Arbitrability of Company Law Disputes in Central and Eastern Europe: International Conference in Cluj-Napoca (Romania)

The Central and Eastern European Company Law Research Network is organising an international conference on the Arbitrability of Company Law Disputes in Central and Eastern Europe that will take place at the Department of Law of the Sapientia University in Cluj-Napoca (Romania). The event will be on 20 October 2017. Speakers include distinguished academics from various Central and Eastern European countries. The conference is open to the public. For the programme, registration and further details, please click here.

2018 ILA Biennial Conference, Sydney, Australia: Developing International Law in Challenging Times – Call for Papers

The International Law Association has launched the following Call for Papers:

„In 2018, the Australian Branch of the International Law Association will be hosting the biennial ILA conference. The conference, which is being held in Sydney, Australia, from 19-24 August 2018, is a major international event that will bring together hundreds of judges, academics, practitioners and officials of governments and international organisations from all around the globe. The

Australian Branch of the ILA is calling for paper and panel proposals as part of the program for the conference.

The objectives of the International Law Association include 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law'. Yet how are we to anticipate the development of international law, and particularly understanding and respect for international law, in an ever-changing world? There are a myriad of international challenges facing global society—sharpening economic divides, nationalist assertions of boundaries, climate change, cycles of war and poverty, new uses of technology. The 2018 ILA conference will address diverse cutting-edge issues in international law as part of its ongoing study of international law, as well as through dialogue on pressing questions of public and private international law.

The ILA biennial conferences provide an opportunity for members of the ILA Committees to meet and advance their work on discrete areas of international law. The current work of the ILA Committees may be found here. Open sessions will be held on these topics to provide all attendees with the opportunity to learn of the Committees' work and to contribute to the development of the program of work.

In addition, a program will run for all attendees on the core theme of the conference: Developing International Law in Challenging Times. To this end, proposals are sought either for individual paper presentations or for panel presentations on specific themes. Higher degree research (PhD) students are also encouraged to submit poster presentation proposals. A networking and social program is also being organised to run during the conference for international and inter-state visitors.

For paper and poster proposals, speakers are to submit a title and 150-200 word abstract, along with a 150 word biography for potential inclusion in the program. A one-page CV should also be submitted. For panel proposals, the title of the panel and the titles of each paper are to be submitted with a 200 word abstract of the discussions of the panel and a statement on the proposed format for the panel. A biography and one-page CV should also be sent for each proposed speaker on the panel.

Submissions are to be emailed to **info@ila2018.org.au** by **1 November 2017**.

We look forward to welcoming you to Sydney in 2018!"

I thought we were exclusive? Some issues with the Hague Convention on Choice of Court, Brussels Ia and Brexit

This blog post is by Dr Mukarrum Ahmed (Lancaster University) and Professor Paul Beaumont (University of Aberdeen). It presents a condensed version of their article in the August 2017 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 where relevant. It also takes account of recent developments in the Brexit negotiation that took place after the journal article was completed.

On 1 October 2015, the Hague Convention on Choice of Court Agreements 2005 ('Hague Convention') entered into force in 28 Contracting States, including Mexico and all the Member States of the European Union, except Denmark. The Convention has applied between Singapore and the other Contracting States since 1 October 2016. China, Ukraine and the USA have signed the Convention indicating that they hope to ratify it in the future (see the official status table for the Convention on the Hague Conference on Private International Law's website). The Brussels Ia Regulation, which is the European Union's device for jurisdictional and enforcement matters, applies as of 10 January 2015 to legal proceedings instituted and to judgments rendered on or after that date. In addition to legal issues that may arise independently under the Hague Convention, some issues may manifest themselves at the interface between the Hague Convention and the Brussels Ia Regulation. Both sets of issues are likely to garner the attention of cross-border commercial litigators, transactional lawyers and private international law academics. The article examines anti-suit injunctions, concurrent proceedings and the implications of Brexit in the context of the Hague Convention and its relationship with the Brussels Ia Regulation. (See pages 387-389 of the article)

It is argued that the Hague Convention's system of 'qualified' or 'partial' mutual trust may permit anti-suit injunctions, actions for damages for breach of exclusive jurisdiction agreements and anti-enforcement injunctions where such remedies further the objective of the Convention. (See pages 394-402 of the article) The text of the Hague Convention and the Explanatory Report by Professors Trevor Hartley and Masato Dogauchi are not explicit on this issue. However, the *procès-verbal* of the Diplomatic Session of the Hague Convention reveal widespread support for the proposition that the formal 'process' should be differentiated from the desired 'outcome' when considering whether anti-suit injunctions are permitted under the Convention. Where anti-suit injunctions uphold choice of court agreements and thus help achieve the intended 'outcome' of the Convention, there was a consensus among the official delegates at the Diplomatic Session that the Convention did not limit or constrain national courts of Contracting States from granting the remedy. (See Minutes No 9 of the Second Commission Meeting of Monday 20 June 2005 (morning) in *Proceedings of the Twentieth Session of the Hague Conference on Private International Law* (Permanent Bureau of the Conference, Intersentia 2010) 622, 623–24) Conversely, where the remedy impedes the sound operation of the Convention by effectively derailing proceedings in the chosen court, there was also a consensus of the official delegates at the meeting that the Convention will not permit national courts of the Contracting States to grant anti-suit injunctions.

However, intra-EU Hague Convention cases may arguably not permit remedies for breach of exclusive choice of court agreements as they may be deemed to be an infringement of the principle of mutual trust and the principle of effectiveness of EU law (*effet utile*) which animate the multilateral jurisdiction and judgments order of the Brussels Ia Regulation (see pages 403-405 of the article; C-159/02 *Turner v Grovit* [2004] ECR I-3565). If an aggrieved party does not commence proceedings in the chosen forum or commences such proceedings after the non-chosen court has rendered a decision on the validity of the choice of court agreement, the recognition and enforcement of that ruling highlights an interesting contrast between the Brussels Ia Regulation and the Hague Convention. It appears that the non-chosen court's decision on the validity of the choice of court agreement is entitled to recognition and enforcement under the Brussels Ia Regulation. (See C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* EU:C:2012:719, [2013] QB 548) The Hague Convention does not similarly protect the ruling of a non-chosen court. In fact, only a judgment given

by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States. (See Article 8(1) of the Hague Convention) Therefore, the ruling of a non-chosen court is not entitled to recognition and enforcement under the Hague Convention's system of 'qualified' or 'partial' mutual trust. This provides a ready explanation for the compatibility of anti-suit injunctions with the Hague Convention but does not proceed any further to transpose the same conclusion into the very different context of the Brussels Ia Regulation which prioritizes the principle of mutual trust.

The dynamics of the relationship between Article 31(2) of the Brussels Ia Regulation and Articles 5 and 6 of the Hague Convention is mapped in the article (at pages 405-408). In a case where the Hague Convention should apply rather than the Brussels Ia Regulation because one of the parties is resident in a non-EU Contracting State to the Convention even though the chosen court is in a Member State of the EU (See Article 26(6)(a) of the Hague Convention) one would expect Article 6 of the Convention to be applied by any non-chosen court in the EU. However, the fundamental nature of the Article 31(2) *lis pendens* mechanism under the Brussels Ia Regulation may warrant the pursuance of a different line of analysis. (See Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Interzuid Transport BV* EU:C:2013:858, [2014] I.L.Pr. 10, [36]; See also to similar effect, Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* EU:C:2010:243, [2010] I.L.Pr. 35, [49]) It is argued that the Hartley–Dogauchi Report's interpretative approach has much to commend it as it follows the path of least resistance by narrowly construing the right to sue in a non-chosen forum as an exception rather than the norm. The exceptional nature of the right to sue in the non-chosen forum under the Hague Convention can be effectively reconciled with Article 31(2) of the Brussels Ia Regulation. This will usually result in the stay of the proceedings in the non-chosen court as soon as the chosen court is seised. As a consequence, the incidence of parallel proceedings and irreconcilable judgments are curbed, which are significant objectives in their own right under the Brussels Ia Regulation. It is hoped that the yet to develop jurisprudence of the CJEU on the emergent Hague Convention and the Brussels Ia Regulation will offer definitive and authoritative answers to the issues discussed in the article.

The implications of Brexit on this topic are not yet fully clear. (See pages 409-410 of the article) The UK is a party to the Hague Choice of Court Agreements

Convention as a Member State of the EU, the latter having approved the Convention for all its Member States apart from Denmark. The UK will do what is necessary to remain a party to the Convention after Brexit. In its recently published negotiating paper – only available after the article in the Journal of Private International Law was completed – the UK Government has explicitly stated that:

"It is our intention to continue to be a leading member in the Hague Conference and to participate in those Hague Conventions to which we are already a party and those which we currently participate in by virtue of our membership of the EU." (see *Providing a cross-border civil judicial cooperation framework* (PDF) at para 22).

The UK will no doubt avoid any break in the Convention's application. Brexit will almost certainly see the end of the application of the Brussels Ia Regulation in the UK. The reason being that its uniform interpretation is secured by the CJEU through the preliminary ruling system under the Treaty on the Functioning of the European Union (TFEU). The UK is not willing to accept that jurisdiction post-Brexit ("Leaving the EU will therefore bring an end to the direct jurisdiction of the CJEU in the UK, because the CJEU derives its jurisdiction and authority from the EU Treaties." see *Providing a cross-border civil judicial cooperation framework* at para 20). So although the UK negotiators are asking for a bespoke deal with the EU to continue something like Brussels Ia ("The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework" see *Providing a cross-border civil judicial cooperation framework* at para 19) it seems improbable that the EU will agree to such a bespoke deal just with the UK when the UK does not accept the CJEU preliminary ruling system. The EU may well say that the option for close partners of the EU in this field is the Lugano Convention. The UK Government has indicated that it would like to remain part of the Lugano Convention (see *Providing a cross-border civil judicial cooperation framework* at para 22). In doing so it would continue to mandate the UK courts to take account of the jurisprudence of the CJEU -when that court is interpreting Brussels Ia or the Lugano Convention – when UK courts are interpreting the Lugano Convention (see the opaque statement by the UK Government that "the UK and the EU will need to ensure future civil judicial cooperation takes into account regional legal

arrangements, including the fact that the CJEU will remain the ultimate arbiter of EU law within the EU." see *Providing a cross-border civil judicial cooperation framework* at para 20). However, unless the Lugano Convention is renegotiated it does not contain a good solution in relation to conflicts of jurisdiction for exclusive choice of court agreements because it has not been amended to reflect Article 31(2) of Brussels Ia and therefore still gives priority to the non-chosen court when it is seised first and the exclusively chosen court is seised second in accordance with the *Gasser* decision of the CJEU (see Case C-116/02 [2003] ECR I-14693). Renegotiation of the Lugano Convention is not even on the agenda at the moment although the *Gasser* problem may be discussed at the Experts' Meeting pursuant to Article 5 Protocol 2 of the Lugano Convention on 16 and 17 October 2017 in Basel, Switzerland (Professor Beaumont is attending that meeting as an invited expert). Revision of the Lugano Convention would be a good thing, as would Norway and Switzerland becoming parties to the Hague Convention. It seems that at least until the Lugano Convention is revised and a means is found for the UK to be a party to it (difficult if the UK does not stay in EFTA), the likely outcome post-Brexit is that the regime applicable between the UK and the EU (apart from Denmark) in relation to exclusive choice of court agreements within the scope of the Hague Convention will be the Hague Convention. The UK will be able to grant anti-suit injunctions to uphold exclusive choice of court agreements in favour of the courts in the UK even when one of the parties has brought an action contrary to that agreement in an EU Member State. The EU Member States will apply Article 6 of the Hague Convention rather than Article 31(2) of the Brussels Ia Regulation when deciding whether to decline jurisdiction in favour of the chosen court(s) in the UK.

Whilst the Hague Convention only offers a comprehensive jurisdictional regime for cases involving exclusive choice of court agreements, it does give substantial protection to the jurisdiction of UK courts designated in such an agreement which will be respected in the rest of the EU regardless of the outcome of the Brexit negotiations. Post-Brexit the recognition and enforcement regime for judgments not falling within the scope of the Hague Choice of Court Agreements Convention could be the new Hague Judgments Convention currently being negotiated in The Hague (see Working Paper No. 2016/3- Respecting Reverse Subsidiarity as an excellent strategy for the European Union at The Hague Conference on Private International Law – reflections in the context of the Judgments Project? by Paul Beaumont). Professor Beaumont will continue to be a part of the EU Negotiating

team for that Convention at the Special Commission in the Hague from 13-17 November 2017. It is greatly to be welcomed that the UK Government has affirmed its commitment to an internationalist and not just a regional approach to civil judicial co-operation:

"The UK is committed to increasing international civil judicial cooperation with third parties through our active participation in the Hague Conference on Private International Law and the United Nations Commission on International Trade Law… We will continue to be an active and supportive member of these bodies, as we are clear on the value of international and intergovernmental cooperation in this area." See *Providing a cross-border civil judicial cooperation framework* at para 21.

One good thing that could come from Brexit is the powerful combination of the EU and the UK both adopting a truly internationalist perspective in the Hague Conference on Private International Law in order to genuinely enhance civil judicial co-operation throughout the world. The UK can be one of the leaders of the common law world while using its decades of experience of European co-operation to help build bridges to the civil law countries in Europe, Africa, Asia and Latin America.

International Congress, Call for Papers

The Private International Law Group from the School of Law of Carlos III University of Madrid (Universidad Carlos III de Madrid, www.uc3m.es) is delighted to announce its *International Congress on matters of matrimonial property regimes and property consequences of registered partnerships* (from 16-17 November 2017).

Young researchers are invited to submit their papers about the subject of the Congress. Abstracts, either in Spanish or English (*Word* format) must be sent to

mjcastel@der-pr.uc3m.es (deadline: **30th September 2017),** including:

-Name and surname

-Affiliation of the submitting researcher

-Short biographical note (no more than 500 words)

-Title and Summary of the proposed paper (no more than 800 words)

The abstracts will be reviewed by the following Committee:

Alfonso L. Calvo Caravaca, Professor of Private International Law (Carlos III University of Madrid).

Esperanza Castellanos Ruiz, Associate Professor of Private International Law (Carlos III University of Madrid).

Juliana Rodríguez Rodrigo, Associate Professor of Private International Law (Carlos III University of Madrid).

The decision will be notified to the author by 15th October 2017

Successful applicants will present their papers into the *Young Researchers Round Table* (17th November 2017) and their papers may be published in the Journal *Cuadernos de Derecho Transnacional.CDT* (www.uc3m.es/cdt).

The organization will not be responsible for the expenses of young researchers' participation in the Congress.

Child & Family Law Quarterly:

Special Brexit Issue

Back in March the Child & Family Law Quarterly together with Cambridge Family Law hosted a conference on the impact of Brexit on international family law (see our previous post). Some of the academic papers that were presented at this occasion have now been published in a special Brexit issue of the Child & Family Law Quarterly.

Here is the table of content:

- Brexit and international family law from a continental perspective, *Anatol Dutta*
- Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations, *Paul Beaumont*
- Divorcing Europe: reflections from a Scottish perspective on the implications of Brexit for cross-border divorce proceedings, *Janeen M Carruthers and Elizabeth B Crawford*
- What are the implications of the Brexit vote for the law on international child abduction?, *Nigel Lowe*
- Not a European family: implications of 'Brexit' for international family law, *Ruth Lamont*

Call for Papers: "60 Years of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Key

Issues and Future Challenges”

On 5/6 April 2018 Dr. Ana Mercedes López Rodríguez, Ph.D. and Dr. Katia Fach Gómez, LL.M will convene a conference to commemorate the 60th anniversary of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The conference will take place at University Loyola Andalucia (Seville/Spain) and is expected to comprise 3-4 Keynote Lectures and round tables with approximately 36 speakers.

Academics, practitioners and policymakers are invited to submit extended abstracts or unpublished full papers on the referred topic to the conference directors (amlopez@uloyola.es; katiafachgomez@gmail.com) by **30 November 2017**. Practitioners at all stages of their careers and senior and junior scholars (including Ph.D. students) are encouraged to participate.

The Conference directors expect to publish an edited volume in English by a relevant legal publishing house containing the most relevant papers presented in the Conference.

Further information about the submission and publication process can be found here and at the Conference website.

New Instrument of the European Law Institute – Rescue of Business in Insolvency Law

The European Law Institute has approved and published its new instrument, the report “Rescue of Business in Insolvency Law”. The report is available on SSRN as well as on the website of the ELI. The abstract on SSRN reads as follows:

Since the global financial crisis, insolvency and restructuring law have been at the forefront of law reform initiatives in Europe and elsewhere. The specific topic

of business rescue appears to rank top on the insolvency law related agenda of both the European Union (EU) and national legislators faced by a rapid growth of insolvencies, which clearly highlighted the importance of efficient mechanisms for dealing with distressed, but viable business. For the European Law Institute (ELI), this fuelled the momentum to launch an in-depth project on furthering the rescue of such businesses across Europe. The European Law Institute, established in 2011, is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, ELI's mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public (see http://www.europeanlawinstitute.eu/).

In September 2013, the ELI Council approved the proposal for a project on the 'Rescue of Business in Insolvency Law' ('Business Rescue Project') and appointed Prof. em. Bob Wessels (Leiden, Netherlands) and Prof. Stephan Madaus (Halle-Wittenberg, Germany) as Project Reporters to lead this two-stage project. The first stage comprised the drafting of National Inventory and Normative reports by National Correspondents (NCs) from 13 EU countries. In addition, Gert-Jan Boon, University of Leiden, prepared an inventory report on international recommendations from standard-setting organisations, such as UNCITRAL, the World Bank, the American Bankruptcy Institute or the Nordic-Baltic Business Rescue Recommendations, under the supervision of the Reporters. Based primarily on these detailed reports, the second stage consisted of drafting the ELI Instrument on Business Rescue ('ELI Business Rescue Report') that elaborates recommendations for a legal framework enabling the further development of coherent and functional rules for business rescue in Europe. After the Project Team finalised the draft Instrument in early 2017, ELI Fellows and Members of the ELI Council voted to approve the 'ELI Business Rescue Report' at the ELI General Assembly, representing ELI Members, and Annual Conference in Vienna (Austria) on 6 September 2017 with no objection. It consists of 115 recommendations explained on more than 375 pages. Oxford University Press will published it soon. The Report is electronically available here as well as on the

website of the ELI.

The Rescue of Business in Insolvency Law project is timely and may have a significant and positive impact on the harmonisation efforts of the European Commission as laid down in the November 2016 Proposal for a Directive on preventive restructuring frameworks. The Report contains recommendations on a variety of themes affected by the rescue of financially distressed businesses: legal rules for practitioners and courts, contract law, treatment and ranking of creditors' claims, labour law, laws relating to transaction avoidance and corporate law. The Report's ten chapters cover: (1) Actors and procedural design, (2) Financing a rescue, (3) Executory contracts, (4) Ranking of creditor claims; governance role of creditors, (5) Labour, benefit and pension issues, (6) Avoidance transactions in out-of-court workouts and pre-insolvency procedures and possible safe harbours, (7) Sales on a going-concern basis, (8) Rescue plan issues: procedure and structure; distributional issues, (9) Corporate group issues, and (10) Special arrangements for small and medium-sized enterprises (SMEs) including natural persons (but not consumers). The Report also includes a glossary of terms and expressions commonly used in restructuring and insolvency law.

The topics addressed in the Report are intended to present a tool for better regulation in the EU, developed in the spirit of providing a coherent, dynamic, flexible and responsive European legislative framework for business rescue. Mindful of the European Commission's commitment to better legal drafting, the Report's proposals are formulated as comprehensibly, clearly, and as consistently as possible. Still, the recommendations are not designed to be overly prescriptive of specific outcomes, given the need for commercial flexibility and in recognition of the fact that parties will bargain in the 'shadow of insolvency law'. The Report is addressed to the European Union, Member States of the EU, insolvency practitioners and judges, as well as scholars. The targeted group many times flows explicitly from the text of a recommendation or the context in which such a recommendation is developed and presented. The Reporters cherish the belief that the report will assist in taking a next, decisive step in the evolutionary process of the European side of business rescue and insolvency law.

HCCH Draft Guide to Good Practice on Article 13(1)(b) of the Hague Child Abduction Convention

The Permanent Bureau of the Hague Conference on Private International Law (HCCH) has just released the final French and English versions of the draft Guide to Good Practice on Article 13(1)(b) of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Child Abduction Convention) for the attention of the *Special Commission meeting of October 2017 on the practical operation of the 1980 Child Abduction Convention and of the 1996 Child Protection Convention*. A Spanish translation of the document is also available.

Further information relating to the Special Commission meeting is available here: https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57

In my view, this topic will likely spark some debate at the meeting given the heightened awareness of some of the pitfalls of the Child Abduction Convention in relation to cases of domestic violence. See, for example, Taryn Lindhorst and Jeffrey L. Edleson, *Battered Women, their Children, and International Law – the Unintended Consequences of the Hague Child Abduction Convention* (Boston: Northeastern University Press, 2012) and Honourable Brenda Hale (Baroness Hale of Richmond), "Taking Flight—Domestic Violence and Child Abduction", *Current Legal Problems* (13 August 2017).

Please note that the meeting above-mentioned is open only to delegates or experts designated by the Members of the Hague Conference, invited non-Member States and International Organisations that have been granted observer status.

Van Den Eeckhout on Private International Law and Globalisation

Written by Veerle Van Den Eeckhout

In February 2017, the working paper "Internationaal privaatrecht in tijden van globalisering. "Neutraal" internationaal privaatrecht!?") of Veerle Van Den Eeckhout was posted on ssrn. This paper was written in Dutch.

Meanwhile, an English, slightly extended version of the paper ("Private International Law in an Era of Globalisation. "Neutral" Private International Law? I could be brown, I could be blue, I could be violet sky") has been made available.

The abstract reads as follows: "In times of (discussions about) globalisation, due attention must be given to the operation of rules of private international law. Examination of the ongoing developments in private international law itself and in private international law in its interaction with other disciplines from the perspective of "protection of weak parties" and "protection of planetary common goods" allows carrying out the analysis to which current developments invite."

The English paper can be found here.

China has signed the Choice of Court Convention

More (not much more) information is here. Guangjian Tu provided a Chinese perspective on the Convention ten years ago. Two other recent publications are in

this context: Zheng Sophia Tang and Alison Lu Xu on Choice of Court Agreements in Electronic Consumer Contracts in China, and King Fung Tsang, Chinese Bilateral Judgment Enforcement Treaties, 40 Loy. L.A. Int'l. & Comp. L. Rev. 1 (2017) (only on heinonline).