parallel, also aimed to create a free public ODR system (*Service public gratuit en ligne d'aide à la résolution amiable des litiges,* see Article 8 of the proposal). However, the development of this public ODR system was finally discarded for

budgetary reasons. Interestingly, whereas the initial proposal from the Government made certification non-compulsory and voluntary, amendments adopted by the French Senate have made certification compulsory for all ODR providers. Senate has also designated the Ministry of Justice as competent authority in charge of certifying ODR providers. At the time of writing, it remains unclear whether certification will ultimately be compulsory or not (an amendment from the National Assembly dated 6 November 2018 reintroduced the voluntary/non-compulsory nature of certification). A decree from the State Council (*Conseil d'Etat*) will specify the details of the certification procedure. As a general rule, to be certified, ODR platforms will have to show that they comply with data protection rules and confidentiality, and prove that they are independent, impartial, and that their procedures are fair and efficient. Importantly, rules also provide that ODR system cannot be based solely on algorithms or automated systems. In other words, human intervention will remain necessary and compulsory. If the ODR platform uses algorithms, it will have to inform parties beforehand, and will have to collect their informed consent. The draft legislation also provides that consumer ADR entities already certified by the CECMC will automatically benefit from the new certification scheme.

The draft proposal has been criticized as a step towards 'a privatisation of justice'. It remains to be seen how the new proposed certification scheme will be implemented.

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Netherlands Commercial Court: English proceedings in The Netherlands

By Friederike Henke, Advocaat & Rechtsanwältin at Buren in Amsterdam

The international demand for English language dispute resolution is increasing as the English language is commonly used in international trade and contracts as well as correspondence, not only between the trading partners themselves, but also by international parties, their legal departments and their advisors. Use of the English language in legal proceedings is expected to save time and money for translations and language barriers in general.

We would like to note that Dutch courts tend to allow parties to provide exhibits in the English language and often allow parties to conduct hearings in English, at least in part. Moreover, the district courts in Rotterdam and The Hague offer the possibility for proceedings in certain types of cases to be held in English: maritime, transportation and international trade cases in Rotterdam and intellectual property rights cases in The Hague. The courts render their judgments in the Dutch language with an English summary.

In order for the Dutch courts to be able to render valid and binding judgments in the English language, the Dutch code of civil procedure needs to be amended.

Netherlands Commercial Court: draft legislation

As mentioned in earlier posts on this blog (see here) in the Netherlands, legislation is on its way for the introduction of English language courts for the settlement of commercial disputes: the Netherlands Commercial Court ("**NCC**") and the Netherlands Commercial Court of Appeal ("**NCCA**").

On 8 March 2018, the Dutch parliament adopted the draft legislation, following which it was expected to be approved by the Dutch senate soon. However, to date, despite earlier optimism, the legislation has not yet been passed. The (draft) rules of procedures are ready though (see here) and the judges have been selected as well. The courts are now expected to open their doors in 2019.

In anticipation to the adoption and effectiveness of the draft legislation, the below blog offers an overview of the key characteristics of the proceedings with the NCC and NCCA.

The NCC and NCCA: structure and location

The NCC and NCCA will be imbedded in the ordinary judiciary. The NCC will thus be a chamber of the Amsterdam district court and the NCCA will be a chamber at the Amsterdam court of appeals. Any appeal from a judgment by the NCC will go to the NCCA. An appeal (cassation) from the NCCA to the highest court of the Netherlands (*Hoge Raad*) will take place in the Dutch language.

The judges of the NCC and NCCA who have already been selected, will be from the ordinary judiciary. No lay judges will be appointed. The selected judges (six for each instance) are judges who have vast experience in commercial disputes and excellent language skills.

Situating the chambers with the courts of Amsterdam has mostly practical reasons: Amsterdam is the financial capital of the Netherlands and a lot of international companies have their corporate seats there. Also, practical reasons have been mentioned: Amsterdam is easy to reach and internationally active law firms have their offices in Amsterdam.

The NCC procedure

Proceedings with the NCC and NCCA will in principle be held in the English language. All legal documents will be in English. Evidence may be handed in in the French, German or Dutch language, without a translation being required. The court hearing will be held in English and the judgment will be rendered in English.

In addition to the NCC's rules of procedure, the NCC will apply Dutch procedural law and the substantive rules of Dutch private international law. The proceedings will be paperless and legal documents will be submitted electronically.

According to article 1.2.1 of the NCC's draft rules of procedure, an action may be initiated in the NCC in case the following three requirements have been met:

1. the action is a civil or commercial matter within the autonomy of the parties and is not subject to the jurisdiction of the cantonal court (*kantongerecht*, the court for small claims) or the exclusive jurisdiction of

any other chamber or court;
2. the matter has an international aspect;
3. the parties to the proceedings have designated the Amsterdam District Court as the forum to hear their case or the Amsterdam District Court has jurisdiction to hear the action on other grounds; and
4. the parties to the proceedings have expressly agreed that the proceedings will be in English and will be governed by the NCC's rules.

The NCC has jurisdiction in any commercial case, regardless the legal ground. So it may hear both contractual disputes – claims for performance or breach of contract, rescission of a contract, termination or damages – as well as claims for unlawful acts.

In line with the case law of the Court of Justice of the EU, the internationality requirement is to be interpreted broadly. Only if all relevant aspects of a case refer to one case, it will thus be considered an internal dispute. An international aspect can e.g. be that one of the parties has its seat outside of the Netherlands or was incorporated under foreign law, that the contract language is not Dutch or a foreign law applies to the contract, that more than 50% of the employees works outside of the Netherlands, etcetera.

The NCC is only competent if the Parties have agreed to settle their dispute under the procedural rules of the NCC. Such agreement may be done in a procedural agreement, before or after a dispute has arisen. The NCC's rules of procedure contain a template clause for a forum choice reflecting such procedural agreement in Annex I:

"*All disputes arising out of or in connection with this agreement will be resolved by the Amsterdam District Court following proceedings in English under that Court's Rules of Procedure of the Chamber for International Commercial Matters ("Netherlands Commercial Court" or "NCC"). Application for provisional measures, including protective measures, available under Dutch law may be made to the NCC's Preliminary Relief Judge in proceedings in English in accordance with the Rules of Procedure of the NCC.*"

The choice of parties to conduct proceedings with the NCC is thus not a forum choice but rather a procedural agreement between the parties.

Court fees

The court fees for proceedings with the NCC will amount to EUR 15,000.- for substantive proceedings and EUR 7,500.- for summary proceedings. The court fees for proceedings with the NCCA will amount to EUR 20,000.- for substantive proceedings and EUR 10,000.- for summary proceedings.

When compared to other courts in the Netherlands, the court fees for the NCC and NCCA are relatively high. In comparison: the highest court fee for cases in first instance currently amount to EUR 3,946.- and for appeal cases to EUR 5,270.-. Within the international playing field, the NCC and NCCA courts fees are however relatively low, especially when compared to arbitration.