# Draft Withdrawal Agreement 19 March 2018: Still a Way to Go

Today, the European Union and the United Kingdom have reached an agreement on the transition period for Brexit: from March 29 of next year, date of disconnection, until December 31, 2020. The news are of course available in the press, and the Draft Withdrawal Agreement of 19 March 2018 has already been published… coloured: In green, the text is agreed at negotiators' level and will only be subject to technical legal revisions in the coming weeks. In yellow, the text is agreed on the policy objective but drafting changes or clarifications are still required. In white, the text corresponds to text proposed by the Union on which discussions are ongoing as no agreement has yet been found. For ongoing judicial cooperation in civil and commercial matters (Title VI of Part III, to be applied from December 31, 2020: see Art. 168), this actually means that subject to "technical legal revisions", the following has been accepted:

- Art. 62: The EU and the UK are in accordance as to the application by the latter (no need to mention the MS for obvious reasons) of the Rome I and Rome II regulations to contracts concluded before the end of the transition period, and in respect of events giving rise to damage, and which occurred before the end of the transition period.
- Art. 64: There is also agreement as to the handling of ongoing cooperation procedures, whereby requests for service abroad, the taking of evidence and in the frame of the European Judicial Network are meant.
- Art. 65: There is agreement as well as to the way Council Directive 2003/8/EC (legal aid), Directive 2008/52/EC on certain aspects of mediation in civil and commercial matter, and Council Directive 2004/80/EC (relating to compensation to crime victims) will apply after the transition period.

Conversely, no agreement has been found regarding Art. 63, i.e., how to deal with jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities (but whatever is agreed will also be valid in respect of the provisions of Regulation (EU) No 1215/2012 as applicable by virtue of the agreement between the European Community and the Kingdom of Denmark, see Art. 65.2, in green).

In the light of this it may  be not really worth to start the analysis of the Title as a whole: Art. 63 happens to be the less clear provision. Some puzzling expressions such as “as well as in the Member States in situations involving the United Kingdom” are common to approved texts, but may change in the course of the technical legal revision. So, let’s wait and see.

NoA: Another relevant provision agreed upon – in green-  is Art. 124, Specific arrangements relating to the Union’s external action. Title X of Part III, on pending cases and new cases before the CJEU, remains in white.

And: On the Draft of February 28, 2018 see P. Franzina’s entry here. The Draft was transmitted to the Council (Article 50) and the Brexit Steering Group of the European Parliament; the resulting text was sent to the UK  and made public on March 15.

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# Religious Conversion and Custody – Important New Decision by the Malaysian Federal Court

A saga that has kept Malaysians engaged for years has finally founds its conclusion. A woman, named (rather improbably, at least for European observers) Indira Gandhi, was fighting with her ex husband over custody. The ex-husband had converted to Islam and had extended the conversion to their three children, with the consequence that the Syariah courts gave him sole custody. What followed was a whole series of court decisions by civil courts on the one hand and Syariah courts on the other, focusing mainly on the jurisdictional question which

set of courts gets to decide matters of religious status and which law—Islamic law or civil law—determines the question. The Malaysian Federal Court now quashed the conversion as regards the children, thereby claiming, at least for children, a priority of the Constitution and the jurisdiction of civil courts.

Although the case is mostly discussed in the context of religious freedom and (civil) judicial review, it also raises core issues of conflict of laws. Malaysia is a country with an interpersonal legal system, which leaves jurisdiction over certain matters of Islamic law to the Syariah courts. Indira Gandhi's ex-husband here used this system, effectively, for a form of forum shopping: converting to Islam enabled him, ostentatiously, to opt into a system more favorable to his own situation. The background, from the perspective of conflict of laws, is that the decisive connecting factor, namely a person's religion, is open to manipulation in a way in which other connecting factors are not. According to Article 121 of the Federal Constitution, the civil courts have no jurisdiction over matters of the Syariah Courts. On the other hand, Art. 12(4) of the Constitution provides that a minor's religion is determined by his parent or guardian, a provision the Syariah Courts neglected here. Letting the Constitution trump leads to a desirable result in this case, but it does not, by itself, resolve the underlying conflict-of-laws issues. Here, as in comparable situations, the doctrinal problem appears to lie first in the issue of unilateral determination of personal status and second in a conflation of issues of jurisdiction and applicable law.

The case is *Indira Gandhi v. Pengarah Jabatan Agama Islam Perak u.a.,* [2018] 1 LNS 86 (Federal Court of Malaysia); it is available here. A short summary is here, another one, including a useful timeline of events, is here. For a very helpful analysis of the case and its background and implications by Jaclyn L. Neo, focusing especially on questions of jurisdiction and judicial review, see here. A longer discussion by Dian A.H. Shah focuses also on two other cases and more broadly on the issues of religious freedom: Dian A.H. Shah, *Religion, conversions, and custody: battles in the Malaysian appellate courts*, in Law and Society in Malaysia: Pluralism, Religion and Ethnicity (Andrew Harding/Dian A.H. Shah eds., 2018). The affair is also discussed in Yvonne Tew's article '*Stealth Theocracy*,' which is forthcoming with the Virginia Journal of International Law.

# Mutual trust and judicial cooperation in the EU's external relations – the blind spot in the EU's Foreign Trade and Private International Law policy?

Further to the splendid conference How European is European Private International Law? at Berlin on 2 and 3 March 2018, I would like to add some thoughts on an issue that was briefly raised by our fellow editor Pietro Franzina in his truly excellent conference presentation on "The relationship between EU and international Private International Law instruments". Pietro rightly observed an "increased activity on the external side", meaning primarily the EU's PIL activities on the level of the Hague Conference.

At the same time, there seems to be still a blind spot for the EU's Private International Law policy when it comes to the design of the EU's Free Trade Agreements (FTAs). Although there is an increasingly large number of such agreements and although "trade is no longer just about trade" (DG Trade) but additionally about exchange or even export of values such as "sustainability", human rights, labour and environmental standards and the rule of law, there seems to be no policy by DG Trade to include in its many FTAs a Chapter on judicial cooperation with the EU's respective external trade partners.

To my knowledge there are only the following recent exceptions: The Association Agreements with Georgia and Moldova. Both Agreements entered into force on 1 July 2016.

Article 21 (Georgia) and Article 20 (Moldova) provide:

"Legal cooperation: 1. The Parties agree to develop judicial cooperation in civil and commercial matters as regards the negotiation, ratification and

implementation of multilateral conventions on civil judicial cooperation and, in particular, the conventions of the Hague Conference on Private International Law in the field of international legal cooperation and litigation as well as the protection of children."

Article 24 of the Association Agreement of 29 May 2014 with the Ukraine reads slightly differently:

"Legal cooperation: 1. The Parties agree to further develop judicial cooperation in civil and criminal matters, making full use of the relevant international and bilateral instruments and based on the principles of legal certainty and the right to a fair trial.2. The Parties agree to facilitate further EU-Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children."

All other FTAs, even those currently under (re-) negotiation, do not take into account the need for the management of trust in the judicial cooperation of the trade partners in their deepened and integrated trade relations. Rather, foreign trade law and PIL seem to have remained separate worlds, although the business transactions that are to take place and increase within these trade relations obviously rely heavily on both areas of the law.

Some thoughts on why there is no integrated approach to foreign trade and PIL in the EU, why this is a deficiency that should be taken care of and how this could possibly be done are offered here.

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# How European is European Private International Law? – Impressions

# from Berlin

*Written by Tobias Lutzi, DPhil Candidate and Stipendiary Lecturer at the University of Oxford*

Last weekend, more than a hundred scholars of private international law followed the invitation of Jürgen Basedow, Jan von Hein, Eva-Maria Kieninger, and Giesela Rühl to discuss the 'Europeanness' of European private international law. Despite the adverse weather conditions, only a small number of participants from the UK – whose presence was missed all the more dearly – were unable to make it to Berlin. Thus, the *Goethe-Saal* of the Max Planck Society's Harnack House was packed, and so was the conference programme, which spanned over two full days.

It was kicked off by Andreas Stein (European Commission) and Johannes Christian Wichard (German Ministry of Justice), who underlined both the accomplishments of and the challenges for European private international law in their respective welcome addresses. The programme then proceeded from a closer look at the sources of European private international law (and their relationship with other international instruments and the domestic laws of the member states) to an analysis of its application in the courts of the member states (including the ascertainment of foreign law) to a discussion of the 'Europeanness' of academic discourse and legal education within the EU and outside of it (with a focus on the political dimension of EU private international law).

All presentations provided ample food for thought, as was evidenced by the lively discussions that followed each panel. They highlighted a number of interesting tendencies, such as the remaining 'piecemeal character' of the field, the ambiguities caused by an ever-increasing number of recitals in European instruments, the regrettable absence of private international law from the legal curriculum in many EU member states, and a certain convergence of academic styles, not least through the growing adoption of German-style commentaries and the emergence of English as the undisputed *lingua franca* of the field. One of the more contentious issues discussed was the possible creation of a general instrument of private international law (think: Rome 0 Regulation), or even a complete codification, with numerous participants pointing towards its potential for more coherence, clarity, and 'teachability' of European private international

law – while others urged more caution.

The most prominent theme of the two days, though, seemed to be the observation that the emergence of a distinctly European scholarship of private international law should be both welcomed and fostered. The idea of creating an association that could provide an institutional framework for further dialogue between European scholars, practitioners, and other stakeholders in private international law was mentioned more than once – and received almost unanimous support during the round table discussion that concluded the conference. It was fitting, then, that the conference included the official launch of the Encyclopedia of Private International Law, many authors of which were present in Berlin. This truly Herculean project, just as the conference itself, is testimony to how fruitful such dialogue can be.

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# This one is next: the Netherlands Commercial Court!

*By Georgia Antonopoulou, Erlis Themeli, and Xandra Kramer, Erasmus University Rotterdam (PhD candidate, postdoc researcher and PI ERC project Building EU Civil Justice)*

Following up on our previous post, asking which international commercial court would be established next, the adoption of the proposal for the Netherlands Commercial Court by the House of Representatives (*Tweede Kamer*) today answers the question. It will still have to pass the Senate (*Eerste Kamer*), but this should only be a matter of time. The Netherlands Commercial Court (NCC) is expected to open its doors on 1 July 2018 or shortly after.

The NCC is a specialized court established to meet the growing need for efficient dispute resolution in cross-border civil and commercial cases. This court is established as a special chamber of the Amsterdam District Court and of the Amsterdam Court of Appeal. Key features are that proceedings will take place in the English language, and before a panel of judges selected for their wide

expertise in international commercial litigation and their English language skills.

To accommodate the demand for efficient court proceedings in these cases a special set of rules of procedure has been developed. The draft Rules of Procedure NCC can be consulted here in English and in Dutch. It goes without saying that the court is equipped with the necessary court technology.

The Netherlands prides itself on having one of the most efficient court systems in the world, as is also indicated in the Rule of Law Index – in the 2017-2018 Report it was ranked first in Civil Justice, and 5th in overall performance. The establishment of the NCC should also be understood from this perspective. According to the website of the Dutch judiciary, the NCC distinguishes itself by its pragmatic approach and active case management, allowing it to handle complex cases within short timeframes, and on the basis of fixed fees.

To be continued…

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# A European Law Reading of Achmea

*Written by Prof. Burkhard Hess, Max Planck Institute Luxembourg.*

An interesting perspective concerning the *Achmea* judgment of the ECJ[1] relates to the way how the Court addresses investment arbitration from the perspective of European Union law. This paper takes up the judgment from this perspective. There is no doubt that *Achmea* will disappoint many in the arbitration world who might read it paragraph by paragraph while looking for a comprehensive line of arguments. Obviously, some paragraphs of the judgment are short (maybe because they were shortened during the deliberations) and it is much more the outcome than the line of arguments that counts. However, as many judgments of the ECJ, it is important to read the decision in context. In this respect, there are several issues to be highlighted here:

First, the judgment clearly does not correspond to the arguments of the German Federal Court (BGH) which referred the case to Luxembourg. Obviously, the BGH expected that the ECJ would state that intra EU-investment arbitration was compatible with Union law. The BGH's reference to the ECJ argued in favor of the compatibility of intra EU BIT with Union law.[2] In this respect, the *Achmea* judgment is unusual, as the ECJ normally takes up positively at least some parts of the questions referred to it and the arguments supporting them. In contrast, the conclusion of AG Wathelet were much closer to the questions asked in the preliminary reference.

Second, the Court did not follow the conclusions of Advocate General Wathelet.[3] As the AG had pushed his arguments very much unilaterally in a (pro-arbitration) direction, he obviously provoked a firm resistance on the side of the Court. In the *Achmea* judgment, there is no single reference to the conclusions of the AG[4] – this is unusual and telling, too.

Third, the basic line of arguments developed by the ECJ is mainly found in paras 31 – 37 of the judgment. Here, the Court sets the tone at a foundational level: the Grand Chamber refers to basic constitutional principles of the Union (primacy of Union law, effective implementation of EU law by the courts of the Member States, mutual trust and shared values). In this respect, it is telling that each paragraph quotes Opinion 2/13[5] which is one of the most important (and politically strongest) decisions of the Court on the autonomy of the EU legal order and the role of the Court itself being the last and sole instance for the interpretation of EU law.[6] *Achmea* is primarily about the primacy of Union law in international dispute settlement and only in the second place about investment arbitration. *Mox Plant*[7] has been reinforced and a red line (regarding concurrent dispute settlement mechanisms) has been drawn.

Although I don't repeat here the line of arguments developed by the Grand Chamber, I would like to invite every reader to compare the judgment with the Conclusions of AG Wathelet. In order to understand a judgment of the ECJ, one has to compare it with the Conclusions of the AG – also in cases where the Court does (exceptionally) not follow the AG. In his Conclusions, AG Wathelet had tried to integrate investment arbitration into Union law and (at the same time) to preserve the supremacy of investment arbitration over EU law even in cases where only intra EU relationships were at stake. Or – to put it the other way around: For the ECJ, the option of investors to become quasi-international law

subjects and to deviate of mandatory EU law by resorting to investment arbitration could not be a valuable option – especially as their home states (being EU Member States) are not permitted to escape from mandatory Union law by resorting to public international law and affiliated dispute resolution mechanisms. Therefore, from a perspective of EU law the judgment does not come as a surprise.

Finally, this judgment is not only about investment arbitration, its ambition goes obviously further: If one looks at para 57 the perspective obviously includes future dispute settlement regimes under public international law and their relationship to the adjudicative function of the Court. One has to be aware that Brexit and the future dispute resolution regime regarding the Withdrawal Treaty is in the mindset of the Court. In this respect the wording of paragraph 57 seems to me to be telling. It states:

"It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, *provided that the autonomy of the EU and its legal order is respected*[8]."

Against this background of European Union law, the *Achmea* judgment appears less surprising than the first reactions of the "arbitration world" might have implied. Furthermore, the (contradictory[9]) statement in paras 54 and 55 should be read as a sign that the far reaching consequences with regard to investment arbitration do not apply to commercial arbitration (*Eco Swiss*[10] and *Mostaza Claro*[11] are explicitely maintained).[12] Finally, it is time to start a discussion about the procedural and the substantive position of individuals in investment arbitration in the framework of Union law. As a matter of principle, EU investors should not expect to get a better legal position as their respective home State would get in the context of EU law. Investment arbitration does not change their status within the Union. In this respect, *Achmea* is simply clarifying a truism. And, as a side effect, the disturbing *Micula* story should now come to an end, too.[13]

*Footnotes*

[1] ECJ, 3/6/2018, case C-284/16, *Slovak Republic v. Achmea BV*, EU:C:2018:158.

[2] BGH, 3/3/2016, ECLI:DE:BGH:2016:030316BIZB2.15.0

[3] Conclusions of 9/19/2017, EU:C:2017:699. The same outcome had occured in case C-536/13, *Gazprom*, EU:C:2015:316, which was also related to investment arbitration.

[4] The Court only addresses the issue whether the hearing should be reopened because some Member States had officially expressed their discomfort with the AG's Conclusions, ECJ, 3/6/2018, case C-284/16, *Amchea*, EU:C:2018:158, paras 24-30.

[5] ECJ, 12/18/2014, Opinion 2/13 (*Accession of the EU to the ECHR*), EU:C:2014:2454.

[6] For the political connotations of Opinion 2/13, cf. *Halberstam*, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward." German L.J. 16, no. 1 (2015): 105 ff.

[7] ECJ, 5/30/2015, case C-459/03 *Commission v Ireland,* EU:C:2006:345.

[8] Highlighted by B.Hess.

[9] Both, commercial and investment arbitration are primarily based on the consent of the litigants, see *Hess*, The Private Public Divide in International Dispute Settlement, RdC 388 (2018), para 121 – in print

[10] ECJ, 6/1/1999, case C?126/97, *Eco Swiss*, EU:C:1999:269.

[11] ECJ, 10/26/2006, case C?168/05, *Mostaza Claro*, EU:C:2006:675.

[12] It is interesting to note that the concerns of the ECJ (paras 50 ss) regarding the intervention of investment arbitration by courts of EU Member States did not apply to the case at hand as German arbitration law permits a review of the award (section 1059 ZPO). The concerns expressed relate to investment arbitration which operates outside of the NYC without any review of the award by state court, especially in the context of articles 54 and 55 ICSID Convention.

[13] According to the ECJ's decision in *Achmea*, the arbitration agreement in the *Micula* case must be considered as void under EU law. However, Micula was given by an ICSID arbitral tribunal and, therefore, there is no recognition procedure open up a review by state courts of the arbitral award, see articles 54 and 55 ICSID Convention.

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# CJEU on the compatibility with EU law of an arbitration clause in an Intra-EU BIT – Case C-284/16 (Slovak Republic v Achmea BV)

*Written by Stephan Walter, Research Fellow at the Research Center for Transnational Commercial Dispute Resolution (TCDR), EBS Law School, Wiesbaden, Germany*

Today, the CJEU has rendered its judgement in Slovak Republic v Achmea BV (Case C-284/16). The case concerned the compatibility with EU law of a dispute clause in an Intra-EU Bilateral Investment Treaty (BIT) between the Netherlands and the Slovak Republic which grants an investor the right to bring proceedings against the host state (in casu: the Slovak Republic) before an arbitration tribunal. In concrete terms, the German Federal Court of Justice referred the following three questions to the CJEU (reported here):

> *Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called BIT internal to the European Union) under which an investor of a contracting State, in the event of a dispute concerning investments in the other contracting State, may bring proceedings against the latter State before an arbitration tribunal, where the investment protection agreement was concluded before one of the contracting States acceded to the European Union but the arbitration proceedings are not to be brought until after that date?*

*If Question 1 is to be answered in the negative:*

*Does Article 267 TFEU preclude the application of such a provision?*

*If Questions 1 and 2 are to be answered in the negative:*

*Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?*

In his Opinion, Advocate General Wathelet answered all three questions in the negative and therefore affirmed the EU law compatibility of such a provision. Most notably (and rather surprisingly for many legal commentators), he concluded that the BIT's arbitration system did not fall outside the scope of the preliminary ruling mechanism of Article 267 TFEU. Hence, an arbitral tribunal established under the BIT was in his opinion eligible to refer questions on the interpretation of EU law to the CJEU.

The CJEU did not follow the Opinion of the Advocate General and held:

*Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*

The Court based this finding on a violation of Article 267 TFEU, Article 344 TFEU and Article 19 paragraph 1 subparagraph 2 TEU. An arbitral tribunal established under the BIT is in the Court's opinion an exception to the jurisdiction of the courts of the contracting states of the BIT. Thus, it does not form part of the judicial system of the Netherlands or Slovakia (para. 45) and cannot be classified as a court or tribunal "of a Member State" within the meaning of Article 267 TFEU (para. 46 et seq.). Consequently, it has no power to make a reference to the Court for a preliminary ruling (para. 49). A subsequent review of the award by a court of a Member State (which could refer questions on the interpretation of EU law to the CJEU) is not enough to safeguard the autonomy of EU law since such a

review may be limited by the national law of the Member State concerned (para. 53). Unlike in commercial arbitration proceedings such a limited scope of review does not suffice in the case of investment arbitration proceedings because these arbitration proceedings do not originate in the freely expressed wishes of the parties. They derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which Article 19 paragraph 1 subparagraph 2 TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law (para. 55).

As the Court already found a violation of the provision with regard to the questions 1 and 2 it did not have to address the third question.

The judgement can be found here.

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# The impact of Brexit on the operation of the EU legislative measures in the field of private international law

On 28 February 2018, the European Commission published the draft Withdrawal Agreement between the EU and the UK, based on the Joint Report from the negotiators of the two parties on the progress achieved during the first phase of the Brexit negotiations.

The draft includes a Title VI which specifically relates to judicial cooperation in civil matters. The four provisions in this Title are concerned with the fate of the legislative measures enacted by the EU in this area (and binding on the UK) once the “transition of period” will be over (that is, on 31 December 2020, as stated in Article 121 of the draft).

Article 62 of the draft provides that, in the UK, the Rome I Regulation on the law applicable to contracts and the Rome II Regulation on the law applicable to non-contractual obligations will apply, respectively, "in respect of contracts concluded before the end of the transition period" and "in respect of events giving rise to damage which occurred before the end of the transition period".

Article 63 concerns the EU measures which lay down rules on jurisdiction and the recognition and enforcement of decisions. These include the Brussels I *bis* Regulation on civil and commercial matters (as "extended" to Denmark under the 2005 Agreement between the EC and Denmark: the reference to Article 61 in Article 65(2), rather than Article 63, is apparently a clerical error), the Brussels II *bis* Regulation on matrimonial matters and matters of parental responsibility, and Regulation No 4/2009 on maintenance.

According to Article 63(1) of the draft, the rules on jurisdiction in the above measures will apply, in the UK, "in respect of legal proceedings instituted before the end of the transition period". However, under Article 63(2), in the UK, "as well as in the Member States in situations involving the United Kingdom", Article 25 of the Brussels I *bis* Regulation and Article 4 of the Maintenance Regulation, which concern choice-of-court agreements, will "apply in respect of the assessment of the legal force of agreements of jurisdiction or choice of court agreements concluded before the end of the transition period"(no elements are provided in the draft to clarify the notion of "involvement", which also occurs in other provisions).

As regards recognition and enforcement, Article 63(3) provides that, in the UK and "in the Member States in situations involving the United Kingdom", the measures above will apply to judgments given before the end of the transition period. The same applies to authentic instruments formally drawn up or registered, and to court settlements approved or concluded, prior to the end of such period.

Article 63 also addresses, with the necessary variations, the issues surrounding, among others, the fate of European enforcement orders issued under Regulation No 805/2004, insolvency proceedings opened pursuant to the Recast Insolvency Regulation, European payment orders issued under Regulation No 1896/2006, judgments resulting from European Small Claims Procedures under Regulation No 861/2007 and measures of protection for which recognition is sought under

Regulation No 606/2013.

Article 64 of the draft lays down provisions in respect of the cross-border service of judicial and extra-judicial documents under Regulation No 1393/2007 (again, as extended to Denmark), the taking of evidence according to Regulation No 1206/2001, and cooperation between Member States' authorities within the European Judicial Network in Civil and Commercial Matters established under Decision 2001/470.

Other legislative measures, such as Directive 2003/8 on legal aid, are the object of further provisions in Article 65 of the draft.

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# The domino effect of international commercial courts in Europe – Who's next?

*Written by Georgia Antonopoulou and Erlis Themeli, Erasmus University Rotterdam (PhD candidate and postdoc researchers ERC project Building EU Civil Justice)*

On February 7, 2018 the French Minister of Justice inaugurated the International Commercial Chamber within the Paris Court of Appeals following up on a 2017 report of the Legal High Committee for Financial Markets of Paris (*Haut Comité Juridique de la Place Financière de Paris* HCJP, see here). As the name suggests, this newly established division will handle disputes arising from international commercial contracts (see here). Looking backwards, the creation of the International Commercial Chamber does not come as a surprise. It offers litigants the option to lodge an appeal against decisions of the International Chamber of the Paris Commercial Court (see previous post) before a specialized division and thus complements this court on a second instance.

According to the press release, litigants will have the possibility to conduct

proceedings not only in English, but also in other foreign languages. The parties can submit documents in a foreign language without official translation and hearings can be held in a foreign language as well. However, a simultaneous translation of the oral hearing will take place. In addition, the parties may submit their briefs in a foreign language accompanied by a French translation. Finally, the court will render its decisions in French accompanied by a translation in the relevant foreign language. Contrary to the respective German and Dutch legislative proposals, which allow for the conduct of proceedings, including the decisions of the court, entirely in English, the French initiative appears more modest setting multiple translation requirements.

However, France is one more domino piece affected by the civil justice system competition in the European Union. In light of Brexit, the list of European Union Member States opting for the creation of international commercial courts is growing. The legislative proposal for the establishment of Chambers for International Commercial Disputes in Germany (*Kammern für Internationale Handelssachen*) was the first -though unsuccessful- attempt. Nevertheless, the recent 'Frankfurt Justice Initiative' came to revive the seemingly dormant German debate (see previous post). Not far away from Germany, the Netherlands is launching the Netherlands Commercial Court (NCC), which is expected to open its doors in the second half of 2018. Finally, in October 2017, the Belgian Minister of Justice announced the government's initiative to establish a specialized court in commercial matters, called the Brussels International Business Court (BIBC) (see previous post).

Competing Member States try to attract cross-border litigation, and thus increase the work of the local legal community and related services. As accepted in the press release of this latest French initiative, a good competitive court is a positive signal to foreign investors. It should be reminded that this is not the first time that competitive activities erupt. A few years ago, competing Member States were focused on publishing brochures to highlight the best qualities of their jurisdictions. This time, competitive activities seem to be more vigorous and seem to better address the needs of international litigants. Only time will show how dynamic competition will unfold, and who the winners will be.

# Court of Appeal of Ljubljana and implied consent to application of Slovenian law by not- contesting the application of Slovenian law in first and in appellate instance

*Written by Dr. Jorg Sladic, Attorney in Ljubljana and Assistant Professor in Maribor (Slovenia)*

In judgment of 25 October 2017 in case I Cpg 1084/2016 (ECLI:SI:VSLJ:2017:I.CPG.1084.2016) published on 31 January 2018 the Slovenian Appellate Court ruled on a question of implied consent to application of Slovenian law.

Unfortunately the underlying facts are not described with the necessary precision. It would appear that there was a three-person contractual chain between an Austrian, an Italian and a Slovenian commercial company. Apparently the Italian company was the seller, the roles of both the Austrian and Slovenian company are not very clearly described. The underlying transaction that led to the dispute was a contract for the sale of goods concluded under the CISG. The ruling does not state where the seller had the habitual residence, yet the condemnation to perform the payment can only be construed in such a way that the Italian plaintiff was the seller.

The court of first instance condemned the defendant (a Slovenian commercial company) to payment of the sum of 52.497,28 EUR to the Italian claimant (Italian commercial company) and dismissed the Slovenian defendant's defense of set-off (exceptio compensationis) in the sum of 50.000,00 EUR.

The condemnation was based upon a sales contract for goods concluded under the application of the CISG. The Slovenian defendant contended that the Italian

claimant did not sign the double order / mandate addressed to the Austrian third person (named the client or the orderer) who had been instructed to perform the payment to the Italian company. The Austrian client later withheld the performance of payment due to a non signed double order / mandate (double order/mandate is a figure where a principal gives the first mandate to the agent to perform an obligation to a third person (recipient) and the second mandate to the third person (recipient) to accept the performance of such an obligation, see Art. 1035 Slovenian Code of Obligations: Through an instruction one person, the principal, authorizes a second person, the agent, to perform an obligation for the latter's account to a certain third person, the recipient (the beneficiary), and authorizes the third person to accept performance in the third person's name. The Slovenian legislative provision corresponds to § 1400 Austrian ABGB, § 784 German BGB and Art. 468 Swiss Code of Obligations). The defendant claimed in his defense of set-off that there was an extra-contractual obligation (a delict) due to lack of performance of the Austrian agent that was caused by the Italian company.

One of the pleas in appeal was that Italian and in the alternative the Austrian substantive law should be applied for assessing the existence of the obligation to be set-off. The Court of Appeal dismissed such a plea. The Slovenian defendant alleged an allegedly mature and liquid non-contractual obligation to be set-off. The assessment of facts narrated by the Slovenian company i.e. the damages set-off due to non signature of an order given to the Austrian company shows that there is in essence a defense of breach of the claimant's obligation in accepting the performance based on the same facts as the claimant's claim to payment. The Appellate Court expressly avoided the characterization of the said breached obligation as contractual or as non-contractual. There was only a precisions that the facts underlying both the contractual obligation to perform a payment and the allegedly breached obligation are identical.

According to the Appellate Court in Ljubljana the court of first instance found that there was an implied consent to apply the Slovenian law, neither party contested the application of Slovenian law in the first and also in the appellate instance. The law applicable to the obligation that was claimed in set – off is therefore Slovenian law. Even if such an obligation were non – contractual, Slovenian law would have to be applied under Art. 4(1) and (3) in connection with Art. 15 Regulation (EC) No 864/2007 (Rome II).

The ruling does not contain any explicit connecting factor. The issue is not Art. 17 Rome I Regulation (Regulation (EC) No 593/2008). One can assume that under Art. 1(1) CISG the applicable law is the CISG as Austria, Italy and Slovenia are contracting parties to the said UN convention. However, the interesting part is the reference to the implied consent to the application Slovenian substantive law. Under Art. 4(1)(a) Rome I Regulation (Regulation (EC) No 593/2008) "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence". This should prima facie be the Italian law, as the Italian company applied for payment after having performed the specific performance under the sales contract. However, not contesting the application of Slovenian substantive law in judicial proceedings in first and also in the appellate instance was then construed as "implied consent" to Slovenian substantive law (Art. 3(2) Regulation Rome I). Seen in pragmatic perspective, in order to avoid a uneasy modus vivendi or fine tuning of Art. 3 and 15 of the Regulation Rome II with Art. 17 Regulation Rome I the Slovenian Appellate Court preferred to refer to Slovenian law even if under conditions that do not easily fit in Art. 3(2) and 10 Rome I Regulation.