Post Brexit: The Fate of Commercial Dispute Resolution in London and on the Continent

A joint conference of the Max Planck Institute for Procedural Law (Luxembourg) and the British Institute for International and Comparative Law will be held on May 26th in London, within the framework of a series of BIICL events on the Brexit.

This particular seminar will look at the potential impact of a Brexit on cross-border commercial dispute resolution and on the role of London as a center for international litigation and arbitration. Speakers will address selected questions such as the legal framework for the transitional period; the validity of choice of court agreements and future frequency of choice of court agreements in favour of English courts; the different approaches in England and under the Brussels I Recast as to parallel proceedings; the cross-border circulation of titles; the Swiss position as to commercial dispute resolution between Member States and third States. A roundtable discussion will place a particular focus on London's future as a centre for commercial dispute resolution post Brexit.

Speakers:

- Burkhard Hess, Max Planck Institute Luxembourg
- Richard Fentiman, University of Cambridge
- Andrew Dickinson, University of Oxford
- Marta Requejo Isidro, Max Planck Institute Luxembourg/University of Santiago de Compostela
- Trevor Hartley, London School of Economics
- Alexander Layton QC, 20 Essex Street
- Tanja Domej, University of Zurich
- Thomas Pfeiffer, University of Heidelberg
- Paul Oberhammer, University of Vienna
- Adam Johnson, Herbert Smith Freehills
- Martin Howe QC, 8 New Square
- Karen Birch, Allen and Overy

- Diana Wallis, President of the European Law Institute and former Vice-President of the European Parliament
- Deba Das, Freshfields Bruckhaus Deringer LLP

Time: 15:30-19:00 (followed by a drinks reception)

Venue: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

The program is available here; for registration click here.

Impact of Brexit on English Choice of Law and Jurisdiction Clauses

Karen Birch and Sarah Garvey from Allen & Overy have published two papers dealing with the likely/possible effects of the UK leaving the European Union on choice of law clauses in favor of English law and jurisdiction clauses in favor of English courts. The authors essentially argue that Brexit would not make a big difference and that commercial parties could (and should) continue to include English choice of law and jurisdiction clauses in their contracts: English courts (as well as other Member States' courts) would continue to recognize and enforce such clauses. And English judgments would continue to be enforced in EU Member States (even though the procedure might be more complex in some cases).

In essence, the authors thus argue that giving up the current unified European regime for choice of law, jurisdiction, recognition and enforcement of foreign judgments, service of process, taking of evidence would not matter too much for commercial parties. I am not convinced.

The papers are available here and here.

Book on The New Relationship between the United Kingdom and the European Union

A book on *The New Relationship between the United Kingdom and the European Union* was recently published. The book is edited by Dr. Emmanuel Guinchard (Liverpool John Moores University) and Prof. Carlo Panara (University of Leicester) and may be accessed here.

Overview

- Covers the whole spectrum of the new relationship between the UK and the EU
- Contains original discussion and evaluations of the impact of Brexit on UK sovereignty
- Includes both topics covered in the recent agreements and topics that have been left in a grey area

About the book

Brexit has reshuffled the cards of the relationship between the United Kingdom and the European Union. It is a once in a lifetime event, which ended nearly 50 years of EU Membership. EU law as such no longer applies in the United Kingdom and British citizens and companies no longer benefit from its advantages. Part of the previous regime has however been maintained (at times with amendments) through the series of treaties negotiated between the UK and the EU in 2019 and 2020, in particular the Trade and Cooperation Agreement of 2020, to which the 2023 Windsor Agreement can be added. The end result is a legal regime which is perhaps even more complex than EU law itself. This book aims to provide the reader with a clarification of this legal regime as well as provide context to it and suggestions to improve it. All key topics are covered, such as citizens of the EU in the UK and British citizens in the EU, trade in goods and in services, criminal justice, public procurement, Northern Ireland, the UK overseas territories, the

dispute settlement, security and defence, international trade agreements of the UK post-Brexit, environmental protection, European civil justice, financial services, education and research, and the European offices of the UK local authorities and devolved administrations after Brexit. All the chapters follow, wherever possible, the same triadic structure. The first part looks at the regime prior to Brexit; the second part analyses the current regime; and the third part discusses ongoing and predictable trends. The concluding chapter attempts to identify some themes likely to impact on the forthcoming preparation of the 2026 review.

1st Issue of Journal of Private International Law for 2025

The first issue of the Journal of Private International Law for 2025 was published today. It contains the following articles:

Pietro Franzina, Cristina González Beilfuss, Jan von Hein, Katja Karjalainen & Thalia Kruger, “Cross-border protection of adults: what could the EU do better?†”

On 31 May 2023 the European Commission published two proposals on the protection of adults. The first proposal is for a Council Decision to authorise Member States to become or remain parties to the Hague Adults Convention “in the interest of the European Union.” The second is a proposal for a Regulation of the European Parliament and the Council which would supplement (and depart from, in some respects) the Convention’s rules. The aim of the proposals is to ensure that the protection of adults is maintained in cross-border cases, and that their right to individual autonomy, including the freedom to make their own choices as regards their person and property is respected when they move from one State to another or, more generally, when their interests are at stake in two or more jurisdictions. This paper analyses these EU proposals, in particular as regards the Regulation, and suggests potential improvements.

Máire Ní Shúilleabháin, “Adult habitual residence in EU private international law: an interpretative odyssey begins”

This article examines the first three CJEU cases on adult habitual residence in EU private international law, against the background of the pre-existing (and much more developed) CJEU jurisprudence on child habitual residence. While the new trilogy of judgments provides some important insights, many questions remain, in particular, as to the scope for contextual variability, and on the role of intention. In this article, the CJEU’s treatment of dual or concurrent habitual residence is analysed in detail, and an attempt is made to anticipate the future development of what is now the main connecting factor in EU private international law.

Felix Berner, “Characterisation in context – a comparative evaluation of EU law, English law and the laws of southern Africa”

Academic speculation on characterisation has produced a highly theorised body of literature. In particular, the question of the governing law is the subject of fierce disagreement: Whether the lex fori, the lex causae or an “autonomous approach” governs characterisation is hotly debated. Such discussions suggest that a decision on the governing law is important when lawyers decide questions of characterisation. Contrary to this assumption, the essay shows that the theoretical discussion about the governing law is unhelpful. Rather, courts should focus on two questions: First, courts should assess whether the normative context in which the choice-of-law rule is embedded informs or even determines the question of characterisation. Insofar as the question is not determined by the specific normative context, the court may take into account any information it considers helpful, whether that information comes from the lex fori, the potential lex causae or from comparative assessments. This approach does not require a general decision on the applicable law to characterisation, but focuses on the normative context and the needs of the case. To defend this thesis, the essay offers comparative insights and analyses the EU approach of legislative solutions, the interpretation of assimilated EU law in England post-Brexit and the reception of the via media approach in southern Africa.

Filip Vlcek, “The existence of a *genuine* international element as a pre-requisite

for the application of the Brussels Ia Regulation: a matter of EU competence?”

Under Article 25(1) of the Brussels Ia Regulation, parties, regardless of their domicile, may agree on a jurisdiction of a court or the courts of an EU Member State to settle any disputes between them. The problem with this provision is that it remains silent on the question of whether it may be applicable in a materially domestic dispute, in which the sole international element is a jurisdictional clause in favour of foreign courts. Having been debated in the literature for years, the ultimate solution to this problem has finally been found in the recent judgment of the ECJ in Inkreal (C-566/22). This article argues that the ECJ should have insisted on the existence of a material international element in order for Article 25 of the Regulation to apply. This, however, does not necessarily stem from the interpretation of the provision in question, as Advocate General de la Tour seemed to propose in his opinion in Inkreal. Instead, this article focuses on the principle of conferral, as the European Union does not have a legal base to regulate choice-of-court clauses in purely internal disputes. Accordingly, with the Regulation applying to legal relationships whose sole cross-border element is a prorogation clause, the Union legislature goes beyond the competence conferred on it by Article 81 TFEU. Such an extensive interpretation of the Regulation’s scope, which is, in reality, contrary to the objective of judicial cooperation in civil matters, is moreover prevented by the principle of subsidiarity as well as the principle of proportionality. Finally, this approach cannot be called into question by the parallel applicability of the Rome I and II Regulations in virtually analogous situations as those Regulations become inherently self-limiting once the international element concerned proves to be artificial.

Adrian Hemler, “Deconstructing blocking statutes: why extraterritorial legislation cannot violate the sovereignty of other states”

Blocking statutes are national provisions that aim to combat the legal consequences of foreign, extraterritorial legislation. They are often justified by an alleged necessity to protect domestic sovereignty. This article challenges this assumption based on an in-depth discussion of the sovereignty principle and its interplay with the exercise of state power regarding foreign facts. In particular, it shows why a distinction between the law’s territorial scope of sovereign validity and its potentially extraterritorial scope of application is warranted and why,

based on these foundations, extraterritorial legislation cannot violate foreign sovereignty. Since Blocking Statutes cannot be understood to protect domestic sovereignty, the article also discusses how they serve to enforce international principles on extraterritorial legislation instead.

Michiel Poesen, "A Scots perspective on *forum non conveniens* in business and human rights litigation: *Hugh Campbell KC v James Finlay (Kenya) Ltd*"

In Hugh Campbell KC v James Finlay (Kenya) Ltd the Inner House of the Court of Session, the highest civil court in Scotland subject only to appeal to the UK Supreme Court, stayed class action proceedings brought by a group of Kenyan employees who claimed damages from their Scottish employer for injuries suffered due to poor labour conditions. Applying the forum non conveniens doctrine, the Court held that Kenya was the clearly more appropriate forum, and that there were no indications that the pursuers will suffer substantial injustice in Kenya. Campbell is the first modern-day litigation in Scotland against a Scottish transnational corporation for wrongs allegedly committed in its overseas activities. This article first observes that the decision of the Inner House offers valuable insight into the application of forum non conveniens to business and human rights litigation in Scotland. Moreover, it argues that the decision would have benefitted from a more rigorous application of the jurisdictional privilege in employment contract matters contained in section 15C of the Civil Jurisdiction and Judgments Act 1982

Hasan Muhammad Mansour Alrashid, "Appraising party autonomy in conflict-of-laws rules in international consumer and employment contracts: a critical analysis of the Kuwaiti legal framework"

Party autonomy plays a vital role in international contracts in avoiding legal uncertainty and ensuring predictability. However, its application in international employment and consumer contracts remains a subject of debate. Consumers and employees are typically the weaker parties in these contracts and often lack the expertise of the other party, raising questions about their autonomy to choose the applicable law. Globally, legal systems differ on this point with some permitting full party autonomy, others rejecting it outrightly and some allowing a qualified

autonomy with domestic courts empowered to apply a different law in deserving cases to protect the employee or consumer. Kuwaiti law allows full autonomy only in international consumer contracts but prohibits it in international employment contracts. This paper critically analyses Kuwait's legal approach to find an appropriate balance between the principle of party autonomy in the choice of law and the protection of employees and consumers.

Alexander A. Kostin, "Recognition and enforcement of foreign judgments in bankruptcy and insolvency matters under Russian law"

This article addresses the role of certain Russian Federal Law "On Insolvency (Bankruptcy)" provisions (eg Article 1(6)) for resolving bankruptcy and insolvency matters under Russian law. The author argues that the "foreign judgment on the insolvency matters" term covers not only the judgments on initiation of bankruptcy/insolvency, but also other related judgments like those on vicarious liability, avoidance of transactions and settlement agreements. The issues associated with enforcing foreign judgments on the grounds of reciprocity under Article 1(6) of the Federal Law "On Insolvency (Bankruptcy)" are being explored and valid arguments in favour of recognition simpliciter (recognition of foreign judgments without extra exequatur proceedings at the national level) are provided. The legal effects of foreign judgments on the initiation of bankruptcy/insolvency proceedings recognition are analysed as well as the interconnection between relevant provisions of the Russian legislation on lex societatis of a legal entity and the rules for recognising foreign judgments on the initiation of bankruptcy/insolvency proceedings.

English and EU Perspectives on Hague 2019: Hybrid Seminar at

UCL Laws

Ugljesa Grusic (UCL) has kindly shared the following invitation with us.

On 24 March 2025, at 6pm UK time, Marta Pertegás (Maastricht University; University of Antwerp; a fulltime member of the Permanent Bureau of the Hague Conference on Private International Law between 2008 and 2017) and Alex Mills (UCL; a Specialist Editor of *Dicey, Morris and Collins on the Conflict of Laws*, with particular responsibility for, inter alia, the rules on the recognition and enforcement of foreign judgments) will give a seminar on *The 2019 Hague Judgments Convention – English and EU Perspectives* at the Faculty of Laws, University College London. The event will be delivered in a hybrid format and the readers of the blog are welcome to join either in person or on line.

The seminar is part of the International Law Association (British Branch) Lecture Series and will be chaired by Ugljesa Grusic.

On 1 July 2025, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters will enter into force in England and Wales. This historic regime establishes a general treaty basis for the recognition and enforcement of civil judgments between Convention States, supplementing the existing national rules and the Hague Choice of Court Convention 2005. Perhaps most significantly, it will provide common rules for the recognition and enforcement of judgments from England and Wales in EU Member States, and conversely, for EU Member State judgments to be recognised and enforced in England and Wales, to some extent filling a 'gap' created by Brexit.

This seminar will address the significance of this development from both an English and EU perspective, examining the main features of the 2019 Convention and considering the opportunities and challenges it presents.

To register, please follow this link.

Trending Topics in German PIL 2024 (Part 1 – Illegal Gambling and “Volkswagen”)

At the end of each year I publish an article (in German) about the Conflict of Laws developments in Germany of the last twelve months, covering more or less the year 2024 and the last months of 2023. I thought it would be interesting for the readers of this blog to get an overview over those topics that seem to be most trending.

The article focuses on the following topics:

1. Restitution of Money lost in Illegal Gambling
2. Applicable Law in the Dieselgate litigation
3. The (Non-)Valitidy of Online Marriages
4. New German conflict-of-law rules regarding gender afiliation / identity
5. Reforms in international name law

I will start in this post with the two first areas that are mainly dealing with questions of Rome I and Rome II while in my follow-up post I will focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

This is not a resumen of the original article as it contains a very detailed analysis of sometimes very specific questions of German PIL. I do not want to bore the readers of this blog with those specificities. Those interested in knowing those details can find the article here (no free access).

I would be really curious to hear whether these or similar cases are also moving courts in other jurisdictions and how courts deal with them. So, please write me via mail or in the comments to the post if you have similar or very different experiences on those cases.

Part 1 – Illegal Gambling and "Volkswagen"

I will start with the two areas that are mainly questions of Rome I and Rome II while in my follow-up post I will focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

1. Restitution of Money lost in Illegal Gambling

Cases involving the recovery of money lost to illegal online gambling are being heard in courts across Germany and probably across Europe. Usually the cases are as follows: A German consumer visits a website offering online gambling. These websites are in German and offer German support by phone or email with German phone numbers etc. However, the provider is based in Malta or – mainly before Brexit – Gibraltar. After becoming a member, the consumer has to open a bank account with the provider. He transfers money from his (German) account to the account in Malta and uses money from the latter account to buy coins to gamble. In Germany, in order to offer online gambling, you need a licence under German law. The operators in these cases are usually licensed under Maltese law but not under German law.

- In terms of **applicable law**, Rome I and Rome II are fairly straightforward. Since the question in this case is whether the plaintiff can claim the return of money lost on the basis of an illegal and therefore void contract, Rome I is applicable as it also governs claims arising from contracts that are ineffective or of doubtful validity. It is therefore irrelevant that German law would provide for restitution on the basis of unjust enrichment (*Leistungskondiktion*), which generally is a non-contractual obligation that falls within the scope of Rome II. As we have a consumer and a professional, **Article 6 Rome I** has to be applied. As I described the case above, there are also little doubts that the website is (also) directed to Germany and therefore German law as the country of the habitual residence of the consumer applies. To this conclusion came, e.g. the German BGH, but also the Austrian OGH.
- The application of German law leads to the invalidity of the contract

pursuant to sec. 134 BGB, which **declares a contract null and void if it violates a law that prohibits that contract**. In order to determine whether the law prohibits this concrete gaming contract, the question arises as to the **geographical scope of the prohibition on offering gambling/casino contracts without a German licence**. As this prohibition is based on German public law, it is limited to gambling/casino games that take place on German territory. So far, German courts have applied the German prohibition in cases where the consumer was in Germany when playing. One court (LG Stuttgart, 11.9.2024 – 27 O 137/23, 18.09.2024 – 27 O 176/23) even considered it sufficient if the consumer was in Germany when opening the bank account with the gaming provider from which the money was then transferred to the games. The court ruled that it did not matter whether the consumer played from Germany, whether the provider was located abroad or whether the bank account from which the money was finally transferred to the game was located in another country. It appears that Austrian courts have similar cases to decide, but see this point differently, the Austrian OGH decided that the Austrian rules prohibiting unlicensed gambling are limited to providers based in Austria.

- As you probably know, the Austrian OGH made a request to the CJEU to determine the place of the damage (**Article 4 para. 1 Rome II**) in a case where the consumer/player transfers the money from the local bank account to the account of the Bank in Malta and then makes payments from this second bank account. So far, German courts were hesitant to take this road. The way over unjust enrichment resulting from a invalid contract has the charming effect that you do not have to apply Rome II's general tort rule (Article 4 para. 1 Rome II) and dive into the discussion how to determine the place of economic damages. Under German law, however, Rome II may be relevant in cases where the claim is not based on unjust enrichment but on **intentional damage inflicted in a manner offending common decency** (*vorsätzliche sittenwidrige Schädigung*), a special offence which is more difficult to prove (sec. 826 BGB). In some few cases, where sec. 826 was in question, courts still did try to avoid the discussion how to locate this economic loss. One simply applied the law of the place of the habitual residence of the consumer/gamer as the play from which the transfer from the first bank account was effected (OLG Karlsruhe 22.12.2023 – 19 U 7/23; 19.12.2023 – 19 U 14/23). Other courts

avoided the discussion altogether by applying Article 4 para. 3 Rome II directly – leading to an accessory connection to the law applied to the gambling contract (LG Hagen, 5.10.2023).

One footnote to the whole scenario: There is a case pending at the CJEU that might make the whole discussion superfluous (Case C-440/23). The German practice of distributing gambling licences might be classified as unlawful under EU law at least for some older cases. The question by the CJEU to be decided is whether this results in a ban on reclaiming losses from this gambling.

2. Place of Damage in Volkswagen Cases

The Volkswagen emission scandal cases, in German dubbed "Dieselgate", are about claims for damages that end customers are asserting against Volkswagen (or other vehicle manufacturers). The damage is that they bought a car with a manipulated defeat device which, under certain conditions of the type-approval test, resulted in lower emissions than in normal operation. As a result, vehicles with higher emissions than permitted were registered and marketed. Volkswagen is currently being sued throughout Europe. Most cases are initiated by consumers who did not buy directly from the manufacturer but through a local dealer, so there is no direct contractual link. As German law is in some respects restrictive in awarding damages to final consumers, it seems to be a strategy of Volkswagen to come to German law.

- **Rome I**: As far as Volkswagen argued that there is an implicit contract between Volkswagen and the end consumer resulting from a warranty contract in case with a Spanish end buyer, a German court did not follow that argument or at least came to the conclusion that this is a question of Spanish law as such a warranty contract would have to be characterized as a consumer contract in the sense of Article 6 para. 1 Rome I Regulation (LG Ingolstadt 27.10.2023 – 81 O 3625/19)
- In general German courts apply Article 4 para. 1 Rome II and determine the law of the damage following the CJEU decision in VKI and MA v FCA Italy SpA: The place of damage is where the damaging contract is concluded or, in case the places are different, where the vehicle in question is handed over. The BGH (and lower instance courts, e.g. OLG Dresden, 07.11.2023 – 4 U 1712/22 – not free available online) followed

that reasoning. One court had to consider whether, instead, Article 7 Rome II Regulation (**environmental damages**) would be applicable, as the increased emissions would also damage the environment. The LG Ingolstadt did not follow that line of argument, as the damage claimed in the concrete case was a pure economic loss, not an environmental damage.

What are your thoughts? How do courts treat these cases in your jurisdictions (I guess there are many cases as well)? Do you have different or similar issues in discussion?

Stay tuned for the second part of this article which will move to trending topics in family law…

CJEU's first ruling on the conformity of asymmetric jurisdiction clauses with the Brussels I recast regulation and the 2007 Lugano Convention

by Guillaume Croisant, Claudia Cavicchioli, Nicole Rölike, Alexia Kaztaridou, and Julie Esquenazi (all Linklaters)

In a nutshell: reinforced legal certainty but questions remain

In its decision of yesterday (27 February 2025) in the *Lastre* case (Case C-537/23), the Court of Justice of the European Union (CJEU) handed down its long-awaited first judgment on the conformity of asymmetric jurisdiction clauses with the Brussels I recast regulation and the 2007 Lugano Convention.

The Court ruled that the validity of asymmetric jurisdiction clauses is assessed in the light of the autonomous rules of Article 25 of the regulation (rather than Member States' national laws) and confirmed their validity where the clause can be interpreted as designating courts of EU or Lugano States.

This decision dispels some of the previous uncertainties, particularly arising from the shifting case law of the French Supreme Court. The details of the decision and any possible impact, in particular the requirement for the clause to be interpreted as designating courts of EU or Lugano States, will need to be analysed more closely, but on the whole the CJEU strengthened foreseeability and consistency regarding unilateral jurisdiction clauses under the Brussels I regulation and the Lugano convention.

Besides other sectors, this decision is of particular relevance in international financing transactions, including syndicated loans and capital markets, where asymmetric jurisdiction clauses in favour of the finance parties have been a long-standing practice.

Background

A so-called asymmetric or unilateral jurisdiction clause allows one party to choose any competent court to bring proceedings, while the other party is restricted to a specific jurisdiction. Such clauses are common in financial agreements, like international syndicated loan transactions, where lenders, bearing most of the financial risk, reserve the right to enforce claims wherever the borrower may have assets.

Article 25 of the Brussels I recast regulation provides autonomous conditions for the formal validity of jurisdiction clauses designating EU courts. By contrast, for the jurisdiction clause's substantive validity, Article 25 refers to the law of the Member State designated by the jurisdiction clause. While one of the Brussels I recast regulation's predecessors, the 1968 Brussels Convention, referred to

jurisdiction clauses "*concluded for the benefit of only one of the parties*", the regulation is silent on the validity of asymmetrical jurisdiction clauses. Their precise working under Article 25, particularly in relation to the substantive validity rule, awaited authoritative consideration by the CJEU.

In the absence of relevant national case law in many Member States and diverging approaches in jurisdictions where decisions had been rendered, today's judgment brings welcomed clarity and legal certainty. For instance, in *Commerzbank AG v Liquimar Tankers Management Inc*, the English Commercial Court considered (pre-Brexit, when EU jurisdiction law still applied in the UK) that asymmetric jurisdiction clauses are valid under Article 25, whereas the evolving jurisprudence of the French Supreme Court (discussed below) has led to many debates.

Arbitration is excluded from the scope of application of the Brussels I recast regulation, meaning that the validity of asymmetric *arbitration* clauses generally depends on the law applicable to the arbitration clause (*lex arbitri*). Under some laws, they are accepted if no consent issues, such as duress, arise (see e.g. under English law the *NB Three Shipping* case).

Discussions in France spur crucial CJEU review

In the case at hand, an Italian and a French company entered into a supply agreement including an asymmetric jurisdiction clause, similar to clauses often seen in financial documentation favouring the lenders:

> *"The jurisdiction of the court of Brescia (Italy) shall apply to any dispute arising from this contract or related to it, [the Italian supplier] reserving the right to proceed against the buyer before another competent court in Italy or abroad."*

When a dispute arose, the French company brought proceedings before the French courts. The supplier challenged the competence of French courts on the basis of the unilateral jurisdiction clause. The French courts dismissed this objection, declaring the clause unlawful due to its lack of foreseeability and one-sided nature.

The case was brought before the French Supreme Court (*Cour de cassation*). In the past, its First Civil Chamber had ruled, in its 2012 *Rothschild* decision, that

jurisdiction clauses giving one party the right to sue the other before "*any other competent court*" are invalid both under the French civil code and the Brussels I regulation, on the ground that this would be "*potestative*" (i.e. that the execution of the clause would depend on an event that solely one contracting party has the power to control or to prevent).

Although the First Chamber later abandoned any reference to the "*potestativité*" criteria, there now appear to be diverging positions among the chambers of the French Supreme Court regarding the validity of asymmetric jurisdiction clauses. On the one hand, further to several decisions, the latest being in 2018, the First Civil Chamber of the Cour de Cassation appears to hold that asymmetric jurisdiction clauses are invalid if the competent courts are not identifiable through objective criteria or jurisdiction rules within a Member State. On the other hand, the Commercial Chamber of the French Supreme Court ruled in 2017 that such clauses are valid if the parties have agreed to them, regardless of predictability.

In this case, the *Cour de cassation* sought guidance from the CJEU through a preliminary ruling reference. The *Cour de cassation* requested the CJEU's position on:

- whether the lawfulness of asymmetric jurisdiction clauses should be evaluated under (i) the autonomous principles of the Brussels I recast regulation or (ii) the applicable national law;
- if the Brussels I recast regulation applies, whether this regulation permits such asymmetric clauses;
- if national law is applicable, how to determine which Member State's law should take precedence.

After the hearing, the Court deemed a prior opinion from the Advocate General not necessary.

CJEU upholds asymmetric clauses… under conditions

On the first question, the CJEU ruled that, in the context of the assessment of the validity of a jurisdiction clause, complaints alleging the imprecision or asymmetry of that agreement must be examined in the light of autonomous criteria which are derived from Article 25 of the Brussels I recast regulation. Matters of substantive validity, for which the law of the relevant Member States shall apply, only concern

causes which vitiate consent, such as error, deceit, fraud or violence, and incapacity to contract.

Turning to the interpretation of these autonomous criteria under Article 25, the Court confirmed the validity of asymmetric jurisdiction clauses designating courts of EU Member States or States that are parties to the Lugano Convention.

The Court first confirmed that parties are free to designate several courts in their jurisdiction clauses, and that a clause referring to "any other competent court" meets the requirements of foreseeability, transparency and legal certainty of the Brussels I recast regulation and the Lugano Convention since it refers to the general rules of jurisdiction provided for by these instruments.

However, the Court importantly held that these requirements are met only insofar as the jurisdiction clause can be interpreted as conferring jurisdiction to the court designated in the clause (in the case at hand, Brescia) and the competent courts of the EU/Lugano States to hear disputes between the parties. EU law alone would not make it possible to confer jurisdiction to a court of third countries, as this designation would depend on the application of their own private international law rules. The exact implications of this requirement will require careful assessment, in particular where non-EU/Lugano parties are involved.

With respect to the alleged "unbalanced" nature of such clause, the Court stressed that the Brussels I recast regulation and the Lugano Convention are based on the principle of contractual autonomy and thus allow asymmetric clauses, as long as they respect the exceptions foreseen by these instruments, in particular with respect to exclusive jurisdiction (Art. 24 Brussels I recast regulation) as well as the protective rules in insurance, consumer and employment contracts (Arts. 15, 19 and 23 Brussels I recast regulation).

Third Issue of Journal of Private

International Law for 2024

The third issue of the Journal of Private International Law for 2024 features a special issue in honour of Professor Trevor Hartley.

It provides as follows (with other research articles):

Jacco Bomhoff, Uglješa Grušic & Manuel Penades Fons, “Introduction to the special issue in honour of Professor Trevor Hartley”

Jacco Bomhoff, Uglješa Grušic & Manuel Penades Fons, “Professor Trevor C Hartley’s Bibliography”

Jacco Bomhoff, “Law made for man: Trevor Hartley and the making of a “modern approach” in European and private international law”

This article offers an overview and an interpretation of Trevor Hartley’s scholarship in the fields of private international law and EU law. It argues that Hartley’s work, beginning in the mid-1960s and spanning almost six decades, shows striking affinities with two broader outlooks and genres of legal discourse that have roots in this same period. These can be found, firstly, in the approach of senior English judges committed to “internationalising” the conflict of laws in the post-war era; and, secondly, in the so-called “legal process” current of scholarship that was especially influential in American law schools from the late 1950s onwards. Reading Hartley’s writings against these backgrounds can help illuminate, and perhaps to some small extent complicate, two labels he himself has given to his own work: of a “modern approach”, in which “law is made for man, not man for the law”.

Adrian Briggs, “What remains of the Brussels I Regulation in the English conflict of laws?”

The paper argues that whether we are concerned with retained or assimilated EU laws, or with rules of UK law made as close copies of EU laws, initial encouragement to interpret them as though they were still rules of EU law is coming to be, and should be, replaced by a cooler realisation that, as they no longer function in English law as cogs in a great European legal construction, they should be reassessed and repurposed to serve the purposes of domestic law.

That will mean, for good or ill, that the tangible and intangible effect of the Brussels I Regulation on English law is less, and will come to be much less, than some had supposed.

Hans van Loon, "A view from the Hague"

This article highlights the crucial role of Trevor Hartley as the principal author of the Explanatory Report of the 2005 Hague Choice of Court Convention. His exhaustive and crystal-clear explanations, for example on the Convention's sophisticated rules on intellectual property and its relation to the Brussels I Regulation, are a lasting, indispensable help to its correct interpretation and application. They even shed light on some aspects of the 2019 Hague Judgments Convention. The article also recalls Trevor Hartley's essential role in the European Group for Private International Law, of which he has been an original member since 1991, most of the time as the only representative of a common-law legal system. Lastly, this contribution praises Trevor Hartley's exceptional scholarly and pedagogical qualities, as evidenced notably by his widely used International Commercial Litigation.

Linda Silberman, "Trevor Hartley: champion for the Hague Choice of Court Convention"

This article, in tribute to Professor Trevor Hartley, discusses the debate between Gary Born and *Professor Hartley about whether countries should ratify the Hague Choice of Court Convention. It also explains how that debate contributed to the conclusions reached by a New York City Bar Committee that was asked by the United States State Department for its views on ratification of the Convention.*

Alex Mills, "Assessing the Hague Convention on Choice of Court Agreements 2005"

Almost twenty years after the adoption of the Hague Choice of Court Convention 2005, it may be an appropriate moment to reflect on and assess its legacy to date. This article, part of an issue paying tribute to the work of Professor Trevor Hartley, notes a number of different ways in which the legacy of the Convention may be evaluated, particularly appreciating the important role of the Explanatory Report co-authored by Professor Hartley. It argues that the Convention should not

be judged merely based on the (admittedly limited, but perhaps growing) number of state parties, but also taking into account its wider influence in a number of different respects which may cast a more positive light on its achievement. These include the importance of the Convention to the Hague Conference on Private International Law, the soft power of the Convention, and the role of the Convention in preserving the enforceability of UK judgments based on exclusive jurisdiction agreements in European Union Member States notwithstanding Brexit.

Andrew Dickinson, "Anti-suit injunctions – beyond comity"

This short article considers a theme emerging from Trevor Hartley's writing on the topic of anti-suit injunctions – the significance of the existence of an international treaty that regulates the circumstances in which the States concerned may or must assert, and may or must decline, jurisdiction with respect to the subject matter of the dispute. It examines, in particular, recent case law extending the reach of the European Union's prohibition on anti-suit injunctions within the Brussels I regime, and the place of anti-suit injunctions within the framework of the Hague Choice of Court Convention.

Verónica Ruiz Abou-Nigm, "Iconic asymmetries of our times: "super Highways" and "jungle tracks" in transnational access to justice"

Drawing from Hartley's "Multinational Corporations and the Third World: A Conflict-of-Laws Analysis" where he exposes the "unequal fight" between powerful multinational corporations and the people and communities in "the third world", suggesting that this is partly a consequence of the deficits of legal infrastructures therein, this brief contribution dwells on the global systemic impact of channelling legal proceedings justiciable in the Global South (GS) to courts in the Global North (GN). It takes a private international law and sustainable development perspective and draws attention to the rhetoric and narratives of interdependence between the "super highways" and the "jungle tracks"- the illustrations used by Hartley. The main argument taken forward in this paper is that to realise private international law's contribution to SDG 16 (peace, justice and strong institutions) responsivity is necessary in jurisdictional

decision making in this context to enhance access to justice for all in the GS.

Grace Underhill, “Masterstroke or misguided? Assessing the proposed parallel proceedings solution of the Hague Conference on Private International Law and the likelihood of its acceptance in Australia”

A dispute litigated simultaneously in two different jurisdictions wastes time and resources, and risks inconsistent judgments. In March 2024, the Hague Convention on Private International Law’s Working Group on matters related to civil and commercial jurisdiction released its third iteration of draft provisions on parallel proceedings. These provisions represent the groundwork (and one chapter) of a long-awaited international instrument that addresses the assumption and declining of jurisdiction. This article canvasses the proposal’s successes and failures in securing the continuance of litigation in a single forum. To assist, this article selects the example of Australia, against whose judicial practice the compatibility of the Working Group’s proposal is tested. This exercise identifies fundamental inconsistencies between the two schemes. Those (potentially insurmountable) concerns for judicial practice, alongside bureaucratic stagnation in Australia’s policy-making appetite in this area must, it is argued, be balanced against the strong normative influences for Australia’s accession to such an agreement. This invites concern for the acceptance of the proposal, and the broader future of the Jurisdiction Project as a whole.

Tobias Lutzi, “What remains of H Limited? Recognition and enforcement of non-EU judgments after Brexit: Journal of Private International Law”

In its controversial decision in H Limited, the Court of Justice held that an English confirmation judgment, transforming two Jordanian judgments into an English one, constituted a judgment in the sense of Articles 2(a) and 39 Brussels Ia and, as such, qualified for automatic recognition and enforcement in all Member States. The decision has been heavily criticized for seemingly violating the rule

against double exequatur and potentially opening a backdoor into the European Area of Justice. As the particular door in question has already been closed with the UK's completed withdrawal from the EU, though, crafty judgment creditors will have to look to other Member States. This paper will make an attempt at identifying those jurisdictions to which they might look. For this purpose, it will first argue that for an enforcement decision to fall under Chapter III of the Regulation, two requirements must be fulfilled: It must be a new decision on the judgment debt (rather than a mere declaration of enforceability) and it must have come out of adversarial proceedings. The paper will then look in more detail at a selection of jurisdictions that might fulfil these two requirements.

Netherlands Commercial Court updates its rules of procedure

The Netherlands Commercial Court (NCC) has recently updated its rules of procedure. The updated version has come into force on January 1, 2025.

The update might interest litigation lawyers, and could be relevant to this blog's readers who follow the developments in regulatory competition, in particular the establishment and work of international commercial courts, including several posts on this blog (see inter alia here, here, here, here, here, here, here, here, here, here, here, here, here, here).

The full title of the NCC rules of procedure is 'Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal) NCC Rules / NCCR'. The document summarizes the amendments as follows:

'This fourth version of the Rules is occasioned by the various changes to the laws

of evidence in the Code of Civil Procedure that come into force on 1 January 2025 (Article 194 ff). Additionally, there are amendments in – amongst others – the following rules:

– 2.1.3 (notification of interested parties)

– 2.2 and explanatory notes (language and third parties)

– 3.2.1 (communication by email)

– 3.2.9 (maximum size of documents in appeal)

– 3.4.2 (extension of a time limit)

– 5.2 (default)

– 6.3.2 (summary proceedings)

– 7.1.4 (scheduling)

– 7.2 (invitation to the hearing)

– 7.7.2 (audio and video recordings)

– 8.4 (right to information and confidentiality)

– 8.4.8 (prejudgment attachment to protect evidence)

– 8.8 (preparatory evidence events)

– explanatory notes 1.3.2 (jurisdiction to deal with prejudgment attachments).'

Several updates thus have practical character; other amendments follow the development of the EU and national civil procedural law (for instance, in relation to the right to information and confidentiality).

Improving the settlement of (international) commercial disputes in Germany

This post was written by Prof. Dr. Giesela Rühl, LL.M. (Berkeley), Humboldt University of Berlin, and is also available via the EAPIL blog.

As reported earlier on this blog, Germany has been discussing for years how the framework conditions for the settlement of (international) commercial disputes can be improved. Triggered by increasing competition from international commercial arbitration as well as the creation of international commercial courts in other countries (as well as Brexit) these discussions have recently yielded a first success: Shortly before the German government coalition collapsed on November 6, the federal legislature adopted the Law on the Strengthening of Germany as a Place to Settle (Commercial) Disputes (Justizstandort-Stärkungsgesetz of 7 October 2024)[1]. The Law will enter into force on 1 April 2025 and amend both the Courts Constitution Act (Gerichtsverfassungsgesetz – GVG) and the Code of Civil Procedure (Zivilprozessodnung – ZPO)[2] with the aim of improving the position of Germany's courts vis-à-vis recognized litigation and arbitration venues – notably London, Amsterdam, Paris and Singapore. Specifically, the new Law brings three innovations.

English as the language of proceedings

The first innovation relates to the language of court proceedings: To attract international disputes to German courts, the new Law allows the German federal states *(Bundesländer)*[3] to establish "commercial chambers" at the level of the regional courts *(Landgerichte)* that will offer to conduct proceedings in English from beginning to end if the parties so wish (cf. § 184a GVG). Before these chambers parties will, therefore, be allowed to file their briefs and all their statements in English, the oral hearings will be held in English and witnesses will be examined in English. In addition, commercial chambers will communicate with the parties in English and write all orders, decisions and the final judgment in English. Compared to the status quo, which limits the use of English to the oral hearing (cf. § 185(2) GVG) and the presentation of English-language documents

(cf. § 142(3) ZPO) this will be a huge step forward.

The new Law, however, does not stop here. In addition to allowing the establishment of (full) English language commercial chambers at the regional court level it requires that federal states ensure that appeals against English-language decisions coming from commercial chambers will also be heard (completely) in English in second instance at the Higher Regional Courts *(Oberlandesgerichte)* (cf. § 184a(1) No. 1 GVG). The new Law also allows the Federal Supreme Court *(Bundesgerichtshof)* to conduct proceedings entirely in English (cf. § 184b(1) GVG). Unfortunately, however, the Federal Supreme Court is not mandated to hear cases in English (even if they started in English). Rather, it will be in the discretion of the Federal Supreme Court to decide on a case-by-case basis (and at the request of the parties) whether it will hold the proceedings in English – or switch to German (cf. § 184b GVG). The latter is, of course, unfortunate, as parties cannot be sure that a case that is filed in English (and heard in English at first and second instance) will also be heard in English by the Federal Supreme Court thus reducing incentives to commence proceedings in English in the first place. But be this as it may: it is to be welcomed that the German federal legislature, after long and heated debates, finally decided to open up the German civil justice system to English as the language of the proceedings.

Specialized "commercial courts" for high-volume commercial disputes

The second innovation that the new Law brings relates to the settlement of high-volume commercial cases (whether international or not). To prevent these cases from going to arbitration (or to get them back into the state court system) the new Law allows the German federal states to establish specialized senates at the Higher Regional Courts. Referred to as "commercial courts" these senates will be distinct from other senates in that they will be allowed to hear (certain) commercial cases in first instance if the parties so wish (cf. § 119b(1) GVG) thus deviating from the general rule that cases have to start either in the local courts (if the value in dispute is below € 5.000,00) or in the regional courts (if the value in dispute is € 5.000,00 or higher). In addition, commercial courts will conduct their proceedings in English (upon application of the parties) and in a more arbitration-style fashion. More specifically, they will hold a case management conference at the beginning of proceedings and prepare a verbatim record of the hearing upon application of the parties (cf. §§ 612, 613 ZPO). Commercial courts will, hence, be able to offer more specialized legal services as well as services

that correspond to the needs and expectations of (international) commercial parties.

It is unfortunate, however, that the German legislature was afraid that the commercial courts would be flooded with (less complex) cases – and, therefore, decided to limit their jurisdiction to disputes with a value of more than € 500.000,00 (cf. § 119b(1) GVG). As a consequence, only parties with a high-volume case will have access to the commercial courts. This is problematic for several reasons: First, it is unclear whether a reference to the value of the dispute is actually able to distinguish complex from less complex cases. Second, any fixed threshold will create unfairness at the margin, as disputes with a value of slightly less than € 500.00,00 will not be allowed to go to the commercial courts. Third, requiring a minimum value can lead to uncertainty because the value of a dispute may not always be clear *ex ante* when the contract is concluded. Fourth, a fixed threshold may create the impression of a two-tier justice system, in which there are "luxury" courts for the rich and "ordinary" courts for the poor. And, finally, there is a risk that the commercial courts will not receive enough cases to build up expertise and thus reputation. Against this background, it would have been better to follow the example of France, Singapore, and London and to open commercial courts for all commercial cases regardless of the amount in dispute. At the very least, the legislature should have set the limit much lower. The Netherlands Commercial Court, for example, can be used for any disputes with a value higher than € 25,000.00.

Better protection of trade secrets

The third innovation, finally, concerns the protection of trade secrets. However, unlike the other innovations the relevant provisions are not limited to certain chambers or senates (to be established by the federal states on the basis of the new Law), but apply to all civil courts and all civil proceedings (cf. § 273a ZPO). They allow the parties to apply for protection of information that qualifies as a trade secret within the meaning of the German Act on the Protection of Trade Secrets (Gesetz zum Schutz von Geschäftsgeheimnissen – GeschGehG). If the court grants the application, all information classified as a trade secret must be kept confidential during and after the proceedings (cf. §§ 16 Abs. 2, 18 GeschGehG). In addition, the court may restrict access to confidential information at the request of a party and exclude the public from the oral hearing (§ 19 GeschGehG). The third innovation, thus, account for the parties' legitimate

interests in protecting their business secrets without unduly restricting the public nature of civil proceedings, which is one of the fundamental pillars of German civil justice. At the same time, it borrows an important feature from arbitration. However, since the new rules are concerned with the protection of trade secrets only, they do not guarantee the confidentiality of the proceedings as such. As a result, the parties cannot request that the fact that there is a court case at all be kept secret.

Success depends on the federal states

Overall, there is no doubt that the new Law is to be welcomed. Despite the criticism that can and must be levelled against some provisions, it will improve the framework for the resolution of high-volume (international) commercial disputes in German courts. However, there are two caveats:

The first caveat has its root in the Law itself. As it places the burden to establish commercial chambers and commercial courts on the federal states, the extent to which it will be possible for civil court proceedings to be conducted entirely in English and the extent to which there will be specialized senates for high-volume commercial disputes will depend on whether the federal states will exercise their powers. In addition, the practical success of the Law will also depend on whether the federal states will make the necessary investments that will allow commercial chambers and commercial courts to strive. For example, they will need to make sure that commercial chambers and commercial courts are staffed with qualified judges who have the necessary professional and linguistic qualifications and ideally also practical experience to settle high-volume (international) commercial disputes. In addition, they will have to ensure that judges have sufficient time to deal with complex (national and international) cases. And, finally, federal states will have to ensure that sufficiently large and technically well-equipped hearing rooms are available for the kind of high-volume disputes that they seek to attract. Should federal states not be willing to make these kinds of investments commercial chambers and commercial courts will most likely be of limited use.

The second caveat concerns the likely success of the new Law with regards to *international* disputes. In fact, even if the federal states implement the new Law in a perfect manner, i.e. even if they establish a sufficient number of commercial chambers and commercial courts and even if they make the investments described above, it seems unlikely that German courts will become sought-after

venues for the settlement of international commercial disputes. This is because the German civil justice system has numerous disadvantages when compared with international commercial arbitration. In addition, the attractiveness of German courts suffers from the moderate reputation and poor accessibility of German substantive law. Both problems will not disappear with the implementation of the new Law.

Against this background, the new Law holds the greatest potential for *national* high-volume commercial disputes. However, it should not be forgotten that these kinds of disputes represent only a small fraction of the disputes that end up before German courts each year. In order to really strengthen Germany as a place to settle dispute, it would, therefore, be necessary to address the problems that these cases are facing. However, while the (now former) Federal Minister of Justice made promising proposals to this effect in recent months, the collapse of the German government coalition in early November makes is unlikely, that these proposals will be adopted any time soon. In the interest of the German civil justice system as a whole, it is, therefore, to be hoped that the proposals will be reintroduced after the general election in early 2025.

[1] Gesetz zur Stärkung des Justizstandortes Deutschland durch Einführung von Commercial Courts und der Gerichtssprache Englisch in die Zivilgerichtsbarkeit (Justizstandort-Stärkungsgesetz) vom 7. Oktober 2024, Bundesgesetzblatt (Federal Law Gazette) 2024 I Nr. 302.

[2] Note that both the translations of the GVG and the ZPO do not yet include the amendments introduced through the new Law discussed in this post.

[3] The German civil justice system divides responsibilities between the federal state *(Bund)* and the 16 federal states *(Bundesländer)*. While the federal state is responsible for adopting unified rules relating to the organization of courts as well as the law of civil procedure (Art. 74 No. 1 of the Basic Law), the federal states are responsible for administering (most) civil courts on a daily basis (Art. 30 of the Basic Law). It is, therefore, the federal states that organize and fund most civil courts, appoint judges, and manage the court infrastructure.