On the Global Community of Private International Law – Impressions from Brazil

From August 3-5 this year, the Pontifical Catholic University of Rio de Janeiro hosted the 7th biennial conference of the Journal of Private International Law. Ably organized by Nadia de Araujo and Daniela Vargas from the host institution, together with Paul Beaumont from Aberdeen, the conference was a great success, as concerns both the quality and quantity of the presentations. Instead of a conference report, I want to provide some, undoubtedly subjective, impressions as concerns the emerging global community of private international law.

First, no less than 168 participants attended, from all over the world. The Journal conference has, by now, become something like a World Congress of Private International Law. This is no small achievement. The Journal of Private International Law started out in 2005 as a very doctrinal publication focusing primarily on common law systems and European private international law. Fittingly, the first two conferences took place in the UK. It was a very wise decision to move, after that, to cities in other countries—New York (2009), Milan (2011), Madrid (2013) and now, after a return to the UK (Cambridge) for the ten-year anniversary in 2015, Rio de Janeiro (2017). By now, it can be said that Journal and conference both really represent the world. And what is emerging is a global community that comes together at these and other events.

Second, this first Journal conference in Latin America was an excellent opportunity to showcase the tremendous developments of the discipline on this Continent. Latin America, the region that created the Código Bustamante, has long produced excellent scholars in private international law. However, for some time the discipline appeared, at least to the outside observer, marginalized, caught between a very doctrinal approach on the one side and a very philosophical one on the other, both often without connection to actual practice. In recent years, this has changed, for a number of reasons: the Hague Conference established a bureau, led by Ignacio Goicoechea; a young generation of scholars connects theory and practice, doctrine and interdisciplinarity; legislators are, at long last, replacing antiquated legislation. Many Latin American scholars and

practitioners at the conference proved that interest and quality. But the best sign for the vitality of the field were the many excellent Brazilian students who followed the conference with enthusiasm and expertise.

Third, and finally, this emerging globalization captures all regions, but not to the same degree. The great importance of Latin America in Rio was no surprise. Nor was the great role that European private international law, a testament not only both to the European background of the journal and the more generous travel budgets in European universities, but also to the legislative and scholarly developments in Europe. Asia was somewhat less well represented, as far as I could see, despite exciting developments there (including current work on Asian Principles of Private International Law), but several presentations dealt with Asian development. The most palpable absence concerned the United States. There were only two participants from the US, fewer than there were Nigerians. In a not so distant past, US private international law was the avant-garde of the discipline worldwide. When the Second Restatement was being discussed, the whole world was watching what the conflicts revolution would yield. Now, a third Restatement is underway. But I heard no word about that from participants in Rio, and the Restatement's reporters did not use the occasion to advertise their project. The United States is no longer leading the globalization of the field. Will it at least follow?

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 5/2017: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

D. Coester-Waltjen: **Fighting Child Marriages – even in Private International Law**

The article describes the newly enacted German law against “child marriages” and analyses the critical points. This law raises the minimum marriage age to 18 years without any option for younger persons to conclude a valid marriage. The former possibility of a dispensation by the family court has been abolished. Even more important and critical at the same time are the new provisions with regard to cases where foreign law governs the ability to marry. Despite the principal application of the spouses’ national law, German law will always govern the question of the minimum marital age. This applies to marriages formed in Germany as well as to those already validly concluded elsewhere. Thus, irrespective of the applicable national law of the spouses a marriage cannot be concluded in Germany by persons who are younger than 18. If such a marriage has been formed nevertheless, it will be null and void from the beginning if one spouse was younger than 16 at the time of the marriage. If the spouses had attained the age of 16, but at least one of them was younger than 18, the marriage will be voidable (and must be declared void) in Germany. This is true also for heterosexual marriages of minors concluded elsewhere and valid under the otherwise applicable law. German law invalidates these marriages either directly (one spouse under 16) or through annulment proceedings (one spouse over 16 but under 18). The law provides only few exceptions and applies to all persons under 18 at the time the new law entered into force.

C. F. Nordmeier: **The German Law on the Modification of Rules in the Area of Private International Law and Private International Procedural Law – New Provisions for Cross-Border Civil Proceedings**

By the recently enacted law on the modification of rules in the area of Private International Law and Private International Procedural Law the German legislator created several alterations for civil procedures involving crossborder elements. The present contribution critically analyses the new rules. As far as service is concerned, the prohibition to demand the designation of an authorized recipient within the scope of application of the EU Service Regulation, the competence of judicial officers to handle incoming requests for service and new one-month periods for certain procedural measures are discussed. Also, the annulment of a European order for payment in the event that the applicant fails to indicate the competent court for the adversary proceedings is examined – as well as the possibility for the States of the Federal Republic of Germany to concentrate proceedings under the European Small Claims Regulation before certain courts.

Finally, the consequences of the continued non-admission of judicial assistance for pre-trial discoveries in Germany are subject to discussion.

F. Maultzsch: **International Jurisdiction and Jointly Committed Investment Torts (Art. 5 No. 3 Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 Brussels I*bis* Regulation)**

The German Federal Supreme Court (BGH) has denied an attribution of acts among joint participants of cross-border investment torts for the purposes of Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels I*bis* Regulation. The judgment is based on a broad reading of the Melzer-decision of the CJEU. This article gives a critical assessment of the BGH's judgment. First of all, the Melzer-decision with its restrictive position as to attribution of tortious acts seems to be problematic in itself. Furthermore, the BGH does not consider that the case law of the CJEU has been developed for situations different from those to be judged by the BGH. The issue of attribution of tortious acts under Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels I*bis* Regulation should be approached in a nuanced way that accounts for the nature of the tort in question. This may also include a resort to the lex causae for specific protective laws (Schutzgesetze). In the case at hand where a foreign financial service provider had relied purposefully on acts of procurement carried out by a third party in Germany, jurisdiction of the German courts should have been approved under Art. 5 No. 3 of the Lugano Convention 2007/Brussels I Regulation, Art. 7 No. 2 of the Brussels I*bis* Regulation.

W.-H. Roth: **Private international law and consumer contracts: data protection, injunctive relief against unfair terms, and unfairness of choice-of-law provisions**

In its Amazon judgment, C-191/15, the European Court of Justice deals with three conflict-of-laws issues. Firstly, it determines the international applicability of data protection laws of the Member States in the light of Directive 95/46/EEC: A Member State may apply its law to business activities of an out-of-state undertaking directed at its territory if it can be shown that the undertaking carries out its data processing in the context of the activities of an establishment situated in that Member State. Secondly, it holds that an action for an injunction directed against the use of unfair terms in general terms and conditions, pursued

by a consumer protection association, has to be classified as non-contractual. The law applicable to the action and the remedy has to be determined on the basis of Article 6 (1) of the Rome II Regulation, being related to an act of unfair competition, whereas the (incidental) question of unfairness of a specific term in general terms and conditions shall be classified as a contractual issue and has to be judged on the basis of the law applicable to contracts according to the Rome I Regulation. Thirdly, the Court holds that the material scope of Directive 93/13/EEC extends to choice-of-law clauses in pre-formulated consumer contracts. Such a choice-of-law clause may be considered as unfair if it leads the consumer into error as far as the laws applicable to the contract is concerned.

C. Thomale: **Refusing international recognition and enforcement of civil damages adjunct to foreign criminal proceedings due to irreconcilability with a domestic civil judgment**

The German Supreme Court refused to enforce a civil claim resulting from criminal proceedings seated in Italy for reasons of irreconcilability with a German judgment given between the same parties. The case illustrates the considerable legal uncertainty that persists with the application of this ground for refusal of recognition and enforcement. The paper argues for a narrow interpretation in order to strengthen free movement of judgments within the European judicial area.

U. P. Gruber: **Recognition of provisional measures under Brussels lla**

In Purrucker, the ECJ established criteria for the recognition of provisional measures in matters of parental responsibility. Pursuant to the ECJ, if the court bases its jurisdiction on Art. 8 to 14 of the Brussels IIa Reg., the judgement containing provisional measures will be recognized and enforced in other Member States by way of Art. 21 et seqq. of the Regulation. If, however, the judgement does not contain an unambiguous statement of the grounds in support of the substantive jurisdiction of that court pursuant to Art. 8 to 14 Brussels IIa, the judgement does not qualify for recognition and enforcement under Art. 21 et seqq. Nevertheless, recognition and enforcement of the judgement are not per se excluded in this case. Rather, it has to be examined whether the judgement meets the prerequisites of Art. 20 Brussels IIa. If this is the case, the judgement can be recognized by use of other international instruments or national legislation. In a new decision, the Bundesgerichtshof applied this two-step-approach established

by the ECJ to a Polish judgement, consequently denying any possibility to recognize the Polish judgement in Germany.

W. Hau: E**nforcement of penalty orders protecting parental rights of access within the European Union**

A dispute over the enforcement in Finland of a Belgian penalty order protecting parental rights of access has uncovered a loophole in the European law of international civil procedure: The Brussels I resp. Brussels I*bis* Regulation deals with the preconditions of the enforcement of foreign penalty orders (especially as regards the final determination of the payable amount), but only in the context of civil and commercial matters, excluding family matters. The Brussels II*bis* Regulation, on the other hand, covers disputes over parental rights of access but remains silent about penalty orders. The CJEU proposes an appropriate solution, bridging the gap in the regulations.

R. Geimer: **Ordre public attenué de la reconnaissance in adoption law**

The relevance of timing by reason of recognizing child adoptions of foreign states despite violation of public order in the original proceedings.

C. A. Kern: **The enforceability of foreign enforcement orders arising from family relationships**

In Germany, various regimes govern the enforceability of foreign enforcement orders arising from family relationships. The traditional way is to have the foreign enforcement order declared enforceable on the basis of adversarial proceedings. Various supranational texts and international treaties provide for a more advanced solution under which the foreign enforcement order is declared enforceable ex parte. The most progressive solution is automatic enforceability. Moreover, depending on the applicable regime, the remedies and the requirements governing their admissibility differ. Two recent decisions of the German Federal Supreme Court (Bundesgerichtshof) illustrate how complex the situation is. It is advisable to unify the applicable procedural rules at least insofar as the complexity is the consequence of diverging national rules.

R. Schaub: **Traffic Accidents with an International Element: The Complex Interaction of European and National Rules in two Cases from the Austrian Supreme Court**

Traffic accidents with an international element are common occurrences but still raise a lot of questions as to the applicable law. In Europe, different sets of rules have been created to facilitate the compensation of victims in such cases. The complex interaction of EU and national rules on substantive law as well as private international law can be seen in two cases from the Austrian Supreme Court.

M. Andrae: **Again on the term „obligations arising out of matrimonial property regimes“**

The article deals with the characterization of claims between spouses living apart, which concern the joint property marital home and its financing through a credit. It involves: (1) compensation between spouses, in case they are jointly and severally liable for their obligations from the contract; (2) reimbursement of expenses for the matrimonial home, in case of the sole use of the matrimonial home by one of the spouses and (3) cases in which one spouse may demand from the other compensation for use of the matrimonial home. The main problem is whether this claim can be subsumed as “obligations arising out of matrimonial property regimes” with the consequence that it would be excluded from the scope of the Rome I and Rome II Regulation. For this the article presents a number of arguments. Finally, a solution will be discussed, insofar as the Brussels I*bis* Regulation for the jurisdiction and the Rome I and Rome II Regulations referring to conflict-of-laws rules are not applicable.

L. M. Kahl: **Differences in dealing with foreign law in German and Italian jurisprudence**

The article compares two cases in which the German Federal Court of Justice (BGH) and the Italian Supreme Court had to decide on the requirements for dealing with foreign law. The BGH only reviews whether the court of lower instance correctly determined the foreign law under Section 293 German Code of Civil Procedure (ZPO), whereas the Corte di Cassazione reviews if the court correctly applied foreign law under Art. 15 Italian law on Private International Law (legge numero 218/1995). In practice, the criteria set out by the BGH provide for a more in-depth review of judgments on foreign law than the criteria of the Corte di Cassazione. The BGH’s approach on review of judgments on foreign law promotes international harmony of judgments.

Douglas and Bath on important changes to the New South Wales' Uniform Civil Procedure Rules

Mr Michael Douglas and Prof Vivienne Bath, of Sydney Law School, have published an article on recent amendments to the Uniform Civil Procedure Rules regarding service outside the Australian state of New South Wales. Under the Rules, effective service of the court's originating process on a defendant outside New South Wales will establish the court's personal jurisdiction over the defendant. The article clearly sets out and analyses changes to the bases on which a defendant can be served outside Australia under the Rules. Numerous bases have been significantly expanded. It also considers the effect of a new rule allowing for a defendant to be served outside Australia, with the court's leave, where the claim does not fall within one of those bases. Among the particularly helpful aspects of the article are several comparative tables displaying the original rule, the revision and the authors' projected impact of the revision.

The authors' abstract is as follows:

'In December 2016, the Uniform Civil Procedure Rules 2005 (NSW) were amended in respect of service outside of the jurisdiction and outside Australia. Previously, service outside Australia was authorised if the claim had a specified connection to the forum. The claim was required to fall within one or more of the heads of Schedule 6. If the defendant failed to appear, the plaintiff would require leave to proceed. That position remains the default under the amended Rules, although the heads of Schedule 6 have been revised. However, there has also been a significant change. Under the new Rules, if the claim does not fall within Schedule 6, service may be authorised with the prior leave of the court. This article outlines and comments on the changes to the Rules, identifying areas which may require judicial clarification.'

The paper is available on SSRN at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025146

Its suggested citation is: Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules' (2017) 44(2) *Australian Bar Review* 160.

Litigación Internacional en la Unión Europea I: el Reglamento Bruselas I-bis

A new book on the Brussels I-bis Regulation, opening a brand new collection of Treaties on European Private International Law, has just seen the light. Entitled "Litigación internacional en la Unión Europea I: el Reglamento Bruselas I-bis" ("International litigation in the European Union I: the Brussels I-bis Regulation"), it is authored by Alfonso-Luis Calvo Caravaca, Javier Carrascosa González and Celia Caamiña Domínguez.

The book is divided into two major parts. The first is devoted to the European system of private international law. It examines the impact of European freedoms of movement on the European rules of private international law and the legal techniques used by the European legislator and the European court of Justice to implement these freedoms: the principle of mutual recognition (*Anerkennungsprinzip*), the doctrine of the "Law of origin" as a general rule of Private International Law and the creation of all-European new conflict rules. The process of europeanisation of Private International Law and its direct relationship with the European judicial area is also set out. To conclude this first part, the legal scenario of European private international law is analyzed, with a particular focus on the "Brussels Regulations" and the "Rome Regulations", as the fundamental pillars of EU private international law.

The second part is devoted to an in-depth study of the Brussels I-bis Regulation. It covers the general aspects of this important bastion of European private

international law, as well as the rules of international jurisdiction those regarding extraterritorial validity of judgments and other decisions.

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For more information, click here

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HCCH discussion paper on the operation of Article 15 of the 1980 Hague Child Abduction Convention

The Permanent Bureau of the Hague Conference on Private International Law (HCCH) has just issued a discussion paper on the operation of Article 15 of the 1980 Hague 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*.

Article 15 of the Child Abduction Convention reads as follows: “The judicial or administrative authorities of a Contracting State may, prior to the making of an

order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child **a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention**, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination." (our emphasis)

The paper proposes the following summary of possible measures to improve the application of Article 15:

- "Encouraging the availability of Article 15 decisions or determinations in all Contracting States;
- Encouraging clarification and improvement of internal Article 15 implementation with a view to making the procedures expeditious and effective;
- Enhancing the Country Profile under the 1980 Convention in relation to Article 15;
- Drafting of an Information Document on Article 15, which would also encourage:
    1. discretion in the use of the Article 15 mechanism and the use of alternatives;
    2. the systematic use of Article 8(3)(f) and Article 14, and the use of direct judicial communications and the IHNJ, where appropriate;

- Drafting of an Article 15 Model Request Form;
- Improving Central Authority practice in:
    1. facilitating the obtaining of decisions or determinations from competent authorities;
    2. encouraging more systematic inclusion of Article 8(3)(f) certificates / affidavits in applications, where deemed necessary;

- Encouraging improved quality of the decisions or determinations (under Art. 15) and certificates or affidavits (under Art. 8(3)(f)) (*e.g.*, through an Information Document and / or Model Request Form);
- Encouraging greater international consistency in a number of identified areas, if feasible (*e.g.*, certain trends / approaches could be described in an Information Document drafted with the assistance of a Working Group;

use of a questionnaire to Contracting States to collect additional information).”

Preliminary and Information Documents of the meeting are available at https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57. A draft agenda, as well as other Preliminary Documents including statistical information, will be uploaded in due course.

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.

The Special Commission on Inter-Regional Conflict of Laws of the Chinese Society of Private International Law Organized Its Third Annual Symposium on Inter-Regional Taking of Evidence Within China

This Report is prepared by Prof. Guangjian Tu/Zeyu Huang (a PhD Candidate in University of Macau)

On 26 August 2017, one of the Special Commissions of the Chinese Society of Private International Law, the Special Commission on Inter-Regional Conflict of Laws (chaired by Professor Guangjian Tu) organized its third annual symposium titled “Inter-Regional Taking of Evidence Within China: Problems, Reflections and

Improvements" under the support of the Chinese Society of Private International Law and the Institute for Advanced Legal Studies of Faculty of Law of University of Macau. Legal scholars and practitioners from the Mainland China, Hong Kong and Macau participated in this event on the beautiful newly-built campus of University of Macau, located in the Hengqin Island (Zhuhai City, PRC).

With the Mainland China –Macau Taking of Evidence Arrangement being made in 2001 and the Mainland China-Hong Kong Taking of Evidence Arrangement being promulgated in March 2017, this symposium was devoted to discussing and examining the potential problems, practical implementation and possible improvements of the two Arrangements. Given that at a global level the Hague Evidence Convention is regularly revisited every five years, useful information arising out of the Convention could be very good reference for Chinese Arrangements; the enhanced version of the Hague Evidence Convention, the EU Evidence Regulation could provide valuable experience to Chinese practice. While emphasis was put on the special features of the two Arrangements, international and foreign ideas and approaches were paid enough attention. It is suggested that within the Chinese Context, for the cross-border taking of evidence, shorter route between court to court could be explored, direct taking of evidence on voluntary witnesses is potentially possible and modern technologies could be made more use of.

Grounds for Refusal of Recognition of (Quasi-) Annex Judgements in the Recast European Insolvency Regulation

Written by Zoltán Fabók, Fellow of INSOL International, Counsel at DLA Piper (Hungary) and PhD Candidate at Nottingham Trent University

Insolvency-related (annex) actions and judgements fall within the scope of the

Recast European Insolvency Regulation ('Recast EIR'). That instrument both determines international jurisdiction regarding annex actions and sets up a simplified recognition system for annex judgements. However, tension between the Recast EIR's provisions on jurisdiction and recognition arises when a court of a state different from the state of insolvency erroneously assumes jurisdiction for annex actions. Such 'quasi-annex' judgements rendered by foreign courts erroneously assuming jurisdiction threaten the integrity of the insolvency proceedings. Besides, the quasi-annex judgements may violate the effectiveness and efficiency of the insolvency proceedings as well as the principle of legal certainty.

In my paper, it is argued that even the current legal framework may offer some ways to avoid the recognition of such quasi-annex judgements. First, the scope of the public policy exception may be extended in order to protect the integrity of the insolvency proceedings from the quasi-annex judgements rendered by foreign courts erroneously assuming jurisdiction. Second, it may be argued that quasi-annex judgements do not equal real annex judgements and therefore do not enjoy the automatic recognition system provided by the Recast EIR. At the same time, their close connection to the insolvency proceedings – disregarded by the forum erroneously assuming jurisdiction – may exclude quasi-annex judgements from the scope of the Brussels Ibis Regulation, as well. As a consequence, those quasi-annex judgements may fall within the gap between the two regulations, meaning that no European instrument instructs the courts of the member state addressed to recognise quasi-annex judgements.

My research article has been accepted for publication by International Insolvency Review. The paper can be accessed in the Early View section at http://onlinelibrary.wiley.com/doi/10.1002/iir.1284/full.

Egyptian Court of Cassation on the

application of the Hague Service Convention

[The author wishes to thank Justice *Hossam Hesham Sadek*, Vice President of the Civil and Commercial Chamber of the Court of Cassation, and reporting judge in the case at hand, for granting access to the Supreme Court's ruling].

1. Introduction

In a recent ruling (22/05/2017), the Egyptian Court of Cassation tackled with the issue of service of process abroad. The facts of the case were the following: The claimant (and appellant) was an Egyptian Medical Equipment company, situated in Cairo. The respondents and appellees were a Chinese company, with its seat in Nanshan district, Shenzen, the Egyptian General Organization for Import and Export Control, and an Egyptian company, with its seat in Heliopolis, Cairo.

2. Facts and instance ruling

The Appellant filed a lawsuit against the Chinese Company and the Second Appellee at Cairo Court of Appeal, requesting a judgment obliging the First Appellee to pay the amount of ten million Egyptian pounds as monetary and moral compensation resulting from the contract's termination. The Appellant asserted that it had been assigned as the sole agent of the First Appellee in Egypt, for selling ultrasonic wave devices, and that it was unexpectedly notified by the First Appellee that the contract was terminated.

The first instance court ordered that the lawsuit be dismissed for lack of proper service to the Chinese company. The Appellant claimed that service had been effected through the Public Prosecution Office, following all necessary procedures through diplomatic channels in China, pursuant to article 13 (9) of the Egyptian Civil and Commercial Code of Procedure (CCCP), and by notification of the claim to the first Appellee's legal representative (Commercial Agent) pursuant to article 13 (5) CCCP.

Article 13 (9) CCCP states that, if no international treaty or a specific provision of law is applicable, service shall be made by delivering the documents to the public prosecutor, who then forwards them to the Minister of Foreign Affairs, to be

delivered through diplomatic channels to the country of destination. Art. 13 (5) CCCP stipulates that, if service is addressed to a foreign company that has a branch or agent in Egypt, domestic service shall be effected (i.e. to the branch or agent located in Egypt).

3. The Supreme Court ruling

The Court of Cassation referred initially to Art. 13 (5) & (9) CCCP. It then mentioned Articles 3 & 14 of the Judicial Cooperation Treaty on Civil, Commercial and Criminal Matters between the Arab Republic of Egypt and The People's Republic of China, signed on 21/4/1994, which stipulates that: "*For the purposes of requesting and providing judicial assistance, parties shall communicate through their central authorities unless otherwise provided for in this Treaty. Central authorities of both parties are represented by the Ministries of Justice. Both parties shall serve judicial documents in civil and commercial matters pursuant to Hague Convention on the service Abroad of Judicial and Extrajudicial Documents in civil or Commercial Matters concluded on 15/11/1965*''.

Based on the above, the Court of Cassation decided as follows: The Hague Convention exclusively stipulates methods, means and conditions for serving judicial documents unless agreed between the Parties on other methods pursuant to Article 11 of the same Convention, and obliges the judge to stay proceedings, save when a document was served by a method prescribed by the internal law of the State addressed, or when the document was actually served to the defendant in its residence under one of the methods prescribed in the Convention in sufficient time to enable him to arrange for his defence.

Since the legislator has permitted in Article 13(5) CCCP that foreign companies may be served by delivering a copy to its branch or agent in Egypt, their existence is considered a question of fact under the exclusive competence of the court. Accordingly, the Court of Cassation confirmed the instance decision, which ruled that service made to the first Appellee through the third appellee (Trade And Importing Company in Heliopolis), ostensibly being its commercial agent and representative, was improper, since the representative of the latter denied its relation with the first Appellee.

Finally, delivering the document to the Public Prosecution in order to take necessary actions towards service by diplomatic channels is not sufficient,

because notice was not delivered / served to the first Appellee.

4. Conclusion

The judgment offers a valuable insight into the practice of Egyptian courts in regards to notification of documents abroad. It is noteworthy that the Court of Cassation examined carefully all legal regimes related to the subject matter: It referred to domestic law (CCCP), the Egyptian – Chinese bilateral treaty, and the multilateral convention, to which the bilateral convention refers. The question whether service of process abroad was necessary or not was decided on a substantive level: Given that the appellant failed to demonstrate that the third appellee was the representative of the Chinese company, the court rightfully considered that service solely to the local Transmission Authority through the Prosecutor's Office does not suffice. Hence, whenever the Hague Service Convention applies, the Court of Cassation dismisses fictitious service (remise au parquet).

Baudenbacher on Brexit and the EFTA option

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

In response to the United Kingdom's intention to leave the jurisdiction of the Court of Justice of the European Union after Brexit (see in this respect the policy paper on providing a cross-border civil judicial cooperation framework issued by the Department for Exiting the European Union), Carl Baudenbacher, the President of the Court of the European Free Trade Association (EFTA), has just published an interesting article which advocates that the United Kingdom could use his court to resolve disputes. According to him, the relationship of the EFTA Court and the CJEU is based on judicial dialogue. On the one hand, the EFTA Court as a rule follows relevant case law of the CJEU. On the other hand, the CJEU usually follows EFTA Court case law, both explicitly and implicitly. In case

of a conflict between the two courts, the EFTA Court is, in his opinion, not easily "outgunned" by the CJEU. By contrast, he highlights that the EFTA Court has gone its own way on essential questions of European single market law. Nonetheless, he argues that the case law of the EFTA Court and the CJEU must develop in a homogeneous way.

The article can be found here.

Second Issue of 2017's Journal of Private International Law

The second issue of 2017's *Journal of Private International Law* has been published.

Just how free is a free choice of law in contract in the EU? by *Peter Mankowski*

> *Free choice of law appears to be the pivot and the unchallenged champion of the private international law of contracts. Yet to stop at this would be a fallacy and would disregard the challenges it has to face. Those challenges come from different quarters. In B2C contracts in the EU not only the more favourable law principles as enshrined in Article 6(2) of the Rome I Regulation must be observed, but also any requirements which the Unfair Contract Terms Directive imposes. Transparency in particular ranks high. In Verein für Konsumenteninformation v Amazon the Court of Justice of the European Union has imposed duties on businesses and professionals to inform their consumer customers about at least the existence and the basic structure of the more favourable law principle. This landmark decision might not stand on ground as firm as it implies at first sight. Its fundament might be shaken by inconsistency. But practice has to comply with it and has to observe its consequences. On a more abstract level, it raises ample necessity to reflect about the modern-day structure of "free" choice of law. In this context, it is argued that the system established for parties' choice of law in the Rome I Regulation does not allow for a content review of choice of law agreements.*

Constitutionalizing Canadian private international law – 25 years since *Morguard* by *Joost Blom*

> *Because of its structuring function, private international law tends to be given a status distinct from the ordinary rules of domestic law. In a federal system, private international law of necessity implicates some aspects of the constitution. In a series of cases beginning in 1990 the Supreme Court of Canada has engaged in a striking reorientation of Canadian private international law, premised on a newly articulated relationship between private international law and the Canadian constitutional system. This constitutional dimension has been coupled with an enhanced notion of comity. The new dynamic has meant that changes in private international law that were initially prompted by constitutional considerations have gone further than the constitutional doctrines alone would demand. This paper traces these developments and uses them to show the challenges that the Supreme Court of Canada has faced since 1990 in constructing a relationship between Canada's constitutional arrangements and its private international law. The court has fashioned the constitutional doctrines as drivers of Canadian private international law but its own recent jurisprudence shows difficulties in managing that relationship. The piece concludes with lessons to be learned from the experience of the last 25 years.*

Freedom of establishment, conflict of laws and the transfer of a company's registered office: towards full cross-border corporate mobility in the internal market? by *Johan Meeusen*

> *Cross-border corporate mobility in the internal market has developed in particular through the interpretation by the Court of Justice of the European Union of the Treaty provisions on freedom of establishment. Certain issues at the crossroads of conflict of laws and European Union (EU) law are still the subject of debate. One of these is whether freedom of establishment includes a right to solely transfer a company's registered office between Member States. As such transformation results in a change of the company's lex societatis, it is intrinsically linked to the debate on regulatory competition in the EU internal market, freedom of choice and the proper balancing of the public and private interests involved. The author defends a nuanced position, referring to the true meaning of "establishment" in the internal market, the policy of "safe"*

regulatory competition and the equivalence of the Member States' conflict of laws rules.

The recast of the Insolvency Regulation: a third country perspective by *Nicolò Nisi*

During the recasting process of the EU Insolvency Regulation, issues relating to the relationship between the Regulation and the outer world were not debated. Indeed, the new Regulation (EU) 2015/848 maintains its territorial scope of application by making the application of the Regulation subject to the location of the centre of main interests within the territory of a Member State. This article tries to highlight the drawbacks of such geographical limitation concerning different aspects of the Regulation: in particular, jurisdiction, groups of companies, recognition of insolvency proceedings, cooperation and communication among courts and insolvency practitioners. Considering various possibilities to establish a truly universal regime, the article concludes that, in the light of the objective of an efficient administration of insolvency proceedings, the preferred approach is to extend the scope of application of the Regulation unilaterally, thereby including insolvencies significantly linked with third States.

A new frontier for Brussels I – private law remedies for breach of the Regulation? by *Ian Bergson*

The English courts have held that the Brussels I Regulation confers private law rights, such that an employee may obtain an anti-suit injunction on the basis of their "statutory right" to be sued in England under the employment provisions of the Regulation. This article examines the correctness of this proposition and argues that the Regulation does not confer rights or impose obligations on private individuals that they may enforce against one another. The article goes on to consider the implications of the English decisions and their remedial consequences, including the possibility of seeking an award of damages for breach of the Regulation.

Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast

especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT by *Mukarrum Ahmed and Paul Beaumont*

> *This article contends that the system of "qualified" or "partial" mutual trust in the Hague Choice of Court Agreements Convention ("Hague Convention") 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. However, intra-EU Hague Convention cases may arguably not permit remedies for breach of exclusive jurisdiction agreements as they may infringe the principles of mutual trust and effectiveness of EU law (effet utile) underlying the Brussels I Recast Regulation. The relationship between Article 31(2) of the Brussels I Recast Regulation and Articles 5 and 6 of the Hague Convention is mapped in this article. It will be 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. This exceptional nature of the right to sue in the non-chosen forum under the Hague Convention can be effectively reconciled with the Brussels I Recast Regulation's reverse lis pendens rule under Article 31(2). This will usually result in the stay of the proceedings in the non-chosen court as soon as the chosen court is seised. The impact of Brexit on this area of the law is uncertain but it has been argued that the likely outcome post-Brexit is that the regime applicable between the UK and the EU (apart from Denmark) in relation to exclusive jurisdiction agreements within the scope of the Hague Convention will be the Hague Convention.*

The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law by *Weizuo Chen and Gerald Goldstein*

> *The Asian Principles of Private International Law (APPIL) finalized in 2017 is a project undertaken by private international law scholars of 10 East and Southeast Asian jurisdictions to harmonize the region's private international law rules or principles. Containing principles on choice of law, international jurisdiction, the recognition and enforcement of foreign judgements, and the judicial support of international commercial arbitration, they are the first harmonization effort in Asia based on comparative analyses of the private international law of the 10 participating APPIL-Jurisdictions. Being the first*

"voice of Asia" in private international law, they may serve as a model for national and regional instruments and thus may be used by the private international law legislators of Asian jurisdictions to interpret, supplement and enact their own private international law statutes; and may even be applied by state courts and arbitral tribunals, albeit not as legally binding instrument but as "soft law". They will mainly function as a private international law model law.

The "statutist trap" and subject-matter jurisdiction by *Maria Hook*

Common law courts frequently rely on statutory interpretation to determine the cross-border effect of legislation. When faced with a statutory claim that has foreign elements, courts seek to determine the territorial scope of the statute as a matter of Parliamentary intent, even if it is clear that Parliament did not give any thought to the matter. In an article published in this journal in 2012, Christopher Bisping argued that "statutism" – the idea that statutory interpretation should determine whether a statute applies to foreign facts – is inconsistent with established principles of choice of law. The purpose of this paper is to demonstrate that, in addition to cutting across principles of choice of law, a statutist approach has the potential to obscure fundamental questions of subject-matter jurisdiction. In particular, statutism can lead to conflation of subject-matter jurisdiction and choice of law, and it impedes the development of coherent principles of subject-matter jurisdiction.

State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU? by *Chris Thomale*

Mother surrogacy in and of itself, as a procreative technique, poses a series of social, ethical and legal problems, which have been receiving widespread attention. Less prominent but equally important is the implementation of national surrogacy policies in private international law. The article isolates the key ethical challenges connected with surrogacy. It then moves on to show how, in private international law, the public policy exception works as a vehicle to shield national prohibitive policies against international system shopping and how it continues to do so precisely in the best interest of the child. Rather than recognizing foreign surrogacy arrangements, national legislators with intellectual support by an EU model law, should focus on adoption reform in

order to re-channel intended parents' demand for children.