Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2024: Abstracts

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

Erik Jayme †

T. Lutzi: **Unilateralism as a structural principle of the Digital Single Market?**

While the body of instruments through which the European legislator aims to create a Digital Single Market keeps growing, it remains strangely devoid of multilateral conflicts rules. Instead, directives in this area usually contain no conflict-of-laws provisions at all, while regulations limit themselves to a unilateral definition of their territorial scope of application. As the instruments do not regulate the matters falling into their material scope of application conclusively, though, they continue to rely on, and interact with, national systems of private law. The existing, general conflict-of-laws rules do not coordinate between these systems satisfactorily. In order to realise a genuine Digital Single Market with uniform standards of liability, specific universal conflicts rules thus seem indispensable

L. Theimer: **The last arrow in the English courts’ quiver? ‘Quasi-anti-suit injunctions’ and damages for breach of exclusive choice of court agreements**

This article analyses the last instance of failed integration of English common law instruments into the jurisdictional system of the Brussels regime. In its decision in

Charles Taylor Adjusting, the ECJ held that decisions granting provisional damages for bringing proceedings in another Member State, where the subject matter of those proceedings is covered by a settlement agreement and the court before which proceedings were brought does not have jurisdiction on the basis of an exclusive choice of court agreement, are contrary to public policy under Art 34 (no 1) and Art 45(1) Brussels I Regulation. More specifically, they violate the principle of mutual trust by reviewing the jurisdiction of a court of another Member State and interfering with its jurisdiction. Such decisions also undermine access to justice for persons against whom they are issued. By and large, the decision merits approval as it unmasks the English decisions as "quasi-anti-suit injunctions" which are incompatible with the Brussels Regulation, just like their "real" siblings, anti-suit injunctions. The ECJ's analysis is, however, not in all respects compelling, particularly with regard to the point of reviewing another court's jurisdiction. Moreover, the Court's and the Advocate General's reluctance to engage with the English view on the issue is regrettable. In conclusion, the ECJ's decision may well – in terms of EU law – have broken the last arrow in the English courts' quiver. It is unlikely, however, that English courts will be overly perturbed by this, considering that, following Brexit, their arsenal is no longer constrained by EU law.

W. Hau: **The required cross-border implication in Article 25 Brussels I Regulation: prerequisite for application or measure against abuse?**

It has long been debated whether two parties domiciled in the same Member State can agree on the jurisdiction of the courts of another Member State pursuant to Art. 25 Brussels Ibis Regulation if, apart from this agreement, the facts of the case have no other cross-border implications. The ECJ has now convincingly answered this question in the affirmative. This ruling provides an opportunity to take a closer look at the function of the requirement of an international element in the context of Art. 25 Brussels Ibis Regulation and some questionable arguments that are derived from other legal instruments.

A. Hemler: **The "consumer jurisdiction of the joinder of parties" in the Brussels Ia Regulation and the comparison between the law applicable to**

consumer contracts and other contracts in the Rome I Regulation

In the cases Club La Costa and Diamond Resorts, Spanish courts referred various questions to the ECJ on timeshare contracts between consumers and businesses residing in the UK concerning the right to use holiday accommodations in Spain. In Club La Costa, the ECJ primarily discussed whether the consumer jurisdiction of Art 18(1) Brussels Ia Regulation permits an action in front of Spanish courts against the consumer's contractual partner if the latter is not established in Spain and if the co-defendant, who is only connected to the consumer via an ancillary contractual relationship, has a registered office in Spain. In both proceedings, the question also arose as to whether the law applicable under the general rules of Art 3, 4 Rome I Regulation can be applied instead of the law applicable under Art 6 Rome I Regulation if the former is more favourable to the consumer in the specific case. The ECJ answered both questions in the negative and with somewhat generalised reasoning. Both decisions can be endorsed above all because both International Civil Procedural Law and the Conflicts of Laws realise consumer protection through abstract rules on the access to domestic courts or the applicable law, which means that, in principle, choosing the most favourable forum or legal result in each individual case is not a valid option.

C. Uhlmann: **The contract to enter into a future contract in Private International Law and International Civil Litigation**

In EXTÉRIA, the ECJ decided upon the question of whether a contract to enter into a future contract relating to the future conclusion of a franchise agreement, which provides for an obligation to pay a contractual penalty based on non-performance of that contract to enter into a future contract, is a service contract in accordance with Art. 7(1)(b) Brussels Ia-Regulation. The ECJ answered this question in the negative on the grounds that the contract to enter into a future contract does not stipulate the performance of any positive act or the payment of any remuneration; in the absence of any actual activity carried out by the co-contractor, the payment of the contractual penalty could also not be characterized as remuneration. Instead, international jurisdiction should be determined in accordance with Art. 7(1)(a) Brussels Ia-Regulation. The author criticizes that the ECJ characterizes the contract to enter into a future contract detached from the future contract and generally argues in favor of an ancillary characterization and

a broad understanding of the provision of services for the purpose of Art. 7(1)(b) Brussels Ia-Regulation.

C. Rüsing: **Transfer of jurisdiction under Article 15 Brussels IIbis Regulation and Articles 12, 13 Brussels IIter Regulation in cases of child abduction**

According to Art. 15 Brussels IIbis Regulation, a court of a Member State may, under certain prerequisites, transfer its jurisdiction in custody proceedings to the court of another Member State. In TT ./. AK (C-87/22), the CJEU held that in cases of child abduction, a court with jurisdiction under Art. 10 Brussels IIbis Regulation may also transfer jurisdiction to a court of the state to which the child has been abducted. The article welcomes this, but highlights problems that both courts must take into account in doing so. It also discusses changes under the Brussels IIter Regulation now in force.

D. Looschelders: **Time-preserving effect of a waiver of the succession before the courts of the heir's habitual residence**

Whether a waiver of the succession before a court at the habitual residence of the heir competent under Article 13 of the EU Succession Regulation has time-preserving effect, even if the declaration of the heir is not forwarded to the court responsible for settling the estate within the period stipulated by the law applicable to the succession, has been controversial to date. In the present decision, the ECJ has affirmed a deadline-preserving effect. The operative part and the grounds of the judgement suggest that the ECJ regards the question of before which court the waiver of the succession is to be declared as a matter of form. The prevailing opinion in Germany, on the other hand, still categorises this question as a matter of substantive law; the jurisdiction of the courts at the habitual residence of the heirs is therefore understood as a case of substitution ordered by law. Within the scope of application of Article 13 EU Succession Regulation the divergent characterisation has no practical significance. However, different results may arise if an heir according to the law of his habitual residence does not waive the succession before a court or if he declares the waiver of the succession before a court of a third country. In these cases, only Article 28 EU

Succession Regulation is applicable, but not Article 13 EU Succession Regulation. As the ECJ has argued with the interaction between both provisions, a new referral to the ECJ may be necessary in this respect.

C. A. Kern/K. Bönold: **Blocking effect of filing an insolvency petition with courts in Member States and third countries under the EU Insolvency Regulation and InsO**

In its preliminary ruling of 24 March 2022 (Case C-723/20 – Galapagos BidCo. Sàrl ./. DE, Hauck Aufhäuser Fund Services SA, Prime Capital SA), the ECJ confirmed that the filing of an insolvency petition with a court of a Member State triggers a bar to the jurisdiction of courts of other Member States. Due to Brexit, the BGH, in its final decision of 8 December 2022 (IX ZB 72/19), had to apply German international insolvency law, which it interpreted differently from the EU Insolvency Regulation.

H.-P. Mansel: **In memory of Erik Jayme**

C. Kohler: **Guidelines on the recognition of a foreign legal relationship in private international law – Conference of the European Group for Private International Law 2023, Milan, September 2023**

Who is bound by Choice of Court Agreements in Bills of Lading?

According to the doctrine of privity of contract, only parties to a choice of court agreement are subject to the rights and obligations arising from it. However, there are exceptions to the privity doctrine where a third party may be bound by

or derive benefit from a choice of court agreement, even if it did not expressly agree to the clause. A choice of court agreement in a bill of lading which is agreed by the carrier and shipper and transferred to a consignee, or third-party holder is a ubiquitous example.

Article 25 of the Brussels Ia Regulation does not expressly address the effect of choice of court agreements on third parties. However, CJEU jurisprudence has laid down that the choice of court agreement may bind a third party in some contexts even in the absence of the formal validity requirements. Effectively, this is a context specific harmonised approach to developing substantive contract law rules to regulate the effectiveness of choice of court agreements. Article 25 of the Brussels Ia Regulation prescribes formal requirements that must be satisfied if the choice of court agreement is to be considered valid. Consent is also a necessary requirement for the validity of a choice of court agreement. (Case C-322/14 *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH* EU:C:2015:334, [26]; Case C 543/10 *Refcomp* EU:C:2013:62, [26]). Although formal validity and consent are independent concepts, the two requirements are connected because the purpose of the formal requirements is to ensure the existence of consent (*Jaouad El Majdoub*, [30]; *Refcomp*, [28]). The CJEU has referred to the close relationship between formal validity and consent in several decisions. The court has made the validity of a choice of court agreement subject to an 'agreement' between the parties (Case C-387/98 *Coreck* EU:C:2000:606, [13]; Case C-24/76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Ruwa Polstereimaschinen GmbH* EU:C:1976:177, [7]; Case C-25/76 *Galeries Segoura SPRL v Societe Rahim Bonakdarian* EU:C:1976:178, [6]; Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravieres Rhenanes SARL* EU:C:1997:70, [15]). The Brussels Ia Regulation imposes upon the Member State court the duty of examining whether the clause conferring jurisdiction was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated (ibid). The court has also stated that the very purpose of the formal requirements imposed by Article 17 (now Article 25 of Brussels Ia) is to ensure that consensus between the parties is in fact established (Case 313/85 *Iveco Fiat v Van Hool* EU:C:1986:423, [5]).

In similar vein, the CJEU has developed its case law as to when a third party may be deemed to be bound by or derive benefit from a choice of court agreement. In the context of bills of lading, the CJEU has decided that if, under the national law

of the forum seised and its private international law rules, the third-party holder of the bill acquired the shipper's rights and obligations, the choice of court agreement will also be enforceable between the third party and the carrier (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti*EU:C:1999:142, [41]; C 387/98 *Coreck* EU:C:2000:606, [24], [25] and [30], C 352/13 *CDC Hydrogen Peroxide* EU:C:2015:335, [65]; Cf. Article 67(2) of the Rotterdam Rules 2009). There is no separate requirement that the third party must consent in writing to the choice of court agreement. On the other hand, if the third party has not succeeded to any of the rights and obligations of the original contracting parties, the enforceability of the choice of court agreement against it is predicated on actual consent (C 387/98 *Coreck* EU:C:2000:606, [26]; C 543/10 *Refcomp* EU:C:2013:62, [36]). A new choice of court agreement will need to be concluded between the holder and the carrier as the presentation of the bill of lading would not *per se* give rise to such an agreement (AG Slynn in *Tilly Russ*).

Article 17 of the Brussels Convention and Article 23 of the Brussels I Regulation did not contain an express provision on the substantive validity of a choice of court agreement. The law of some Member States referred substantive validity of a choice of court agreement to the law of the forum whereas other Member States referred it to the applicable law of the substantive contract (Heidelberg Report [326], 92). However, Article 25(1) of the Brussels Ia Regulation applies the law of the chosen forum (*lex fori prorogatum*) including its choice of law rules to the issue of the substantive validity of a choice of court agreement ('unless the agreement is null and void as to its substantive validity under the law of that Member State').

The CJEU recently adjudicated on whether the enforceability of English choice of court agreements in bills of lading against third party holders was governed by the choice of law rule on 'substantive validity' in Article 25(1) of the Brussels Ia Regulation. (Joined Cases C 345/22 and C 347/22 *Maersk A/S v Allianz Seguros y Reaseguros SA* and Case C 346/22 *Mapfre España Compañía de Seguros y Reaseguros SA v MACS Maritime Carrier Shipping GmbH & Co*.) The CJEU held that the new provision in Article 25(1) referring to the law of the Member State chosen in the choice of court agreement including its private international law rules is not applicable. A third-party holder of a bill of lading remains bound by a choice of court agreement, if the law of the forum seised and its private international law rules make provision for this. Notwithstanding, the principle of

primacy of EU law precludes Spanish special provisions for the subrogation of a choice of court agreement that undermine Article 25 as interpreted by CJEU case law.

In the three preliminary references under Article 267 TFEU, the enforceability of English choice of court agreements between Spanish insurance companies and maritime transport companies was at issue. The insurance companies exercised the right of subrogation to step into the shoes of the consignees and sued the maritime transport companies for damaged goods. The central issue in the proceedings was whether the choice of court agreements concluded in the original contracts of carriage evidenced by the bills of lading between the carrier and the shipper also bound the insurance companies. The transport companies objected to Spanish jurisdiction based on the English choice of court agreements. The Spanish courts referred questions to the CJEU on the interpretation of choice of court agreements under the Brussels Ia Regulation.

At the outset, the CJEU observed that the Brussels Ia Regulation is applicable to the disputes in the main proceedings as the proceedings were commenced by the insurance companies before 31 December 2020. (Article 67(1)(a), Article 127(1) and (3) of the EU Withdrawal Agreement)

The CJEU proceeded to consider whether Article 25(1) of the Brussels Ia Regulation must be interpreted as meaning that the enforceability of a choice of court clause against the third-party holder of the bill of lading containing that clause is governed by the law of the Member State of the court or courts designated by that clause. The CJEU characterised the subrogation of a choice of court agreement to a third party as not being subject to the choice of law rule governing substantive validity in Article 25(1) of the Brussels Ia Regulation. (C 519/19 *DelayFix* EU:C:2020:933, [40]; C 543/10 *Refcomp* EU:C:2013:62, [25]; C 366/13 *Profit Investment SIM* EU:C:2016:282, [23]) The CJEU relied on a distinction between the substantive validity and effects of choice of court agreements (*Maersk*, [48]; AG Collins in *Maersk*, [54]-[56]). The latter logically proceeds from the former, but the procedural effects are governed by the autonomous concept of consent as applied to the enforceability of choice of court agreements against third parties developed by CJEU case law.

Although Article 25(1) of the Brussels Ia Regulation differs from Article 17 of the Brussels Convention and Article 23(1) of the Brussels I Regulation, the

jurisprudence of the CJEU is capable of being applied to the current provision (*Maersk*, [52]; C 358/21 *Tilman*, EU:C:2022:923, [34]; AG Collins in *Maersk*, [51]-[54]). The CJEU concluded that where the third-party holder of the bill of lading has succeeded to the shipper's rights and obligations in accordance with the national law of the court seised then a choice of court agreement that the third party has not expressly agreed upon can nevertheless be relied upon against it (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti* EU:C:1999:142, [41]; C 387/98 *Coreck* EU:C:2000:606, [24], [25] and [30], C 352/13 *CDC Hydrogen Peroxide* EU:C:2015:335, [65]; *Maersk*, [51]; Cf. Article 67(2) of the Rotterdam Rules 2009). In this case, there is no distinct requirement that the third party must consent in writing to the choice of court agreement. The third party cannot extricate itself from the mandatory jurisdiction as 'acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it' (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti* EU:C:1999:142, [41]; C 387/98*Coreck* EU:C:2000:606, [25]; *Maersk*, [62]). Conversely, where the relevant national law does not provide for such a relationship of substitution, that court must ascertain whether that third party has expressly agreed to the choice of court clause (C 387/98 *Coreck* EU:C:2000:606, [26]; C 543/10 *Refcomp* EU:C:2013:62, [36]; *Maersk*, [51]).

According to Spanish law, a third-party to a bill of lading has vested in it all rights and obligations of the original contract of carriage but the choice of court agreement is only enforceable if it has been negotiated individually and separately with the third party. The CJEU held that such a provision would undermine Article 25 of the Brussels Ia Regulation as interpreted by the CJEU case law (*Maersk*, [60]; AG Collins in *Maersk*, [61]). As per the principle of primacy of EU law, the national court has been instructed to interpret Spanish law to the greatest extent possible, in conformity with the Brussels Ia Regulation (*Maersk*, [63]; C 205/20*Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* EU:C:2022:168) and if no such interpretation is possible, to disapply the national rule (*Maersk*, [65]).

The choice of law rule in Article 25(1) is not an innovation without utility. A broad interpretation of the concept of substantive validity would encroach upon the autonomous concept of consent developed by CJEU case law yet it could avoid the need for a harmonised EU substantive contract law approach to the enforceability of choice of court agreements against third parties. The CJEU in its decision

arrived at a solution that upheld the choice of court agreement by the predictable application of its established case law without disturbing the status quo. In practical terms, the application of the choice of law rule in Article 25(1) would have led to a similar outcome. However, the unnecessary displacement of the CJEU's interpretative authorities on the matter would have increased litigation risk in multi-state transactions. By distinguishing substantive validity from the effects of choice of court agreements, the CJEU does not extrapolate the choice of law rule on substantive validity to issues of contractual enforceability that are extrinsic to the consent or capacity of the original contracting parties. On balance, a departure from the legal certainty provided by the extant CJEU jurisprudence was not justified. It should be observed that post-Brexit, there has been a resurgence of English anti-suit injunctions in circumstances such as these where proceedings in breach of English dispute resolution agreements are commenced in EU Member State courts.

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There and Back Again? – The unexpected journey of EU-UK Judicial Cooperation finally leads to The Hague

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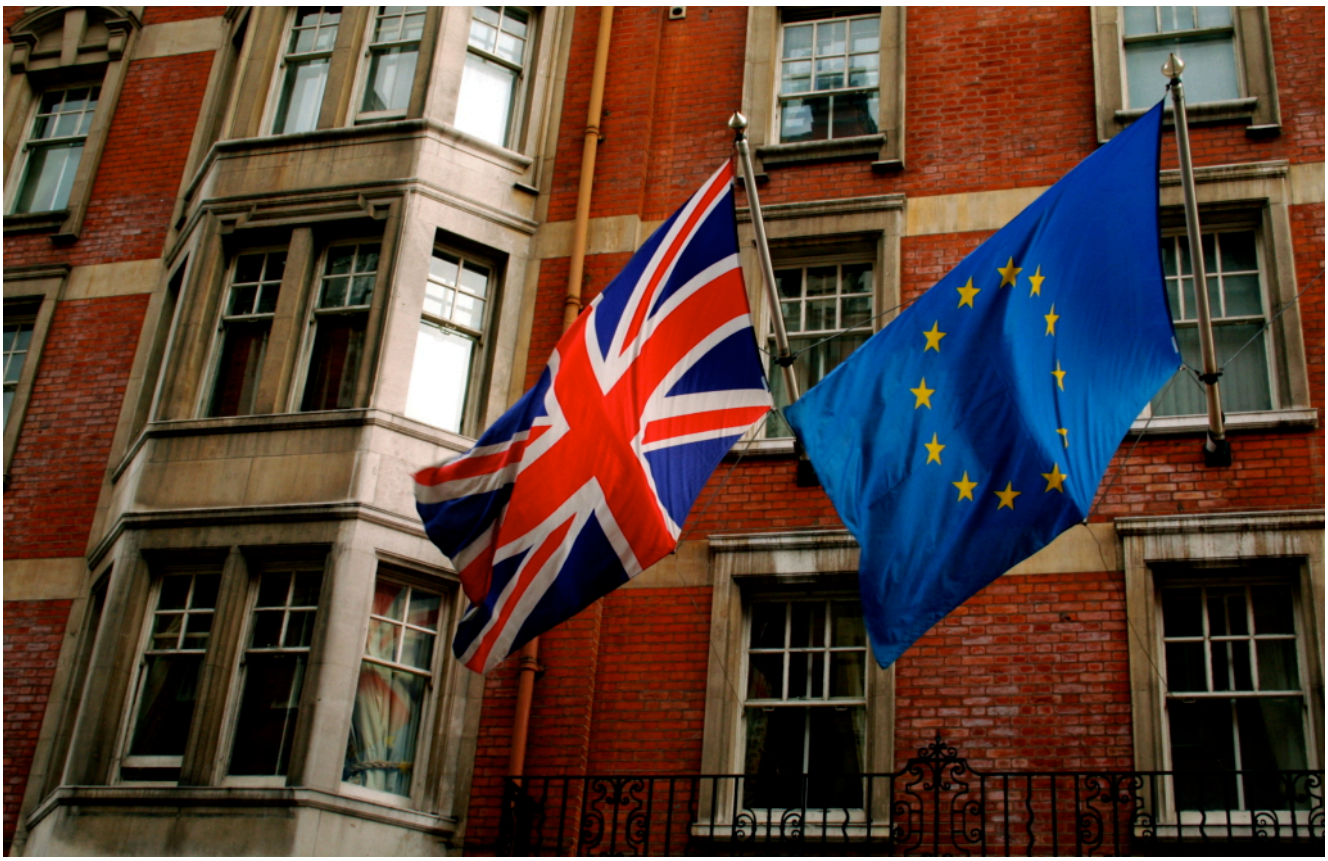

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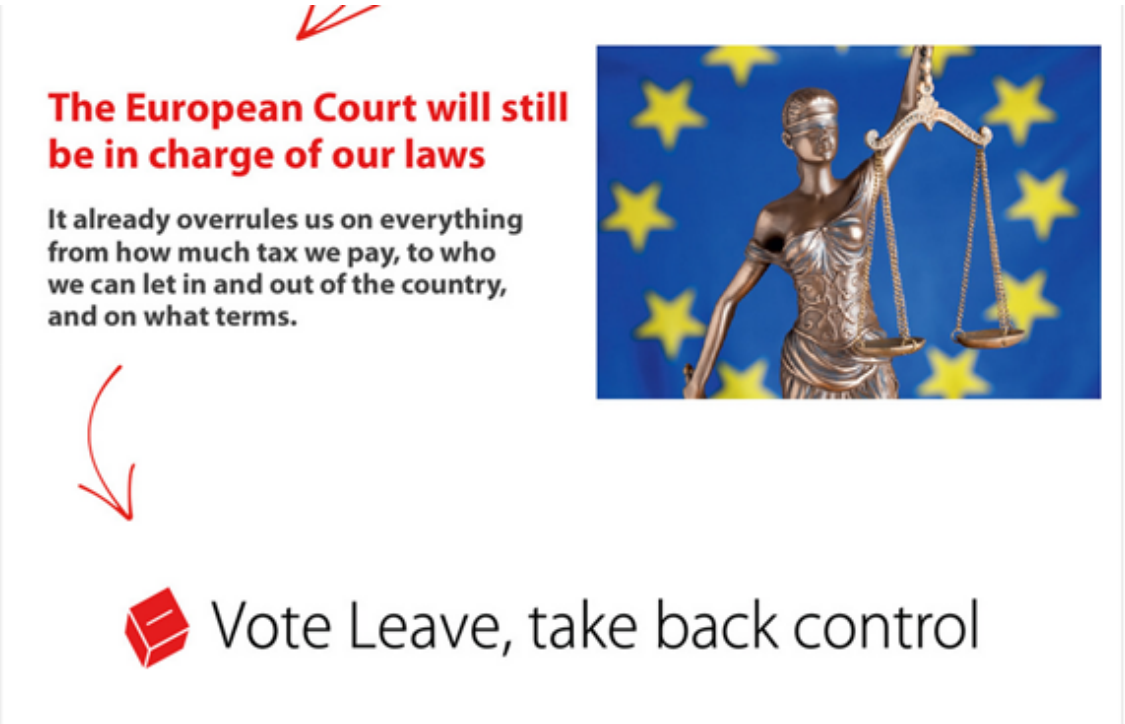
Today marks a significant step towards the reconstruction of EU-UK Judicial Cooperation. As neither House of Parliament has raised an objection by 17 May 2024,[1] the way seems to be paved for the Government's ambitious plans to have the HCCH 2019 Judgments Convention[2] implemented and ratified by the end of June 2024.[3] For the first time since the withdrawal of the United Kingdom from the European Union (so-called *Brexit*) on 31 January 2020, a general multilateral instrument would thus once again be put in place to govern the mutual recognition and enforcement of judgments in civil and commercial matters across the English Channel.

We wish to take this opportunity to look back on the eventful journey that the European Union and the United Kingdom have embarked on in judicial cooperation since Brexit (I.) as well as to venture a look ahead on what may be expected from the prospective collaboration within and perhaps even alongside the HCCH system (II.).

I. From Brexit to The Hague (2016-2024)

When the former Prime Minister and current Foreign Secretary *David Cameron* set the date for the EU referendum on 23 June 2016, this was widely regarded as

just a political move to ensure support for the outcome of his renegotiations of the terms of continued membership in the European Union.[4] However, as the referendum results showed 51.9% of voters were actually in favour of leaving,[5] it became apparent that *Downing Street* had significantly underestimated the level of voter mobilisation achieved by the *Vote Leave* campaign. Through the effective adoption of their alluring "take back control" slogan, the Eurosceptics succeeded in framing European integration as undermining Britain's sovereignty – criticising *inter alia* a purportedly dominant role of the Court of Justice (CJEU) – while simultaneously conveying a positive sentiment for the United Kingdom's future as an autonomous country[6] – albeit on the basis of sometimes more than questionable arguments.[7]



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Whatever the economic or political advantages of such a repositioning might be (if any at all), it proved to be a severe setback in terms of judicial cooperation. Since most – if not all – of the important developments with respect to civil and commercial matters[8]in this area were achieved within the framework of EU Private International Law (PIL) (e.g. Brussels Ibis, Rome I-II etc.), hopes were high that some of these advantages would be preserved in the subsequent negotiations on the future relationship after Brexit.[9] A period of uncertainty in forum planning for cross-border transactions followed, as it required several rounds of negotiations between EU Chief Negotiator *Michel Barnier* and his

changing UK counterparts (*David Frost* served for the final stage from 2019-2020) to discuss both the Withdrawal Agreement[10] as well as the consecutive Trade and Cooperation Agreement (TCA).[11] While the first extended the applicability of the relevant EU PIL Regulations for proceedings instituted, contracts concluded or events occurred during the transition period until 31 December 2020,[12] the latter contained from that point onwards effectively no provision for these matters, with the exception of the enforcement of intellectual property rights.[13] Thus, with regard to civil judicial cooperation, the process of leaving the EU led to – what is eloquently referred to elsewhere as – a "sectoral hard Brexit".[14]

With no tailor-made agreement in place, the state of EU-UK judicial cooperation technically fell back to the level of 1973 before the UK's accession to the European Communities. In fact, – in addition to the cases from the transition period – the choice of law rules of the Rome I and Rome II-Regulations previously incorporated into the domestic law, remained applicable as so-called *retained EU law* (REUL) due to their universal character (*loi uniforme*).[15] However, this approach was not appropriate for legal acts revolving around the principle of reciprocity, particularly in International Civil Procedure.[16] Hence, a legal stocktaking was required in order to assess how *Brexit* affected the status of those pre-existing multilateral conventions and bilateral agreements with EU Member States that had previously been superseded by EU law.

First, the UK Government has been exemplary in ensuring the "seamless continuity" of the HCCH 2005 Choice of Court Convention throughout the uncertainties of the whole withdrawal process, as evidenced by the UK's declarations and *Note Verbale* to the depositary Kingdom of the Netherlands.[17] The same applies *mutatis mutandis* to the HCCH 1965 Service Convention, to which all EU Member States are parties, and the HCCH 1970 Evidence Convention, which has only been ratified so far by 23 EU Member States. Second, some doubts arose regarding an *ipso iure* revival of the original Brussels Convention of 1968,[18] the international treaty concluded on the occasion of EU membership and later replaced by the Brussels I Regulation when the EU acquired the respective competence under the Treaty of Amsterdam.[19] Notwithstanding the interesting jurisprudential debate, these speculations were effectively put to a halt in legal practice by a clarifying letter of the UK Mission to the European Union.[20] Third, there are a number of bilateral agreements with

EU Member States that could be reapplied, although these can hardly substitute for the Brussels regime, which covers most of the continental jurisdictions.[21] This is, for example, the position of the German government and courts regarding the German-British Convention of 1928.[22]

It is evident that this legal patchwork is not desirable for a major economy that wants to provide for legal certainty in cross-border trade, which is why the UK Government at an early stage sought to enter into a more specific framework with the European Union. First and foremost, the *Johnson Ministry* was dedicated to re-access the Lugano Convention[23] which extended the Brussels regime to certain Member States of the European Free Trade Association (EFTA)/European Economic Area (EEA) in its own right.[24] Given the strong resentments *Brexiteers* showed against the CJEU during their campaign this move is not without a certain irony, as its case law is also crucial to the uniform interpretation of the Lugano Convention.[25] Whereas Switzerland, Iceland and Norway gave their approval, the European Commission answered the UK's application in the negative and referred to the HCCH Conventions as the "framework for cooperation with third countries".[26] What some may view as a power play by EU bureaucrats could also fairly be described as a necessary rebalancing of trust and control due to the comparatively weaker economic and in particular judicial integration with the United Kingdom *post-Brexit*.[27] At the very least, the reference to the HCCH reflects the consistent European practice in other agreements with third countries.[28]

Be that as it may, if *His Majesty's Government* implements its ratification plan as diligently as promised, the HCCH 2019 Judgments Convention may well be the first new building block in the reconstruction what has been significantly shattered on both sides by the twists and turns of *Brexit*.

II. (Prospective) Terms of Judicial Cooperation

Even if the path of EU-UK Judicial Cooperation has eventually led to The Hague, there is still a considerable leeway in the implementation of international common rules.

Fortunately, the UK Government has already put forward a roadmap for the HCCH 2019 Judgments Convention in its responses to the formal consultation carried out from 15 December 2022 to 9 February 2023[29] as well as the

explanatory memorandum to the Draft Recognition and Enforcement of Judgments Regulations 2024.[30] Generally speaking, the UK Government wants to implement the HCCH Convention for all jurisdictions of the United Kingdom without raising any reservation limiting the scope of application. Being a devolved matter, this step requires the Central Government to obtain the approval of a Northern Ireland Department (*Roinn i dTuaisceart Éireann*) and the Scottish Ministers (*Mhinistearan na h-Alba*).[31] Furthermore, this approach also implies that there will be no comparable exclusion of insurance matters as under the HCCH 2005 Convention.[32] However, the Responses contemplated making use of the bilateralisation mechanism in relation to the Russian Federation upon its accession to the Convention.[33]

Technically, the Draft Statutory Instrument employs a registrations model that has already proven successful for most recognition and enforcement schemes applicable in the UK.[34] However, registration within one jurisdiction (e.g. England & Wales) will on this basis alone not allow for recognition and enforcement in another (e.g. Scotland, Northern Ireland), but is rather subject to re-examination by the competent court (e.g. Court of Session).[35] This already constitutes a significant difference compared to the system of automatic recognition under the Brussels regime. Moreover, the draft instrument properly circumvents the peculiar lack of an exemption from legalisation in the HCCH 2019 Convention by recognizing the seal of the court as sufficient authentication for the purposes of recognition and enforcement.[36] It remains to be seen if decisions of third states "domesticated" in the UK under the common law *doctrine of obligation* will be recognized as judgments within the European Union. If the CJEU extends the position taken in *J. v. H Limited* to the HCCH 2019 Judgments Convention, the UK may become an even more attractive gateway to the EU Single Market than expected.[37] Either way, the case law of the CJEU will be mandatory for 26 Contracting States and thus once again play – albeit not binding – a dominant role in the application of the HCCH legal instrument.

As far as the other legal means of judicial cooperation are concerned, the House of Lords does not yet appear to have given up on accession to the Lugano Convention.[38] Nevertheless, it seems more promising to place one's hopes on continued collaboration within the framework of the HCCH. This involves working towards the reconstruction of the remaining foundational elements previously present in EU-UK Judicial Cooperation by strengthening the HCCH *Jurisdiction*

Project and further promoting the HCCH 1970 Evidence Convention in the EU.

III. Conclusion and Outlook

After all, the United Kingdom's withdrawal from the European Union has dealt a serious blow to judicial cooperation across the English Channel. A look back at the history of *Brexit* and the subsequent negotiations has revealed that the separation process is associated with an enormous loss of trust. Neither could the parties agree on a specific set of rules under the TCA, nor was the European Union willing to welcome the United Kingdom back to the Lugano Convention.

Against this background, it is encouraging to see that both parties have finally agreed on the HCCH as a suitable and mutually acceptable forum to discuss the future direction of EU-UK Judicial Cooperation. If *Brexit* ultimately brought about a reinvigorated commitment of the United Kingdom to the HCCH Project, this might even serve as an inspiration for other States to further advance the Hague Conference's ambitious goal of global judicial cooperation. Then the prophecies of the old songs would have turned out to be true, after a fashion. Thank goodness!

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[1] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 1. According to sec. 20 (1) (a) and (2) of the Constitutional Reform and Governance Act 2010 (c. 25) is a treaty not ratified unless a Minister of the Crown has laid a copy before parliament for a period of 21 sitting days.

[2] Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (HCCH 2019 Judgments Convention) of 2 July 2019, UNTS I-58036 and Tractatenblad 2024, 42 (Verdragsnr. 013672).

[3] Civil Procedure Rule Committee, Minutes of 1 December 2023, para. 28

[4] See *inter alia*, *Mason*, "How did UK end up voting to leave the European Union?", The Guardian of 24 June 2016; *Boffey*, "Cameron did not think EU referendum would happen, says Tusk", The Guardian of 21 January 2019; *Duff*,

“David Cameron’s EU reform claims: If not ‘ever closer union’, what?”, Blogpost of 26 January 2016 on Verfassungsblog | On Matters Constitutional; *von Lucke*, “Brexit oder: Die verzockte Demokratie”, Blätter 8/2016, 5 et seq.

[5] UK Electoral Commission, “23 June 2016 referendum on the UK’s membership of the European Union”, Report of September 2016, p 6.

[6] Compare *Haughton*, “Ruling Divisions: The Politics of Brexit”, Perspectives on Politics 19 (2021), 1258, 1260; *Özlem Atikcan/Nadeau/Bélanger*, “Framing Risky Choices: Brexit and the Dynamics of High-stakes Referendums”, p. 44.

[7] E.g. *Rankin*, “Is the leave campaign really telling six lies?”, The Guardian of 7 June 2016.

[8] This finding might look different for International Family Law, according to *Beaumont*, “Private International Law concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations”, Child & Fam. L. Q. 29 (2017), 213, 232: “In all these matters students, practitioners and judges will be grateful to have fewer operative legal regimes post-Brexit”.

[9] For example, on this blog *Fitchen*, “Brexit: No need to stop all the clocks”, Blogpost of 31 January 2020 or *Lutzi*, “Brexit: The Spectre of Reciprocity Evoked Before German Courts”, Blogpost of 13 December 2020.

[10] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement) of 24 January 2020, OJ EU CI 384/1.

[11] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) of 30 December 2020, OJ EU L 149/10.

[12] Art. 126 of the Withdrawal Agreement.

[13] Compare Chapter 3: Art. 256-273 of the TCA.

[14] *Bert*, “Judicial Cooperation in Civil Matters: Hard Brexit After All?”, Blogpost of 26 December 2020 on Dispute Re§olution Germany.

[15] Sec. 3 (1) European Union (Withdrawal) Act 2018, Chapter 16/2018, sec. 10, 11 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/834; For the current status of the Retained EU Law, see House of Commons Library "The end of REUL? – Progress in reforming retained EU law", Research Briefing No.°09957 of 2 February 2024 (author: *Leigh Gibson*).

[16] Implicitly *Dickinson*, "Realignment of the Planets – Brexit and European Private International Law", IPRax 2021, 213, 217 et seq.

[17] See Notes Verbales of the United Kingdom to the Kingdom of the Netherlands in its capacity as depositary of the HCCH 2005 Judments Convention from 28 December 2018 to 28 September 2020 in the Treaty Database.

[18] Convention on jurisdiction and the enforcement of judgments in civil and commercial matter (Brussels Convention) of 27 September 1968, OJ EU L 229/31; See e.g. *Rühl*, "Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?", ICLQ 67 (2018), 99, 104 et seq.

[19] Art. 73m of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997, OJ EU C 340/1.

[20] UK Mission to the European Union, Letter to the Council of the European Union of 29 January 2021, NO 17/2021.

[21] See, for example, the Agreement on the continued Application and Amendment of the Convention between the Government of the United Kingdom and the Government of Norway providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters singed at London on 12 June 1961, SI 2020 No. 1338.

[22] Convention on the Facilitation of Legal Proceedings in Civil and Commercial Matters between His Majesty and the President of the German Reich of 20 March 1928; RGBl. 1928 II Nr. 47; for the position of the German Government, please refer to German Federal Government "Response to the parliamentary enquiry on judicial cooperation in civil matters with the United Kingdom post-Brexit", BT-Drucks. 19/27550 of 12 March 2021, p. 3, for a recent decision of the German Judiciary, see Higher Regional Court of Cologne, Decision of 2 March 2023, I-18 U

188/21, paras. 60 et seq.

[23] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) of 30 October 2007, OJ EU L 339/3.

[24] With the notable exception of Liechtenstein.

[25] Art. 64 Lugano Convention as well as the Protocol concerning the interpretation by the Court of Justice of 3 June 1971, OJ EU L No°204/28.

[26] For the consent of the other Contracting State (except Denmark), see Swiss FDFA, "Communications by the depositary with respect to the application of accession by the United Kingdom", Notification of 28 April 2021, 612-04-04-01 – LUG3/21; for the rejection of the EU Commission, Note Verbale to the Swiss Federal Council of 22 June 2021 and, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, pp. 3 et seq. However, this decision was not without criticism, for example by the Chair-Rapporteur of the OHCHR Working Group on the issue of human rights and transnational corporations and other business enterprises in a letter to the EU Commission of 14 March 2024.

[27] For these arguments see EU Commission, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, p. 3 and European Parliamentary Research Service (EPRS), "The United Kingdom's possible re-joining of the 2007 Lugano Convention" Briefing PE 698.797 of November 2021 (author: *Rafa? Ma?ko*), pp. 3 et seq. For a theoretical foundation, see *M. Weller*, " 'Mutual Trust': A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond", RdC 423 (2022), 37, 295 et seq.

[28] See e.g. Art. 24 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other par, OJ EU No°L 161/3: "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". Until recently, the regulation of judicial cooperation

specifically in and for extra-EU trade relations appeared to be aout of sight, see *M. Weller*, "Judicial cooperation of the EU in civil matters in its relations to non-EU States – a blind spot?", in Alan Uzelac/Rhemco van Rhee (eds.), Public and Private Justice (PPJ) 2017: The Transformation of Civil Justice, Intersentia 2018, pp. 63 et seq.

[29] UK Ministry of Justice, The Hague 2019 – Response to Consultation of 23 November 2023 ("Responses").

[30] Draft Statutory Instruments 2024 No. XXX Private International Law: The Recognition and Enforcement of Judgments (2019 Hague Convention etc.) Regulations 2024 ("Draft Guidelines"). The competence to make regulations in that respect is based on sec. 2 (1) of the Private International Law (Implementation of Agreements) Act 2020 (c. 24). According to sec. 2 (11) read in conjunction with sched. 6 paras. 4 (2) (a) and (d) draft regulations need to be laid before parliament for approval of each House by a resolution.

[31] Sec. 2 (12) Private International Law (Implementation of Agreements) Act 2020 (c. 24); see also Letter from the Scottish Minister for Victims and Community Safety of 19 March 202 regarding the "UK SI Notification – The Recognition and Enforcement of Judgments (2019 Hague Convention etc) Regulations 2024".

[32] See Response, para. 51; a similar discussion took place regarding "mixed litigation issues", where only certain elements are within the scope of the HCCH 2019 Judgments Convention.

[33] Responses, para. 53.

[34] See *inter alia* the Administration of Justice Act 1920, Chapter 81/1920 (Regnal. 10 & 11 Geo 5) or the Foreign Judgments (Reciprocal Enforcement) Act 1933, Chapter 13/1933 (Regnal. 23 & 24 Geo 5.

[35] Sec. 15 Draft Guidelines and Draft Explanatory Memorandum, para. 5.5.5.

[36] Sec. 12 Draft Guidelines; *Garcimartin/Saumier*, HCCH 2019 Judgments Convention: Explanatory Report, para. 307.

[37] See CJEU, Judgment of 7 April 2022, *J. v. H. Limited*, C-568/20, para. 47. However, there is a certain chance that this case law will be corrected in the

upcoming revision process of the Brussels Ibis-Regulation, see e.g. *Hess/Althoff/Bens/Elsner/Järvekülg*, "The Reform of the Brussels Ibis Regulation", MPI Luxembourg Research Paper Series N.°2022 (6), proposal 15.

[38] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 17: "Many stakeholders have called for the Government to continue its efforts to join the Lugano Convention in addition to ratifying Hague 2019. We agree that the Government should do so."

Advocate General in Case Mirin (C-4/23): Refusal of recognition of a new gender identity legally obtained in another Member State violates the freedom of movement and residence of EU citizens

The following case note has been kindly provided by *Dr. Samuel Vuattoux-Bock*, LL.M. (Kiel), University of Freiburg (Germany).

On May 7, 2024, Advocate General Jean Richard de la Tour delivered his opinion in the case C-4/23, *Mirin*, concerning the recognition in one Member State of a change of gender obtained in another Member State by a citizen of both States. In his opinion, Advocate General de la Tour states that the refusal of such a recognition would violate the right to move and reside freely within the Union (Art. 21 TFEU, Art. 45 EU Charter of Fundamental Rights) and the right of

respect for private and family life (Art. 7 EU Charter of Fundamental Rights).

1. Facts

The underlying case is based on the following facts: a Romanian citizen was registered as female at birth in Romania. After moving with his family to the United Kingdom and acquiring British citizenship, he went through the (medically oriented) gender transition process under English law and finally obtained in 2020 a "Gender Recognition Certificate" under the Gender Recognition Act 2004, confirming his transition from female to male and the corresponding change of his forename. As the applicant retained his Romanian nationality, he requested the competent Romanian authorities (Cluj Civil Status Service) to record the change on his birth certificate, as provided for by Romanian law (Art. 43 of Law No. 119/1996 on Civil Status Documents). As the competent authority refused to recognize the change of name and gender (as well as the Romanian personal numerical code based on gender) obtained in the United Kingdom, the applicant filed an action before the Court of First Instance, Sector 6, Bucharest. The court referred the case to the CJEU for a preliminary ruling on the compatibility with European law (Art. 21 TFEU, Art. 1, 20, 21, 45 of the Charter of Fundamental Rights) of such a refusal based on Romanian law. In particular, the focus is on the Cluj Civil Status Office's demand that the plaintiff initiates a new judicial procedure for the change of gender in Romania. The plaintiff sees in this request the risk of a contrary outcome to the British decision, as the European Court of Human Rights ruled that the Romanian procedure lacks clarity and predictability (ECHR, *X. and Y. v. Romania*). In addition, the Romanian court asked whether Brexit had any impact on the case (the UK proceedings were initiated before Brexit and concluded during the transition period).

2. Opinion of the Advocate General

Advocate General de la Tour gave his opinion on these two questions. Regarding the possible consequences of Brexit, de la Tour drew two sets of conclusions from the fact that the applicant still holds Romanian nationality. First, an EU citizen can rely on the right to move freely within the European Union with an identity document issued by his or her Member State of origin (a fortiori after Brexit). Second, the United Kingdom was still a Member State when the applicant

exercised his freedom of movement and residence. As the change of gender and first name was acquired, the United Kingdom was also still a Member State. EU law is therefore still applicable as the claimant seeks to enforce in one Member State the consequence of a change lawfully made in another (now former) Member State.

On the question of the recognition of a change of first name and gender made in another Member State, Advocate General de la Tour argues that these issues should be treated differently. The fact that the first name may be sociologically associated with a different sex from the one registered should not be taken into account as a preliminary consideration for recognition (no. 61). He therefore answers the two questions separately. Already at this point, de la Tour specifies that the relevant underpinning logic for this type of case should not be the classical recognition rules of private international law, but rather the implementation and effectiveness of the freedom of movement and residence of EU citizens (nos. 53-55).

a) Change of first name

With regard to the change of the first name, de la Tour states (with reference to the *Bogendorff* case) that the refusal to recognize the change of the first name legally acquired in another Member State would constitute a violation of the freedoms of Art. 21 TFEU (no. 58). Since the Romanian Government does not give any reason why recognition should not be granted, there should be no obstacle to automatic recognition. The Advocate General considers that the scope of such recognition should not be limited to birth certificates but should be extended to all entries in a civil register, since a change of first name, unlike a change of surname, does not have the same consequences for other family members (nos. 63-64).

b) Change of gender

With regard to gender change, Advocate General de la Tour argues for an analogy with the Court's case-law on the automatic recognition of name changes, in particular the *Freitag* decision. Gender, like the name, is an essential element of the personality and therefore protected by Art. 7 of the Charter of Fundamental Rights and Art. 8 ECHR. The jurisprudence on names (in particular *Grunkin and Paul*) shows that the fact that a Member State does not have its own procedure

for such changes (according to de la Tour, this concerns only 2 Member States for gender changes) does not constitute an obstacle to the recognition of a change lawfully made in another Member State (nos. 73-74). Consequently, de la Tour sees the refusal of recognition as a violation of the freedoms of Art. 21 TFEU, because the existence of a national procedure is not sufficient for such a refusal (no. 81). Furthermore, the Romanian procedure cannot be considered compatible with EU law, as the judgment of the European Court of Human Rights *X. and Y. v. Romania* shows that it makes the implementation of the freedoms of Art. 21 TFEU impossible or excessively difficult (No. 80). Nevertheless, there is nothing to prevent Member States from introducing measures to exclude the risk of fraudulent circumvention of national rules, for example by making the existence of a close connection with the other Member State (e.g. nationality or residence) a condition (nos. 75-78).

Unlike the change of first name, the change of gender affects other aspects of personal status and may have consequences for other members of the family (e.g. the gender of the parent on a child's birth certificate before the transition) or even for the exercise of other rights based on gender differentiation (e.g. marriage in States that do not recognize same-sex unions, health care, retirement, sports competition). Imposing rules on the Member States in these areas (in particular same-sex marriage) would not be within the competence of the Union (no. 94), so Advocate General de la Tour proposes a limitation to the effect of recognition in the Member State of origin. If the change of gender would have an effect on other documents, the recognition should only have an effect on the person's birth certificate and the documents derived from it which are used for the movement of the person within the Union, such as identity cards or passports. The Advocate General himself points out that this solution would lead to unsatisfactory consequences in the event of the return of the person concerned to his or her State of origin (no. 96), but considers that the solution leads to a "fair balance" between the public interest of the Member States and the rights of the transgender person.

3. Conclusion

In conclusion, Advocate General de la Tour considers that the refusal to recognize in one Member State a change of first name and gender legally obtained in another Member State violates the freedoms of Art. 21 TFEU. The existence of an

own national procedure could not justify the refusal. Drawing an analogy with the Court's case-law on change of name, the Advocate General recommends that the change of first name should have full effect in the Member State of origin, while the change of gender should be limited to birth certificates and derived documents used for travel (identity card, passport).

Although the proposed solution may not be entirely satisfactory for the persons concerned, as it could still cause difficulties in the Member State of origin, the recognition in one Member State of a change of first name and sex made in another Member State should bring greater security and would underline the mutual trust between Member States within the Union, as opposed to third countries, as demonstrated by the recent decision of the Swiss Federal Tribunal concerning the removal of gender markers under German law

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No role for anti-suit injunctions under the TTPA to enforce exclusive jurisdiction agreements

Australian and New Zealand courts have developed a practice of managing trans-Tasman proceedings in a way that recognises the close relationship between the countries, and that aids in the effective and efficient resolution of cross-border disputes. This has been the case especially since the implementation of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement, which was entered into for the purposes of setting up an integrated scheme of civil jurisdiction and judgments. A key feature of the scheme is that it seeks to "streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency" (Trans-Tasman Proceedings Act 2010 (TTPA), s 3(1)(a)). There have been many examples of Australian and New Zealand courts working to achieve this goal.

Despite the closeness of the trans-Tasman relationship, one question that had

remained uncertain was whether the TTPA regime allows for the grant of an anti-suit injunction to stop or prevent proceedings that have been brought in breach of an exclusive jurisdiction agreement. The enforcement of exclusive jurisdiction agreements is explicitly protected in the regime, which adopted the approach of the Hague Convention on Choice of Court Agreements in anticipation of Australia and New Zealand signing up to the Convention. Section 28 of the Trans-Tasman Proceedings Act 2010 (NZ) and s 22 of the Trans-Tasman Proceedings Act 2010 (Cth) provide that a court must not restrain a person from commencing or continuing a civil proceeding across the Tasman "on the grounds that [the other court] is not the appropriate forum for the proceeding". In the secondary literature, different opinions have been expressed whether this provision extends to injunctions on the grounds that the other court is not the appropriate forum due to the existence of an exclusive jurisdiction agreement: see Mary Keyes "Jurisdiction Clauses in New Zealand Law" (2019) 50 VUWLR 631 at 633-4; Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, 2020) at [2.445].

The New Zealand High Court has now decided that, in its view, there is no place for anti-suit injunctions under the TTPA regime: *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] NZHC 736 at [4]. Justice O'Gorman reasoned that the TTPA involves New Zealand and Australian courts applying "mirror provisions to determine forum disputes, based on confidence in each other's judicial institutions" (at [4]), and that anti-suit injunctions can have "no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction" (at [17]).

A-Ward Ltd, a New Zealand company, sought an interim anti-suit injunction to stop proceedings brought against it by Raw Metal Corp Pty Ltd, an Australian company, in the Federal Court of Australia. The dispute related to the supply of shipping container tilters from A-Ward to Raw Metal. A-Ward's terms and conditions had included an exclusive jurisdiction clause selecting the courts of New Zealand, as well as a New Zealand choice of law clause. In its Australian proceedings, Raw Metal sought damages for misleading and deceptive conduct in breach of the Competition and Consumer Act 2010 (Cth) (CCA). A-Ward brought proceedings in New Zealand seeking damages for breach of its trade terms, including the jurisdiction clause, as well as an anti-suit injunction.

O'Gorman J's starting point was to identify the different common law tests that

courts had applied when determining an application to the court to stay its own proceedings, based on the existence (or not) of an exclusive jurisdiction clause. While *Spiliada* principles applied in the absence of such a clause, *The Eleftheria* provided the relevant test to determine the enforceability of an exclusive jurisdiction clause: at [16]. The alternative to a stay was to seek an anti-suit injunction, which, however, was a controversial tool, because of its potential to "interfere unduly with a foreign court controlling its own processes" (at [17]).

Having set out the competing views in the secondary literature, the Court concluded that anti-suit injunctions were not available to enforce jurisdiction agreements otherwise falling within the scope of the TTPA, based on the following reason (at [34]):

1. The term "appropriate forum" in ss 28 (NZ) and s 22 (Aus) of the respective Acts could not, "as a matter of reasonable interpretation", be restricted to questions of appropriate forum in the absence of an exclusive jurisdiction agreement. This was not how the term had been used in the common law (see *The Eleftheria*).
2. The structure of the TTPA regime reinforced this point, because it is on an application under s 22 (NZ)/ s 17 (Aus), for a stay of proceedings on the basis that the other court is the more appropriate forum, that a court must give effect to an exclusive jurisdiction agreement under s 25 (NZ)/ s 20 (Aus).
3. Sections 25 (NZ) and 20 (Aus) already provided strong protection to exclusive choice of court agreements, and introducing additional protection by way of anti-suit relief "would only create uncertainty, inefficiency, and the risk of inconsistency, all of which the TTPA regime was designed to avoid".
4. The availability of anti-suit relief would "rest on the assumption that the courts in each jurisdiction might reach a different result, giving a parochial advantage". This, however, would be "inconsistent with the entire basis for the TTPA regime – that the courts apply the same codified tests and place confidence in each other's judicial institutions".
5. Australian case law (*Great Southern Loans v Locator Group* [2005] NSWSC 438), to the effect that anti-suit injunctions continue to be available domestically as between Australian courts, was distinguishable because there was no express provision for exclusive choice of court

agreements, which is what "makes a potentially conflicting common law test unpalatable".

6. Retaining anti-suit injunctions to enforce exclusive jurisdiction agreements would be inconsistent with the concern underpinning s 28 (NZ)/ s 22 (Aus) about "someone trying to circumvent the trans-Tasman regime as a whole".
7. The availability of anti-suit relief would defeat the purpose of the scheme to prevent duplication of proceedings.
8. More generally, anti-suit injunctions "have no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction".

The Court further concluded that, even if the TTPA did not exclude the power to order an anti-suit injunction, there was no basis for doing so in this case in relation to Raw Metal's claim under the CCA (at [35]). There was "nothing invalid or unconscionable about Australia's policy choice" to prevent parties from contracting out of their obligations under the CCA, even though New Zealand law (in the form of the Fair Trading Act 1986) might now follow a different policy. The TTPA regime included exceptions to the enforcement of exclusive jurisdiction agreements. Here, A-Ward seemed to have anticipated that, from the perspective of the Australian court, enforcement of the New Zealand jurisdiction clause would have fallen within one of these exceptions, and the High Court of Australia's observations in *Karpik v Carnival plc* [2023] HCA 39 at [40] seemed to be consistent with this. The "entirely orthodox position" seemed to be that the Federal Court in Australia "would regard itself as having jurisdiction to determine the CCA claim, unconstrained by the choice of law and court" (at [35]).

Time will tell whether Australian courts will agree with the High Court's emphatic rejection of anti-suit relief under the TTPA as being inconsistent with the cooperative purpose of the scheme. The parallel debate within the context of the Hague Choice of Court Convention – which does not specifically exclude anti-suit injunctions – may be instructive here: Mukarrum Ahmed "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" (2017) 13 Journal of Private International Law 386. Despite O'Gorman J's powerful reasoning, her judgment may not be the last word on this important issue.

From a New Zealand perspective, the judgment is also of interest because of its restrained approach to the availability of anti-suit relief more generally. Even assuming that the Australian proceedings were, in fact, in breach of the New Zealand jurisdiction clause, O'Gorman J would not have been prepared to grant an injunction as a matter of course. In this respect, the judgment may be seen as a departure from previous case law. In *Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc* [2023] NZHC 793, for example, the Court granted an anti-suit injunction to compel compliance with an arbitration agreement, without inquiring into the foreign court's perspective and its reasons for taking jurisdiction. O'Gorman J's more nuanced approach is to be welcomed (for criticism of *Maritime Mutual*, see here on The Conflict of Laws in New Zealand blog).

A more challenging aspect of the judgment is the choice of law analysis, and the Court's focus on the potential concurrent or cumulative application of foreign and domestic statutes (at [28]-[31], [35]). The Court said that, to determine whether a foreign statute is applicable, the New Zealand court can ask whether the statute applies on its own terms (following *Chief Executive of the Department of Corrections v Fujitsu New Zealand Ltd* [2023] NZHC 3598, which I criticised here on The Conflict of Laws in New Zealand blog, also published as [2024] NZLJ 22). It is not entirely clear how this point was relevant to the issue of the anti-suit injunction. The Judge's reasoning seemed to be that, from the New Zealand court's perspective, the Australian court's application of the CCA was appropriate as a matter of statutory interpretation and/or choice of law, which meant that the proceedings were not unconscionable or unjust (at [35]).

Van Calster on European Private International Law (4th Edition)

The fourth edition of Geert van Calster's (KU Leuven) *European Private International Law* has just been published by Hart/Bloomsbury. It focuses on those instruments and developments that are most significant in commercial

litigation. I had the privilege to review the first edition of the book in the *Law Quarterly Review* and I am certain that the latest edition will live up to the expectations.

The blurb reads as follows:

This classic textbook provides a thorough overview of European private international law. It is essential reading for both practitioners and students of private international law and transnational litigation, wherever they may be located: the European rules extend beyond European shores.

Opening with foundational questions, the book clearly explains the subject's central tenets: the Brussels I, Rome I and Rome II Regulations (jurisdiction, applicable law for contracts and tort). Additional chapters explore private international law and insolvency, freedom of establishment, and the impact of private international law on corporate social responsibility. The relevant Hague instruments, and the impact of Brexit, are fully integrated in the various chapters.

Drawing on the author's rich experience, the new edition retains the book's hallmarks of insight and clarity of expression ensuring it maintains its position as the leading textbook in the field.

UK has signed the 2019 Judgments Convention

On 12 January 2024, the United Kingdom has signed the 2019 Judgments Convention (Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters), as announced in the press release of the Hague Conference on Private International Law.

This a milestone within the coming about of the worldwide framework for recognition and enforcement of foreign judgments and a welcome addition to the post-Brexit legal landscape.

German Federal Court of Justice rules on what constitutes a genuine international element within the meaning of Art. 3(3) of the Rome I-Regulation (BGH, judgment of 29 November 2023, No. VIII ZR 7/23)

by Patrick Ostendorf (HTW Berlin)

The principle of party autonomy gives the parties to a contract the opportunity to determine the applicable substantive (contract) law themselves by means of a choice-of-law clause – and thus to avoid (simple) mandatory rules that would otherwise bite. According to EU Private International law, however, the choice of the applicable contract law requires a genuine international element: in purely domestic situations, i.e. where *"all other elements relevant to the situation at the time of the choice"* are located in a single country, all the mandatory rules of this country remain applicable even if the parties have chosen a foreign law (Art. 3 (3) Rome I Regulation).

In the absence (for the time being) of relevant case law from the European Court of Justice, the precise requirements of this threshold are not yet settled. However, in a recent judgment, the German Federal Court of Justice (Bundesgerichtshof) has – seemingly for the first time – considered the requirements for a sufficient international element in this respect.

The decision concerned a lease agreement for an apartment in Berlin which was rented out by the embassy of a foreign state (the embassy acting on behalf of the

foreign ministry of that state, which was the owner of the apartment). The lease contained a choice-of-law clause in favor of the law of that state and was drafted in the language of that state.

As the lease was entered into for a fixed term, the landlord informed the tenant shortly before the expiry of the lease that it would not be renewed and asked them to vacate the premises accordingly. The tenant in turn invoked section 575(1) of the German Civil Code (Bürgerliches Gesetzbuch – BGB), according to which a fixed-term lease agreement is deemed to have been concluded for an indefinite period of time if the landlord has failed to inform the tenant in writing of the reasons for the fixed term at the time the lease was concluded.

The Bundesgerichtshof concludes that these facts constitute a purely domestic situation within the meaning of Art. 3 (3) of the Rome I Regulation; therefore section 575 BGB (a mandatory provision of the German Civil Code) applies notwithstanding the governing law clause in the contract providing otherwise. Accordingly, the request by the claimant to grant eviction has to be rejected.

As a starting point for its analysis, the Court emphasised that the genuine international element required for a choice of law must be of some significance and weight for the specific transaction in question (based on the principles of the applicable conflict-of-laws rules, in particular the connections with a foreign state referred to in Art. 4 Rome I Regulation), whereas subjective references to a foreign law based solely on the agreement of the parties will generally not suffice.

Even the fact that a foreign state was a party to the lease agreement does not, in the view of the Court, change this, since the embassy, acting both as the agent of the foreign state and as the institution responsible for the further implementation of the lease agreement, constitutes a branch within the meaning of Art. 19(2) of the Rome I Regulation ("*If the contract is concluded in the course of the business of a branch, agency or other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or establishment is situated shall be treated as the place of habitual residence*"). It follows that not only the tenant's but also the landlord's habitual residence is deemed to be in Germany. Finally, according to the Court, the fact that the apartment in question was primarily used for the accommodation of embassy staff (although not in the present case), that the contract was concluded in a foreign language and that the tenant was (also) a foreign national

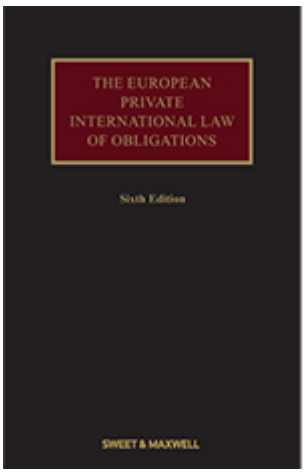
is not sufficient to establish a genuine international element as well.

Although the decision of the Bundesgerichtshof is undoubtedly well reasoned, it reaches the opposite conclusion to recent English case law: in particular, the English Court of Appeal has (even before Brexit) taken the contrary view that the use of a foreign contractual language or a standard form contract tailored to international transactions would even on a standalone basis be sufficient to constitute a relevant international element – and accordingly allow the parties to escape the restrictions stipulated by Art. 3(3) Rome I Regulation (Dexia Crediop SpA v Comune di Prato [2017] EWCA Civ 428, discussed here).

Further guidance from the European Court of Justice on the interpretation of Art. 3(3) Rome I Regulation would therefore be desirable.

BOOK REVIEW OF THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS

EDITED



The European Private International Law of Obligations is a practitioners' work that is evidently written at a very high standard. This is perhaps unsurprising because the authors, Mr Michael Wilderspin was a legal adviser to the European Commission, and Sir Richard Plender was an English Judge in his lifetime.

In the 6th edition of this authoritative and very illuminating book, Michael Wilderspin now assumes responsibility for its writing. The first edition of the book (in 1991) was solely written by Richard Plender, but he brought in Michael Wilderspin to work on the second edition with him. They worked together on successive editions of the book for a long time. Unfortunately, Richard Plender passed away in 2020, after the 5th edition of this book which was published in 2019.

The book is regularly cited in English courts, and it is likely that this tradition will be maintained in the 6th edition of the book. In this new edition over 70 recently decided cases (from the UK, Court of Justice of the European Union ("CJEU") and other Member States of the EU) have been incorporated into the analysis. The new edition also incorporates many recent secondary sources in its analysis.

The book contains four main parts. Part One contains what is described as "COMMON PRINCIPLES" on Rome I and Rome II Regulations. This runs from pages 3 to 91, focusing on preliminary matters such as the history and interpretative approaches of Rome I and Rome II, and a comparison of both

Regulations. Part Two contains what is described as “CONTRACT” based on Rome I. This runs from pages 95 to 488, focusing on a detailed analysis of the Articles of Rome I. Part Three contains what is described as “THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS.” This runs from pages 491 to 860, focusing on a detailed analysis of the Articles of Rome II. Part Four contains what is described as “ROME I AND II REGULATIONS IN THE UK.” This runs from pages 863 to 868, focusing on the changes brought by Brexit to Rome I and Rome II as provided in The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

Each chapter usually commences with a very useful legislative history. There is very impressive knowledge of Rome I and Rome II from a European comparative perspective and comparisons with other international conventions. The interaction between domestic private law in Member States and England, and law applicable to contract and torts is an underlying theme that is explored well in the book. In this regard, there is impressive knowledge of the domestic private laws and conflict of laws rules of many Member States in the EU and England, making this book genuinely European. One point worth mentioning is that the authors also note the final decision of Member State Courts that refer a matter to the CJEU on the applicable law of obligations. For example, in analysing the decision of the CJEU in *Haeger* (2015) which interprets Article 4(4) of the Rome Convention on the law applicable to contract of carriage of goods, Wilderspin also notes the final decision of the French Cour de Cassation that referred the question (see paragraph 8-016, footnote 37). Similarly, in analysing the decision of the CJEU in *Nikiforidis* (2016) which interprets Article 9 of Rome I on overriding mandatory rules, Wilderspin also notes the final decision of the German Court that referred the question (see paragraph 12-041).

Wilderspin notes in the Preface that whilst Richard Plender did not challenge the accuracy of his views, he encouraged him to use a more polite language in writing. Indeed, Wilderspin is a bold writer. He fiercely engages with both primary and secondary sources. On some occasions, he is very blunt. For example, Recital 12 to the Rome I Regulation provides in interpreting Article 3 of Rome I that:

“An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.”

Many French scholars like Professor Maxi Scherer (2011) are of the view that there is a requirement of corroboration with other factors in utilising an exclusive jurisdiction agreement to imply a choice of law under Article 3 of Rome I. However, Wilderspin disagrees and regards this view as a “scarcely credible claim” and “very weak.” This tops my chart as one of the strongest languages used by a conflict of laws’ academic to disagree with another academic.

Wilderspin now appears to have changed his view on the significance of the word “clearly demonstrated” under Article 3 of Rome I (see para 6-028 and 29-104). Wilderspin and Plender previously expressed the view that there is no significant difference between “demonstrated with reasonable certainty” under Article 3 of the Rome Convention and “clearly demonstrated” under Article 3 of Rome I, on the ground that the change was made to merely align the English and German version with the French version. This is a view that has been endorsed by English judges in *Lawlor* (at para 3) and *Aquavita International SA v Ashapura Minecham Ltd* [2014] EWHC 2806 (Comm) [20], citing inter alia, older editions of Plender and Wilderpin. Wilderspin now expresses the view that the English version of Article 3 of Rome I is “apparently stricter” than Article 3 of the Rome Convention, and notes that “although the English version was in line with the majority of the other language versions, in particular the German, those versions have become aligned with the minority, French version” (see para 6-028 and 29-104). This change of view by Wilderspin can be attributed to the influence of the outstanding work of Mr Michael McParland (2015) on Rome I Regulation, who at paras 9.37-9.72 notes the detailed legislative history that brought about the significant change in wording under Article 3 of Rome I. Indeed, he cites McParland. However, at para 11-027, footnote 48, Wilderspin notes that the difference between the wording of Article 3 of the Rome Convention and Article 3 of Rome I is “probably more apparent than real.” I think this statement might be an error that was carried over from the last edition. I also take this view because

Wilderspin refers to the old paragraph 6-024 instead of the new 6-026 of the new edition of the book.

In the light of this modified view by Wilderspin, it is open to question if English judges and other courts of Member State courts will apply a stricter approach in interpreting Article 3 of Rome I. For example, Professor Pietro Franzina also notes in a book chapter (at para 3.1.1) that the Italian Supreme Court (Cass., 10 April 2019, No. 10045, Pluris) held that while the wording of Article 3 of the Rome Convention and Rome I were not identical, "they must be understood to have, in substance, the same meaning" on tacit choice of law.

The book is a highly specialist work that is meticulously written. Nevertheless, I found what I consider to be only three minor typographical errors the author may correct for the next edition. These are odd references to "CHECK" at paragraph 9-061, "that1" at paragraph 9-064, and "pr" at paragraph 9-089.

My final verdict is that the 6th edition of this book will make an excellent Christmas and New Year's gift in the library of any academic and/or practitioner with an interest in conflict of laws. I highly recommend it without any reservations.

The Jurisdiction Puzzle: Dyson,

Supply Chain Liability and Forum Non Conveniens

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On 19 October 2023, the English High Court declined to exercise jurisdiction in *Limbu v Dyson Technology Ltd*, a case concerning allegations of forced labour and dangerous conditions at Malaysian factories which manufactured Dyson-branded products. The lawsuit commenced by the migrant workers from Nepal and Bangladesh is an example of business and human rights litigation against British multinationals for the damage caused in their overseas operations. Individuals and local communities from foreign jurisdictions secured favourable outcomes and won jurisdictional battles in the English courts over the last years in several notable cases, including *Lungowe v Vedanta*, *Okpabi v Shell* and *Begum v Maran*.

The *Dyson* case is particularly interesting for at least two reasons. First, it advances a novel argument about negligence and unjust enrichment of the lead purchasing company in a supply chain relationship by analogy to the parent company liability for the acts of a subsidiary in a corporate group. Second, it is one of the few business and human rights cases filed after Brexit and the first to be dismissed on *forum non conveniens* grounds. Since the UK's EU referendum in 2016, the return of *forum non conveniens* in the jurisdictional inquiry has been seen as a real concern for victims of business-related human rights and environmental abuses seeking justice in the English courts. With the first case falling on jurisdictional grounds in the first instance, the corporate defendants started to collect a 'Brexit dividend', as cleverly put by Uglješa Grušic in his case comment.

Facts

The proceedings were commenced in May 2022. The claimants were subjected to forced labour and highly exploitative and abusive conditions while working at a factory in Malaysia run by a local company. The defendants are three companies in the Dyson corporate group, two domiciled in England and one in Malaysia. The

factory where alleged abuses took place manufactured products and components for Dyson products. Claimants argued that Dyson defendants were liable for (i) negligence; (ii) joint liability with the primary tortfeasors (the Malaysian suppliers running the factory and local police) for the commission of the torts of false imprisonment, intimidation, assault and battery; and (iii) unjust enrichment. They further alleged that the Dyson group exercised a high degree of control over the manufacturing operations and working conditions at the factory facilities and promulgated mandatory ethical and employment policies and standards in Dyson's supply chain, including in Malaysian factories.

The English courts are already familiar with the attempts to establish direct liability of the English-based parent companies for the subsidiaries' harms relying on negligence and the breach of duty of care owed to the claimants. In *Vedanta* and *Okpabi*, the UK Supreme Court made it clear that the parent company's involvement and management of the subsidiary's operations in different ways can give rise to a duty of care.

Broadening the scope of the parent company liability in a corporate group beyond strict control opened paths to supply chain liability. While lead purchasing companies, like Dyson, are not bound by shareholding with their suppliers, they often exercise a certain level of managerial control over independent contractors. Such involvement with particular aspects of a supplier's activities leads to the argument that a lead company could also be liable in negligence for a breach of the duty of care. The unjust enrichment claim that Dyson group has been enriched at the claimant's expense is a relatively novel legal basis, although it has already been raised in similar cases. To the best of my knowledge, in addition to the *Dyson* case, at least four legal actions focusing on supply chain liability are progressing in England: Malawian tobacco farmer claims against British American Tobacco and Imperial, Malawian tea farmer claims against PGI Group Ltd, Ghanaian children accusations against cocoa producer Olam and forced labour allegations by Burmese migrants against Tesco and Intertek.

Judgment

The court had to resolve the jurisdictional question of whether the case would proceed to trial in England or Malaysia. The English common law rules are founded on service of the claim form on the defendant and are based on the defendant's presence in the jurisdiction. In general terms, jurisdiction over

English-domiciled parent companies is effected within the jurisdiction as of right. Following Brexit, proceedings against an English parent company may be stayed on *forum non conveniens* grounds. Foreign subsidiaries are served outside the jurisdiction with the court's permission, usually on the basis of the 'necessary or proper party' gateway. In the *Dyson* case, the English defendants asked the court to stay the proceedings based on *forum non conveniens*, and the Malaysian defendant challenged the service of the claim form, arguing that Malaysia is a proper place to bring the claim.

The court agreed with the corporate defendants, having applied the two-stage test set out by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*. The first stage requires consideration of the connecting factors between the case and available jurisdictions to determine a natural forum to try the dispute. The court concluded that Malaysia was 'clearly and distinctly more appropriate' [122]. Some factors taken into account were regarded as neutral between the different fora (convenience for all of the parties and the witnesses [84], lack of a common language for each of the witnesses [96], location of the documents [105]). At least one factor was regarded as a significant one favouring England as the proper place to hear the claim (risk of a multiplicity of proceedings and or irreconcilable judgments [109]). However, several factors weighed heavily in favour of Malaysia (applicable law [97], place where the harm occurred [102]). As a result, Malaysia was considered to be the 'centre of gravity' in the case [122].

Under the second limb of the *Spiliada* principle, the English courts consider whether they should exercise jurisdiction in cases where the claimant would be denied substantial justice in the foreign forum. The claimants advanced several arguments to demonstrate that there is a real risk of them not obtaining substantial justice in Malaysia [125–168], including difficulties in obtaining justice for migrant workers, lack of experienced lawyers to handle the case, the risk of a split trial, the cost of the trial and financial risks for the claimants and their representatives, limited role of local NGOs to support the claimants. The court did not find cogent evidence that the claimants would not obtain substantial justice in Malaysia [169]. A stay of proceedings against English defendants was granted, and the service upon the Malaysian company was set aside [172]. Reaching this conclusion involved consideration of extensive evidence, including contradictory statements from Malaysian lawyers and civil society organisations. The Dyson defendants have given a number of undertakings to submit to the jurisdiction of

the Malaysian courts and cover certain claimants' costs necessary to conduct the trial in Malaysia, which persuaded the court [16].

Comment

The *Dyson* case marks a shift from the recent trend of allowing human rights and environmental cases involving British multinationals to proceed to trial in the UK courts. Three principal takeaways are worth highlighting. First, the claimants in the business and human rights cases can no longer be certain about the outcome of the jurisdictional inquiry in the English courts. The EU blocked the UK's accession to the Lugano Convention despite calls from NGOs and legal experts. The risk of dismissal on *forum non conveniens* grounds is no longer just a theoretical concern.

Second, the *Dyson* case demonstrates the difficulties of finding the natural forum under the doctrine of *forum non conveniens* in civil liability claims involving multinationals. These complex disputes have a significant nexus with both England, where the parent or lead company is alleged to have breached the duty of care, and the foreign jurisdiction where claimants sustained their injuries. The underlying nature of the liability issue in the case is how the parent or lead company shaped from England human rights or environmental performance of its overseas subsidiaries and suppliers. In this context, I agree with Geert van Calster, who criticises the court's finding about Malaysia being the 'centre of gravity' in the case. I have argued previously that the *forum non conveniens* analysis should properly acknowledge how the claimants frame the argument about liability allocation between the parent company and other entities in the group or supply chain.

Finally, the *Dyson* case is not the first one to be intensely litigated on the *forum (non) conveniens* grounds. In *Lubbe v Cape*, *Connelly v RTZ* and *Vedanta*, the English courts accepted jurisdiction, acknowledging that the absence of a means of funding or experienced lawyers to handle the case in a host state will lead to a real risk of the non-availability of substantial justice. The court in *Dyson* reached a different conclusion, but its analysis of the availability of substantial justice for claimants in Malaysia is not particularly persuasive, especially considering the claimants' 'fear of persecution, detention in inhumane conditions and deportation should they return to Malaysia' [71].

One aspect of the judgment is notably concerning. Claimants referred to the conduct of the Dyson defendants as being ‘aggressive’ and ‘heavy-handed’ [71], [73]. In concluding remarks, the court accepted there were deficiencies in Dyson’s responses to the claimants’ requests for the documents [173]. Yet despite this acceptance, the court has on multiple occasions relied on the defendants’ undertakings to cooperate with the claimants to ensure the trial can proceed in Malaysia [136], [147], [151], [152], [166], [169]. Undoubtedly, the ruling will be appealed, and it remains to be seen if the English courts will be willing to try cases involving British multinationals in the post-Brexit landscape.