Klára Drličková, Radovan Malachta,
Patrik Provazník (eds.)

COFOLA INTERNATIONAL 2022

Current Challenges of Resolution of International (Cross-Border) Disputes

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About the Authors

Orsolya Antal is a lecturer and a PhD student at Széchenyi István University, Deák Ferenc Faculty of Law, Hungary. She also works as a lawyer, psychologist, and mediator. Her research is focused on the impact assessment of the regulation and training system for mediation. She has been using mediation as a method in her private practice for almost a decade. Typically, she assists clients in family, relationship, youth, divorce, and child placement conflicts, complemented by her couple and family therapy approach. Her teaching activities focus on these fields. She also holds university courses in communication and methodology, as well as in alternative dispute resolution.

Veronika Barková is a PhD student at the Faculty of Law, Department of International Law and International Relations, Comenius University, Bratislava. In her studies she specializes in international arbitration. She primarily focuses on arbitration agreements and the law applicable to arbitration proceedings.

Bára Bečvářová is a PhD student at the Department of Commercial Law, Faculty of Law, Charles University, with specialization in private international law and international trade law. In addition to her research activity, she coaches a student team participating in the Willem C. Vis International Commercial Arbitration Moot and works as a junior lawyer at Clifford Chance.

Monica Chan is a PhD student at the Faculty of Law, University of Macau. She has participated in research projects involving European Union law and international investment law. Her area of research is primarily focused on the law of technology, international commercial arbitration, and comparative legal studies.

Marcin Dorochowicz is a PhD student at the Department of Constitutional Law, Faculty of Law and Administration, Nicolaus Copernicus University in Toruń. He is a member of the Self-Government Board of Appeal

in Bydgoszcz, member of the Legal Office of the National Representation of Doctoral Students, and senator of the University. For his achievements, he has been awarded many times with scholarships of the Minister, Marshal of the Province, Mayor of the City, Rector of Nicolaus Copernicus University, as well as the title of the Best Student of the Nicolaus Copernicus University in Toruń. Marcin has also attended and spoken at numerous scientific conferences. He has authored several publications, mainly in the field of non-criminal activities of the prosecutor's office, the rule of law, and constitutional guarantees in criminal proceedings.

Martina Filipová is a PhD student at the Faculty of Law, Department of International Law and International Relations, Comenius University, Bratislava. In her studies she specializes in EU competition law regulation. She particularly focuses on the EU state aid rules and the application practice of the European Commission.

Adrian Hemler is a legal scholar and PostDoc (assistant professor equivalent) at the University of Konstanz, Germany, who is currently working on his habilitation thesis. In 2021, he graduated from the University of Cambridge after completing his German legal education with the First and Second State exams. During his legal clerkship (Rechtsreferendariat), he worked as a trainee lawyer in Antitrust and International Commercial Law and at the German Embassy in Tirana, Albania. His research focuses on private law, conflict of laws, and legal corpus linguistics.

Jan Hodermarsky is a PhD student of Private International Law at the Department of International and European Law at the Faculty of Law, Masaryk University, Brno, the Czech Republic. As for law, his interests revolve around private international law, law of information and communication technologies, and international relations. His PhD research focuses on international aspects of intellectual property.

Lilla Király is a counsel and member of the Dispute Resolution practice group at Dentons' Budapest office. Her practice primarily focuses on civil procedure cases, including alternative dispute resolution and court

proceedings. Before joining Dentons, she was a senior lecturer in law at the Department of Civil Procedure Law and Legal Sociology, Faculty of Law, University of Pécs in Hungary for 18 years. She delivered lectures in Hungarian and European Civil Procedure Law and Private International Law, was involved in the university's activities as a project director, supervisor at the Doctorate School, and undergraduate and postgraduate courses leader. Currently, she is also an associate professor at Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law, Department of Procedure Law, supervisor at the Doctorate School, and Director of the Postgraduate Training Institute. She has extensive experience in securing and managing scientific project grants from Hungary and the EU. She has received numerous scholarships from the EU to carry out research, teaching activities in the context of the Erasmus Mobility in EU Law, and to organize and establish a network of higher education institutions.

Hana Kršňáková is a PhD student at the Department of Commercial Law, Faculty of Law, Charles University. In her studies she specializes in international commercial mediation. She also currently works as an in-house counsel for an international software company. In addition to her work and research activities, she is involved in the Student ADR Association at Charles University, and coaches student teams participating in mediation and negotiation competitions around the world.

Zdeněk Nový is a senior lecturer in public international law at the Faculty of Law of Masaryk University in Brno, the Czech Republic, and an attorney-at-law specialised in international law and arbitration. Dr. Nový read law at Masaryk University in Brno and European University Institute in Florence, Italy. He has authored a number of publications relating to international arbitration, public international law, and EU law. Publications of Dr. Nový have been quoted in 15 countries.

Eszter Papp is a PhD candidate at the Doctoral School of Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law, and Co-head of Litigation and Arbitration at Sok Siphana & Associates in Cambodia. Her primary research interest lies in cross-border litigation in ASEAN and the EU.

Lea Pődör is an assistant professor at the Department of Legal Theory, Deák Ferenc Faculty of Law and Political Sciences, Széchenyi István University of Győr. Her research interests include legal-theoretical analysis of judicial decision-making, questions of law and morality, and ethical-philosophical dilemmas of artificial intelligence. She obtained her PhD in 2021 with the dissertation thesis entitled "The nature of easy case-hard case distinction in judicial decision-making – A legal theoretical approach". In addition to her teaching and research activities, she works in the field of judiciary.

Lenka Psárska is a student at the Faculty of Law, Masaryk University, specialising in the field of international arbitration. She is currently working as a paralegal at Dentons, an international law firm, where she primarily focuses on dispute resolution. In addition to her research activity, she has participated in Foreign Direct Investment International Arbitration Moot.

Patrik Provazník is a PhD student in Private International Law at the Department of International and European Law, Faculty of Law, Masaryk University, Brno, the Czech Republic. His research focuses on the question of values and policies in private international law and the ways they shape choice-of-law methodology. He is also interested in moral and ethical considerations in the field of private international law.

Vlastislav Stavinoha is a PhD student at the Faculty of Law, Department of International Law, Saint Petersburg State University, Russian Federation. In his research he focuses on the so-called "de facto States". His research project deals with the enjoyment of human rights by individuals living in or depending on de facto States from the point of view of international law. He is also interested in international commercial arbitration and international trade law with particular focus on the de facto States and occupied territories.

Tereza Ševčíková is a 2022 graduate of the Faculty of Law of Masaryk University, specialising in the field of international investment law with her thesis research focusing on the Reform of International Investment Arbitration. Furthermore, she is an alumna of the International Relations

program at the same university. Concurrently, she is a legal counsel as a part of the team of expert lawyers in the International Arbitration and Investment Protection Unit at the Ministry of Finance of the Czech Republic. She was also the captain of the FDI Moot Court Masaryk Team 2021, and, as of this year's competition, she has become a coach of the team.

Martina Tičić is an assistant at the University of Rijeka, Faculty of Law, and a doctoral student of the Croatian Science Foundation (HRZZ). Her interests and research include private international law, European procedural law, and cross-border enforcement. She was involved in scientific research work on the project "Train to enforce – Train 2 EN4CE" which aimed at familiarizing national legal practitioners with the EU regulations on European Order for Payment and European Small Claims Procedure. In the course of her doctoral study, she conducted a three-month research stay at the University of Antwerp, Belgium, three-month research stay at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and attended the 2022 Summer Courses in Private International Law of The Hague Academy of International Law, the Hague, the Netherlands.

Peng Wang is a master's student at the Law School of Tsinghua University, China. His research interests include dispute settlements and international organizations under public international law.

Krzysztof Żok is an assistant professor (adjunct) at the Faculty of Law and Administration at Adam Mickiewicz University in Poznań, Poland. His research interests focus on private law, primarily on contract law, succession law, consumer law, as well as general theory of civil law. He also studies legal aspects of new technologies. He has published several books and articles on Polish and European private law.

List of Abbreviations[1]

AI	Artificial Intelligence
Art.	Article / Articles
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels I Regulation (recast)	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
cf.	Confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union (previously as European Court of Justice)
EU	European Union
ff.	And the following pages
fn.	Footnote
HCCH	Hague Conference on Private International Law
ICC	International Chamber of Commerce
ICJ	International Court of Justice

1 The abbreviations listed below are common for more than one contribution featured in these conference proceedings. The authors were allowed to introduce their own abbreviations exclusively for the purposes of their contributions. These are not listed here.

ICSID	International Centre for Settlement of Investment Disputes
New York Convention	United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards
No.	Number
ODR	Online Dispute Resolution
p. / pp.	Page / Pages
para.	Paragraph / Paragraphs
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US / U.S.	United States
Vol.	Volume

Preface

The COFOLA ("Conference for Young Lawyers") conference has been annually organized by Masaryk University, Faculty of Law, since 2007. The main aim of this conference is to give the floor to doctoral students and young scientists at the early stage of their career, and to enable them to present the results of their scientific activities.

In 2013, COFOLA was enriched by a special part called "COFOLA International". From 2013 to 2019, COFOLA International formed part of the COFOLA conference. Since 2020, COFOLA International has been organised as a separate conference. COFOLA International focuses primarily on issues of international law and the regulation of cross-border relations, and is also oriented to doctoral students and young scientists from foreign countries. COFOLA International contributes to the development of international cooperation between students and young scientists from different countries. It constitutes a platform for academic discussion, and develops scientific and presentation skills of young scientists. Such a platform for scientific debate beyond the boundaries of one country contributes to the global view on the law, which is so vital in current days.

This year's COFOLA International conference was titled "Current Challenges of Resolution of International (Cross-Border) Disputes". The oral part of the conference was held in a hybrid form (both at the Faculty of Law, Masaryk University, and online) with a total of 22 participants. Representatives of 8 countries (namely China, Croatia, the Czech Republic, Germany, Hungary, Italy, Poland, and Slovakia) gathered to present their papers on selected topics. Eventually, 18 papers were submitted in a written form. The papers included in these proceedings represent topics that were recommended for publication after an independent double-blind review process.

After an introductory paper challenging the doctrinal rift between public and private international law, the papers may be categorized as follows. The first group consists of papers dealing with the recent developments in alternative dispute resolution mechanisms and the challenges they face. The second

group of papers elaborates on topical issues concerning disputes in Public International Law and European Law. The next category focuses on the field of international arbitration, where some papers are devoted to the area of international investment arbitration, while the others discuss the area of international commercial arbitration. The last section consists of papers dealing with the digitalization of justice, and the selected aspects of national and international cross-border dispute resolution.

The final versions of the papers included in these conference proceedings were submitted by the authors on 31 May 2022. After this date, some papers could have been revised based on the recommendations by the reviewers.

Klára Drličková

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Bridging the Public-Private Law Divide in the Conflict of Laws

Adrian Hemler

Faculty of Law, University of Konstanz, Germany

Abstract

As the name suggests, the methodology of private international law relates to substantive private law only. A parallel methodological system regarding public law does not exist. The paper argues that this methodological rift lacks any doctrinal justification. It concludes that there are no obstacles to all-sided conflict of laws rules in the public law domain. Since the paper finds that foreign public law is already applicable in private party cases (albeit heavily obscured), it focuses on public law relationships where a foreign state appears as a plaintiff. In this respect, it is shown why the application of foreign public law embodies an attractive compromise between legal assistance and recognition.

Keywords

Foreign Public Law; Public Law Taboo; Foreign State as a Party; Conflict of Laws; Private International Law.

1 Introduction

A bridge is only necessary if we want to cross a rift. We have to address the obstacle to be crossed first before we can discuss the nature of our bridge. So, what is the public-private law divide in the Conflict of Laws ("CoL")?

1.1 Defining Conflict of Laws Rules

Since the public-private law divide also relates to the reach of the term "CoL rules", we should address their definition, first: When we are talking about CoL rules, we are referring to (1) originally national rules that (2) designate

the spatial scope of application of (3) one or more substantive rules of one or more states.

1. The "originally national" nature of CoL rules refers to the so-called principle of autonomy: Generally, a state can decide freely if and to which extent domestic and/or foreign law shall be applicable.[1] CoL rules are neither a matter of public international law themselves nor do states consider their CoL rules a sole reiteration of public international law principles.[2] Due to the autonomy principle, a state is, of course, also free to engage in international harmonisation. However, it is essential to note that only the principle of autonomy and, accordingly, the national origin of CoL rules condition international harmonisation (not the other way around). That is why CoL rules remain "originally" national even if they have been harmonised by EU law or state treaties.
2. Additionally, CoL rules only designate the spatial scope of application of substantive rules. They do not solve any social conflict by themselves but only tell us which domestic or foreign rule might provide us with a solution.[3] Hence, CoL rules are "nonsubstantive" because they only tell us when domestic and/or foreign law is applicable.
3. Finally, CoL rules can relate to one specific rule of one specific state or to a whole legal field of many or all states. If a CoL rule relates to all states, we call it "all-sided".[4]

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1 Translated from the German original: *"We must examine whether foreign rules should rule, not whether they want to rule."* – KAHN, F. Gesetzeskollisionen. *Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*. 1891, Vol. 30, p. 129; see also MANN, F. A. *Further Studies in International Law*. Oxford: Clarendon Press, 1990, p. 15; HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, p. 84. The principle of autonomy is not to be confused with party autonomy.

2 HEMLER, A. Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats. *The Rabel Journal of Comparative and International Private Law*. 2022, Vol. 86, no. 4, pp. 905–934. Of course, just like any other national laws, CoL rules can be influenced and/or restricted by public international law. – Ibid.

3 Cf. BAR, C. von, MANKOWSKI, P. *Internationales Privatrecht. Band I. Allgemeine Lehren*. München: C. H. Beck, 2003, pp. 11 ff.; DICEY, A., COLLINS, L., MORRIS, J. *Dicey, Morris and Collins on the Conflict of Laws*. 15. ed. London: Sweet & Maxwell, para. 1-036 ff. This is not as clear-cut as it sounds: We could argue that the designation of the law's scope of application is a social conflict ("meta conflict") as well. This objection can be addressed by adjusting the definition insofar as CoL rules do not solve any social conflict by themselves apart from meta conflicts.

4 BAR, C. von, MANKOWSKI, P. *Internationales Privatrecht. Band I. Allgemeine Lehren*. München: C. H. Beck, 2003, pp. 11 ff.

We are most familiar with all-sided rules since they are the most common type of CoL rules. Take, for example, Article 4 para. 1 of the Rome II Regulation[5]: It tells us that we ought to apply the law on non-contractual obligations of the country where the damage occurred. It, therefore, relates to all states – not only to the domestic or one foreign state. If a rule relates only to one state – be it the domestic or a foreign state – we call it "one-sided".[6]

As a logical exercise, all-sided CoL rules can be fragmented into their one-sided components.[7] For example, we can explicate the one-sided component of Article 4 para. 1 Rome II Regulation regarding German substantive law as follows: *"The law applicable to a non-contractual obligation arising out of a tort/delict shall be German law if the damage occurs in Germany"*; or, regarding Swiss (or any other state's) law: *"The law applicable to a non-contractual obligation arising out of a tort/delict shall be Swiss law if the damage occurs in Switzerland"*.

1.2 The Public-Private Law Divide

CoL rules are often understood as pertaining only to substantive private law. That is why the terms "conflict of laws" and "private international law" are generally used synonymously. However, counterintuitively, "public international law" does not designate a CoL system regarding substantive public law. Instead, it refers to the law of nations.

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

6 BAR, C. von, MANKOWSKI, P. *Internationales Privatrecht. Band I. Allgemeine Lehren*. München: C. H. Beck, 2003, pp. 11 ff.; MANN F. A. Statutes and the Conflict of Laws. In: WALDOCK, H., JENNINS, R. Y. (eds.). *British Yearbook of International Law, Vol. 46, 1972–1973*. Oxford: Oxford University Press, 1975, p. 119. It must be noted that the prevalent view only calls CoL rules on the domestic law's scope of application "one-sided". However, I argue that we should call CoL rules "one-sided" whenever they relate to one state, including a foreign state only (see the references in fn. 7).

7 The fragmentability of all-sided CoL rules relates to the number of states ("horizontal grouping") and the amount of individual substantive provisions of one particular state ("vertical grouping"). – Cf. HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 120 ff. Ultimately, the relationship between all-sided and one-sided CoL rules (as well as their smallest building block, so-called "elementary" CoL rules) can be conceptualised using set logic: All-sided CoL rules form a subset of one-sided CoL rules. One-sided CoL rules form a subset of the superset "elementary CoL rules" (HEMLER, A. forthcoming publications).

This terminological framework is closely linked to the assumption that, within CoL, those rules that we define loosely as "public law"[8] must be treated somewhat differently. These dissimilarities between the treatment of public and private law relate to an alleged methodological rift first and foremost: Its central claim is the thesis that all-sided CoL rules are only possible within the private law's domain. Hence, regarding public law, it is usually maintained that only one-sided CoL rules regarding the domestic law's scope of application are conceivable.[9] These one-sided CoL rules on domestic public law are usually called "delimiting" rules or simply "rules on the domestic law's scope of application".[10] Their existence is not disputed and, in my view, even compulsory.[11] Only all-sided CoL rules that allow for the application of foreign public law are usually deemed impossible.[12]

Let us consider an example. Article 6 of the Chinese Criminal Code states: *"*[The Chinese Criminal Code] *applies to all who commit crimes within the territory of the People's Republic of China…"* We should note that this is a one-sided CoL

8 As a working definition, I will understand "public law" as *"law that is concerned with the exercise of [sovereign] power within a state"* – cf. ELLIOT, M., FELDMAN, D. Introduction. In: ELLIOT, M. et al. (eds.). *The Cambridge Companion to Public Law*. Cambridge: Cambridge University Press, 2015, p. 1; Since I will reject any methodological difference between the application of foreign private and public law, a precise definition is unnecessary for CoL purposes.

9 This can be traced back to KAHN, F. Über Inhalt, Natur und Methode des Internationalen Privatrechts. *Jherings Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*. 1898, Vol. 40, p. 53; FEDOZZI, P. De l'efficacité extra-territoriale des lois et des actes de droit public. In: *Recueil des Cours 1929*. The Hague: Brill Nijhoff, 1930, Vol. 27, p. 149. The first detailed treatise on this subject was provided by NEUMEYER, K. *Internationales Verwaltungsrecht*. Zürich: Verlag für Recht und Gesellschaft, 1936, 600 p.

10 Ibid.; HANDRLICA, J. Is There an EU International Administrative Law? A Juristic Delusion Revisited. *European Journal of Legal Studies*. 2020, Vol. 12, no. 2, pp. 79–116, who uses the term "delimiting rules".

11 One cannot pronounce a normative "Ought" without an explicit or tacit statement on its scope of application (even if the connecting factor "always" is used (HEMLER, A. forthcoming publications). Cf., albeit only tacitly: DICEY, A., COLLINS, L., MORRIS, J. *Dicey, Morris and Collins on the Conflict of Laws*. 15. ed. London: Sweet & Maxwell, 2012, para. 1-037.

12 TORREMANS, P., HEINZE, C., GRUŠIĆ, U. *Cheshire, North & Fawcett: Private International Law*. 15. ed. Oxford: Oxford University Press, 2017, p. 115; Cf. HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 62 ff. for more details. The inapplicability of foreign public law is labelled "public law taboo" in common law jurisdictions. – LOWENFELD, F. A. Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction. In: *Recueil des Cours 1979*. The Hague: Brill Nijhoff, 1980, Vol. 163, pp. 322 ff.

rule since it prescribes the conditions of applicability of (domestic) Chinese criminal law of only one (the domestic) state. According to the traditional view, the following all-sided extension of this CoL rule is considered doctrinally impossible since it would allow for the applicability of foreign public (criminal) law: *"The criminal law of the country where the crime has been committed is applicable."*

2 Bridging the Methodological Rift Between Public and Private Law

There are several doctrinal justifications for the CoL's (alleged) methodological rift between public and private law (i.e., the belief according to which the application of foreign public law is impossible). The most prominent doctrinal arguments draw on two assumptions: First, it is believed that applying foreign law is only possible if the state is "neutral" toward the applicable law. Second, the application of foreign public law is explicitly or tacitly equated with an import of foreign state power. I will advance the view that those and other counter-arguments cannot be upheld and that, therefore, the CoL's methodology applies to both public and private law.

2.1 Neutrality

A popular justification for the non-applicability of foreign public law reads as follows:

1. The application of foreign law is only possible if the state is "neutral" or "indifferent" toward the foreign law's content.
2. Only concerning private law, (1) is true.
3. Therefore, we can only apply foreign private law.
4. Therefore, applying foreign public law is impossible.[13]

However, premise (1) already contradicts legal reality. I even argue that it has always been a doctrinal fiction: The modern state has never been "neutral" or "indifferent" toward the applicable law.

13 See HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 82 ff., 113 ff. for more details and references.

This is not disputed concerning substantive private law: Obviously, the state aims to foster material interests such as party autonomy, the protection of weaker parties, consumer protection or other societal values by private law legislation. This should not come as a surprise: Law is the state's central tool to bring about societal change. Therefore, private law, too, is employed to realise political visions (even in the 19th century, just remember patriarchal marriage law). Hence, a "state-free" private law has never been more than a libertarian dream. Its existence remains a somewhat popular but ultimately unprovable claim.[14]

The legislator adopts the same perspective of interest-related non-neutrality within the CoL. This is quite visible within EU private international law. For example, Article 6 of the Rome I Regulation[15] aims to protect consumers, and Article 11 of the Rome I Regulation aims to favour the formal validity of contracts. Apart from the design of our CoL rules, several general instruments (public policy, adaptation, *fraus legis*…) help us to achieve verdicts that we deem just whenever we decide to solve cross-border cases by applying foreign law. Contrary to the prevalent opinion, this "materialisation" of CoL existed long before EU private international law arose.[16] Even *Savigny*, who tends to be painted as the godfather of a "value-neutral" CoL system, referred to material interests in order to establish his system of (usually) all-sided CoL rules. For example, concerning marriage law, *Savigny* argued that we must use the husband's domicile as a connecting factor since the husband is *"forever and among all peoples of the world recognised as the head of the family"*[17].

Hence, the CoL has never been "neutral" itself or adopted a "neutral" perspective toward substantive outcomes. The neutrality thesis' popularity among legal scholars might be grounded in a mistaken conclusion from the

14 See HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 82 ff., 113 ff. for more details and references.

15 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

16 HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 82 ff., 113 ff.

17 *"Über den wahren Sitz des ehelichen Verhältnisses ist kein Zweifel; er ist anzunehmen an dem Wohnsitz des Ehemannes, der nach den Rechten aller Völker und aller Zeiten als das Haupt der Familie anerkannt werden muss."* – SAVIGNY, F. C. von. *System des heutigen Römischen Rechts. Achter Band*. Berlin: Veit & Comp., 1849, p. 325.

nonsubstantive nature of CoL rules to a "value-neutral" approach: Yes, CoL rules are indeed "neutral" insofar as they do not decide on a social conflict by themselves. However, from this, it does not follow that substantive interests cannot govern CoL provisions or that CoL rules cannot favour specific substantive outcomes.

Furthermore, it must be noted that some proponents of the neutrality thesis, in particular those from the 19th century, were tacit or explicit supporters of an internationalist view: According to them, CoL was a subject of public international law that was concerned with the detailed allocation of limits to legislative state power.[18] If this were true, material interests of individual states would, of course, be unable to influence CoL provisions. However, while the internationalist view is intrinsically unconvincing for many other reasons,[19] it suffices to note that it was never observed in practice. The autonomy principle, according to which the CoL is a national matter, is firmly established – not only doctrinally[20] but also as a fact of legal reality[21].

Let us conclude: We can convincingly refute premise (1) since the state has never been "neutral" or "indifferent" toward the foreign law's content but, nevertheless, continues to apply it. Apparently, a "neutral" or "indifferent" perspective is no prerequisite for any foreign law application. Hence, we cannot exclude the applicability of foreign public law by reference to the neutrality thesis.

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18 Cf. MANN, F. A. *Further Studies in International Law*. Oxford: Clarendon Press, 1990, p. 15; HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 82 ff., 101; HEMLER, A. Improving Cross-Border Compliance of Private Individuals and Corporations by Applying Foreign Public Law in Foreign State as Party Cases (forthcoming). The "internationalist view" dates back to the 19th century. Since, back then, public international law was not as established as it is today, their proponents did not explicitly argue in favour of a public international law system. Instead, they used slightly different terms: They advocated for a "supranational" CoL system or one that should be "joint laws of all states".

19 Ibid.

20 MANN, F. A. *Further Studies in International Law*. Oxford: Clarendon Press, 1990, p. 15; JENNINGS, R., WATTS, A. *Oppenheim's International Law. Volume 1 Peace*. 9. ed. Oxford: Oxford University Press, 2008, pp. 6 ff.

21 We can observe that diverging CoL provisions do not spark international outrage. Additionally, the state can ban or modify applicable foreign law freely, for example due to the public policy exception.

2.2 Embodied State Power

A second justification for the alleged inapplicability of foreign public law can be standardised as follows:

1. Applying foreign law translates to importing embodied foreign state power, which is an intrusion into domestic sovereignty.
2. This intrusion can only be justified by the notion of comity.
3. Comity can only justify applying foreign law when the state is not interested in the foreign law's content.
4. Only private law is a legal order in which the state takes no interest.
5. Therefore, the notion of comity can only justify applying foreign private law.[22]

This argument can be attacked swiftly and from multiple angles: First, premise (4) rests on the already rebutted neutrality thesis. Second, it is by no means certain that we apply foreign law on the grounds of comity, as premise (2) suggests. Instead, I argue that we apply foreign law to foster domestic distributive justice – not as a courteous favour to foreign states, as the comity approach claims.[23]

Let us, therefore, consider another widespread mutation of the above-mentioned argument:

1. Applying foreign law translates to importing embodied foreign state power, which is an intrusion into domestic sovereignty.
2. Only private law does not embody state power due to its "pre-state" nature.

22 A passionate proponent of this view was VOGEL, K. *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm*. Frankfurt am Main: Metzner, 1965, p. 237; see also HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 83 ff.; HEMLER, A. Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats. *The Rabel Journal of Comparative and International Private Law*. 2022, Vol. 86, no. 4, pp. 905–934, for more details and references.

23 This thought is founded on the basic principle of equality, which demands treating similar cases similarly and different cases differently *("suum cuique tribue")*. Given that cases with foreign elements are different from purely domestic ones, we can fulfil this demand by applying foreign law. Since the application of non-domestic law embodies a different treatment of a different case (i.e., a just treatment), a better or worse legal situation than under domestic law is, therefore, something we actively want to enable (HEMLER, A. forthcoming publications). Additionally, the notion of comity is inherently problematic since it relies on the internationalist view of CoL (see above).

3. Hence, only the application of foreign private law does not violate domestic sovereignty.

Although we can tackle premise (2) in numerous ways,[24] let us focus on a rebuttal of premise (1): Due to the autonomy principle, the domestic state remains the ultimate authority over the extent to which foreign law is applicable. This also means that the state's sovereign will, the so-called "imperative element", persists whenever we apply foreign law.[25] Hence, the domestic state's sovereign decision to apply foreign law is never questioned. Since the domestic imperative element continues to exist even if we apply foreign law, the foreign law's element of sovereignty is structurally ignored.

Therefore, no application of foreign law (be it public or private) can ever be understood as an import of foreign state power or an intrusion into domestic sovereignty. Instead, we only use foreign legal ideas and disregard any element of foreign sovereignty whenever we apply foreign law.[26]

2.3 Further Arguments

On a doctrinal level, there are no more arguments that might ban the application of foreign public law altogether. In particular, concerns over the possibility of a loyal application of foreign public law[27], reciprocity[28]

24 Since private law remains the result of state-driven legislation, the alleged "pre-state" nature boils down to assumptions closely connected to the refuted neutrality thesis. Additionally, it must be noted that the "pre-state" nature of private law has only been stressed in CoL doctrine because scholars believed that foreign law application would otherwise violate the domestic state's sovereignty (premise (1)). Since this is not the case, it is superfluous to focus on private law's "pre-state" nature in order to explain its applicability. – HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 95 ff.

25 SCHURIG, K. *Kollisionsnorm und Sachrecht*. Berlin: Duncker & Humblot, 1981, pp. 70 ff.; SCHINKELS, B. *Normsatzstruktur des IPR*. Tübingen: Mohr Siebeck, 2007, p. 134; see also HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 83 ff.

26 This leads to strange consequences: Given that a CoL theory that relies on the autonomy principle must understand legal norms as a union of an imperative and rational element, endowing a foreign rational element with a domestic imperative element will create a hybrid legal norm ("hybrid law theory"). – See HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 83 ff. and forthcoming publications.

27 TEO, M. Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine. *Journal of Private International Law*. 2020, Vol. 16, no. 3, p. 377.

28 Judgment of the United States Court of Appeals, Ninth Circuit, 21 June 1979, *Her Majesty the Queen in Right of the Province of British Columbia vs. Gilbertson*, para. 6, 14–17.

or increased difficulty[29] cannot justify a doctrinal blanket ban. This does, of course, not mean that they cannot play a role when we discuss the extent to which foreign public law might be applicable.

2.4 Applying Foreign Public Law in Legal Reality

Additionally, we can already observe the application of foreign public law in practice.

This is comparably widespread in private party cases: For example, foreign public law is applicable as an integral part of the foreign *lex causae* or as a preliminary question.[30] In EU private international law, foreign public law is also "given effect" through so-called foreign overriding mandatory provisions of the place of performance (Article 9 para. 3 of the Rome I Regulation) or due to the "consideration" of foreign rules of safety and conduct (Article 17 of the Rome II Regulation). Due to the above-mentioned (unsound) doctrinal reservations, we are merely reluctant to subscribe to the fact that we apply foreign public law. Instead, we hide behind unnecessary concepts like the "(factual) consideration" of foreign public law or intentional vagueness ("giving effect"). Both approaches are, ultimately, indistinguishable from any other "real" application of foreign law since, in all cases, we are endowing foreign normative ideas with domestic validity.[31]

However, in private party cases, we might argue that we do not really apply foreign public law as such but merely their private law consequences between private parties. That is why it is important to note that, in rare cases, foreign public law even applies to relationships between public and private actors. For example, within Schengen states, domestic police forces are bound to foreign police law when they engage in cross-border surveillance

29 BAADE, H. W. The Operation of Foreign Public Law. *Texas International Law Journal*. 1995, Vol. 30, no. 3, p. 483.

30 HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 68 ff.

31 Ibid., pp. 74 ff.

(Article 40 of the Schengen agreement).[32] Furthermore, domestic social security bodies can, in some cases and only in the second degree, be obliged to pay social benefits under foreign public law.[33]

2.5 All-Sided CoL Rules: A Ubiquitous Methodology

This presents us with an exciting conclusion. Since our updated CoL doctrine provides for the applicability of foreign public law, CoL rules embody a ubiquitous methodology: Both in private and public law, CoL rules are concerned with the domestic law's scope of application. And both in private and public law, CoL rules might also allow for the application of foreign law.[34]

Hence, from a methodological point of view, a public-private law divide does not exist. The difference between public and private law turns out to be quantitative, not qualitative: Compared to the application of foreign private law, the application of foreign public law, albeit methodologically possible, is exceedingly rare.

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32 The Schengen acquis. *Official Journal of the European Union* [online]. 22. 9. 2000 [cit. 30. 5. 2022]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2000:239:FULL&from=EN – Art. 40 para. 1: *"Officers of one of the Contracting Parties who* […] *are keeping under surveillance in their country a person who is presumed to have participated in an extraditable criminal offence shall be authorised to continue their surveillance in the territory of another Contracting Party where the latter has authorised cross-border surveillance in response to a request for assistance made in advance."*; Art. 40 para. 3 letter a): *"The officers carrying out the surveillance must comply with the provisions of this Article and with the law of the Contracting Party in whose territory they are operating."* Additionally, comparable bilateral provisions on cross-border police cooperation might provide for similar solutions. – Cf. HANDRLICA, J. A Treatise for International Administrative Law, Part II: On Overgrown Paths. *The Lawyer Quarterly*. 2021, Vol. 11, no. 1, p. 190, on Czech-Bulgarian and Czech-Austrian police cooperation.

33 On the respective bilateral Swiss-German treaty see TRUTMANN, V. Kollisionsnormen im Schweizerischen Sozialversicherungsrecht. In: MEIER, I., SIEHR, K. (eds.). *Rechtskollisionen: Festschrift für Anton Heini zum 65. Geburtstag*. Zürich: Schulthess, 1995, p. 473.

34 HEMLER, A. *Die Methodik der Eingriffsnorm im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019; see also HANDRLICA, J. Foreign Law as Applied by Administrative Authorities: Grenznormen Revisited. *Zbornik Pravnog fakulteta u Zagrebu*. 2018, Vol. 68, no. 2, pp. 193–215. I am sure my esteemed colleague *Handrlica* does not mind me pointing out a minor misunderstanding: Contrary to his assumption in HANDRLICA, J. Is There an EU International Administrative Law? A Juristic Delusion Revisited. *European Journal of Legal Studies*. 2020, Vol. 12, no. 2, p. 91, fn. 46, I have always, in fact, advocated for the applicability of foreign public law.

3 Bridging the Practical Rift Between Public and Private Law

Since applying foreign public law is doctrinally possible, when should we do so? Given that foreign public law is already applied in private party cases (see above), we should focus on cases where the domestic or a foreign state is a party. Since jurisdictional limitations typically prevent situations where domestic state authorities might be inclined to apply foreign public law,[35] we should focus on legal relationships between a foreign state and a private (usually domestic) actor. To be more precise: Can a foreign state appear in front of domestic courts (e.g., as a plaintiff) and request the application and enforcement of its foreign public laws against a private individual that falls under domestic jurisdiction? Or: Can a foreign state request the application and enforcement of its public laws by domestic authorities? According to the prevalent inapplicability thesis, the foreign state cannot do so. However, since doctrinal concerns could not be upheld and given that there are no additional general reservations toward a foreign state appearing in domestic courts,[36] we should reconsider this case in greater detail.

3.1 Trust

Before we can discuss individual cases, we should address a general matter: How much trust in the foreign legal system is necessary in order to apply foreign public law?

We can quantify the necessary degree of trust by comparing the application of foreign law to two other vital instruments employed to solve cross-border

35 HEMLER, A. *Improving cross-border compliance of private individuals and corporations by applying foreign public law in foreign state as party cases* (forthcoming). However, note that the above-mentioned examples (Schengen, social security) both constitute cases where domestic state authorities apply foreign public law.

36 In particular, state immunity is not an issue since the domestic state would not scrutinise a foreign act of state, but rather pronounce a domestic act of state (e.g., a domestic court verdict) under foreign public law as a result of an unsolicited subordination of the foreign state under the domestic court system. See also SIEHR, K. Commercial Transactions and the Forfeiture of State Immunity Under Private International Law. *Art Antiquity and Law*. 2008, Vol. 13, no. 4, p. 339. Albeit I think we should not even talk of a "forfeiture" of state immunity, as *Siehr* proposes. – HEMLER, A. *Improving cross-border compliance of private individuals and corporations by applying foreign public law in foreign state as party cases* (forthcoming).

cases: recognition and legal assistance. We can categorise them by reference to the origin of the foreign legal content, the law-applying authority and the imperative element.

When we provide legal assistance, which is widespread in the public law domain as well, the applicable law remains genuinely domestic: For example, a criminal who was previously extradited to the domestic state to be tried in front of domestic courts still faces sanctions from genuine domestic criminal law. Therefore, the legal content's origin remains domestic, just like the law-applying authority's origin (e.g., a court).

Given that the application of foreign law uses foreign legal ideas, the applicable legal content is not genuinely[37] domestic. However, when we apply foreign law, the law-applying authority's origin remains domestic.

The recognition of foreign legal decisions is similar to applying foreign law insofar as both instruments make use of foreign legal contents. However, when we recognise a foreign decision, even the application process is left to a foreign authority: We recognise the results of an application of foreign legal contents as pronounced by a foreign authority. Hence, the process of application is beyond our control.

All three methods remain firmly grounded on the above-mentioned autonomy principle: The domestic state decides for itself if and to which degree it provides or accepts legal assistance, applies foreign law or recognises foreign decisions. In all three instances, the ultimate sovereign will of the domestic state remains unquestioned. Hence, the imperative element continues to be of domestic origin.

The key takeaway from this structural comparison is the following: Legal assistance requires the least trust, albeit some (e.g., we need to be sure that the foreign state has not forged foreign documents we requested as evidence). When we apply foreign law, we make room for foreign legal ideas, which requires more trust – but at least we stay in control over the application process. With regard to recognition, we do not even govern the application process anymore, which is why, here, most trust is needed. Hence, with

37 This refers to the "hybrid law theory", according to which every application of foreign law creates new domestic, hybrid rules that endow a foreign legal idea ("rational element") with domestic sovereign validity ("imperative element"). – Cf. fn. 26.

an increasing amount of components of foreign origin (legal assistance: zero; foreign law application: one; recognition: two), the necessary degree of trust in the foreign legal system grows.

	Legal assistance	**Application of foreign law**	**Recognition**
The legal content's origin	Domestic	Foreign	Foreign
The law-applying authority's origin	Domestic	Domestic	Foreign
The imperative element's origin	Domestic	Domestic	Domestic
Trust in the foreign legal system	Low ———		High

Therefore, whenever recognition mechanisms in a particular legal field are in place, we already trust the foreign legal system (more than) enough to apply foreign law since, at least, we stay in control of the application process. For example, in German criminal law, some foreign criminal judgments can be recognised and enforced in Germany:[38] German citizen A was sentenced to prison in front of Swiss courts *(in absentia)* because A was speeding through the Swiss Gotthard tunnel. German courts recognised and enforced the Swiss penal judgment by imprisoning him in Germany.[39] Here, *de lege ferenda*, German prosecutors should equally well be able to prosecute A under Swiss law or even allow Swiss prosecutors to appear in front of German courts themselves.

However, it must be noted that recognising foreign verdicts is usually less complicated than applying foreign law in front of domestic courts. That is why the following second conclusion from our above-mentioned comparison is more important: Whenever there is not enough trust in the foreign legal system in order to allow for the recognition of foreign verdicts, the application of foreign public law by domestic courts or authorities might remain possible. Since the domestic state would stay in control of the application process, domestic authorities or courts would still be able

38 Germany. § 48 ff. Gesetz über die internationale Rechtshilfe in Strafsachen (IRG).

39 Judgment of the Higher Regional Court Stuttgart (Oberlandesgericht Stuttgart), Germany of 25. 4. 2018, Case No. 1 Ws 23/18.

to secure procedural justice without having to ignore non-compliance with foreign public law.

Just like every other application of foreign law, the application of foreign public law would, of course, remain subject to the public policy exception. Hence, foreign public law that violated fundamental principles (e.g., by prescribing capital punishment) would not be accepted.

3.2 Cases

Given that the CoL is governed by the autonomy principle, the state is generally free to choose in which fields of public law it permits foreign states to appear in front of domestic courts and enforce their public laws. However, as a starting point, we can safely assume that most states do not want to turn a blind eye to any non-compliance with foreign public law. They might choose to do so for selfish or political reasons in particular legal fields (e.g., in so-called tax havens), but the widespread acceptance of legal assistance mechanisms proves that most states usually aim to foster compliance with foreign (public) law – even if they only choose to do so on the grounds of reciprocity.

Additionally, the state's willingness to improve compliance with foreign public law increases when the foreign law's policy goals match those of the domestic state (e.g., if both follow comparable objectives within environmental protection law).

Some of the most promising cases shall be discussed on the following pages.

3.2.1 Criminal Law

Within the EU, there are already some frameworks in place that allow for the recognition of financial penalties.[40] In the absence of a treaty framework, some states will still recognise and enforce foreign penal judgments, even in the case of non-monetary sanctions like imprisonment.[41]

40 Art. 6 Council Framework Decision 2005/214/JHA of 24. 2. 2005 on the application of the principle of mutual recognition to financial penalties.

41 Germany. § 48 ff. Gesetz über die internationale Rechtshilfe in Strafsachen (IRG); Switzerland. Art. 94 ff. Bundesgesetz über internationale Rechtshilfe in Strafsachen.

Since the recognition of foreign criminal verdicts requires more trust in the foreign legal system than the application of foreign criminal law, states that provide recognition mechanisms should not object to the application of foreign criminal law (see above).

If recognition mechanisms do not exist, the applicability of foreign criminal law seems to be particularly helpful concerning those crimes that are not already covered by the universality principle, i.e., all crimes that are not considered extremely serious (such as war crimes or crimes against humanity).[42] For example, a foreign state could request prosecution of a resident of the domestic state under foreign criminal law with regard to past conduct in the foreign state's territory (e.g., traffic-related crimes, theft, fraud).

The foreign state might favour applying foreign criminal law over legal assistance or the recognition of criminal judgments for several reasons, for example, if extradition appears disproportionate or if the facts are still uncertain. Here, the application of foreign criminal law would provide the domestic state with the ability to secure a fair trial in its courts while the culprit would still be held accountable.

In this respect, a newly emerging question concerning the public policy exception arises: To what extent shall the domestic state accept foreign criminal laws that punish behaviour that is legal under domestic law? For example, should a state where hate speech or denying the holocaust is legal nevertheless enforce German laws that partly criminalise such acts if the respective conduct had a significant connection to Germany? Or should the domestic state reject this due to concerns over the freedom of speech by employing the public policy exception?

42 According to the public international law principle of universality, the seriousness of certain crimes might justify the application of domestic penal law even without any significant connections to the adjudicating state. See also HEMLER, A. Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats. *The Rabel Journal of Comparative and International Private Law*. 2022, Vol. 86, no. 4, pp. 905–934, on the universality principle, how it relates to CoL and why the perpetual application of domestic penal law is not an option in all cases.

3.2.2 Tax Law

Contrary to criminal law, recognition mechanisms are sparse in the domain of tax law.[43] That is why the tax-collecting state might be unable to enforce its tax claim when it first arises after the tax debtor has already left the country (e.g., due to the realisation of capital gains[44]).

This is particularly problematic if there are no assets of the tax debtor left in the tax-collecting state. In these cases, tax collection assistance might only help substantiate a tax claim. Effective enforcement, however, will only be possible where the debtor's foreign assets are. Here, the application of foreign tax law by domestic tax authorities might, once again, strike an attractive balance between legal assistance and recognition: Why should the foreign state not be able to request enforcement of a justified tax claim, in particular, if the respective tax type is familiar to the domestic state?

3.2.3 Environmental Protection Laws and Cross-Border Pollution

Another auspicious overlap of policy goals can be found in the domain of environmental protection law.

Imagine, for example, a short-lived subsidiary of a domestic corporation violates foreign environmental protection law by dumping chemicals into a river of a foreign state. Since the recognition of an administrative fine issued by the foreign state might be unlikely, it appears, once again, reasonable to let the foreign state sue the domestic corporation responsible in front of domestic courts under its own (foreign) environmental protection laws.

The inversion of this case is equally fascinating, in particular in cases where domestic private actors are responsible for cross-border pollution (or other hazards). Here, a state is generally justified to endow its environmental

43 Cf. Art. 27 para. 8 letter b) Organisation for Economic Co-operation and Development ("OECD") Model Tax Convention 2003; Council Directive (EC) 2001/44/EC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties.

44 BAKER, P. Changing the Norm on Cross-border Enforcement of Tax Debts. *Intertax*. 2002, Vol. 30, no. 6–7, p. 217.

protection laws with an extraterritorial scope of application that might, for example, oblige private actors in bordering states to reduce cross-border pollution or contain cross-border hazards.[45] In this case, the domestic state could try to enforce its environmental protection laws against foreign private actors in front of the bordering state's (administrative) courts.

3.2.4 Cultural Heritage Law

Given that the protection of cultural heritage is another widely accepted policy goal, we might also consider letting a foreign state appear in front of domestic courts to enforce its public laws on cultural heritage. While this issue already plays a significant role in private party litigation, it would undoubtedly strengthen the practical enforcement of cultural heritage law if a foreign state could, for example, request the return of culturally significant artefacts that had been unlawfully exported from the country of origin.[46]

4 Summary

The public-private law divide describes a methodological and practical rift within the Conflict of Laws, according to which foreign public law is inapplicable. However, the doctrinal reasons for the inapplicability thesis cannot hold up to scrutiny: The application of foreign law is neither conditioned by a "neutral" perspective of the domestic state toward the applicable foreign law nor can the application of foreign public law be understood as an intrusion into domestic sovereignty. Additionally, the application of foreign public law already happens in practice.

Therefore, it is time to extend the CoL's all-sided methodology to the public law domain and embrace the application of foreign public law as a valuable tool to solve cross-border public law disputes. This relates not only to private

45 HEMLER, A. Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats. *The Rabel Journal of Comparative and International Private Law*. 2022, Vol. 86, no. 4, pp. 905–934.

46 Cf. Judgment of the House of Lords, UK, of 21. 4. 1983, *Attorney-General of New Zealand vs. Ortiz* [1984] AC 1 (HL), [1984] 2 WLR 809; SIEHR, K. Private International Law and the Difficult Problem to Return Illegally Exported Cultural Property. *Uniform Law Review*. 2015, Vol. 20, pp. 503 ff.

law consequences of foreign public law but also to cases where the foreign state is a plaintiff. In the latter case, the applicability of foreign public law seems to provide an attractive middle ground between legal assistance and the recognition of foreign verdicts.

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Contact – e-mail
adrian.hemler@uni-konstanz.de

ORCID
0000-0001-7552-4042

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New Practices in Alternative Dispute Resolution – New Pathways to Peace

Orsolya Antal

Deák Ferenc Faculty of Law, Széchenyi István University, Hungary

Abstract

This paper seeks to answer the question of how the pandemic has given rise to new solutions in the field of alternative dispute resolution. It examines the legislative processes these solutions have generated and, looking ahead, asks whether these legislative solutions can be expected to remain timeless or even evolve. Unfortunately, the examination of this question has also become topical, as humanity, which has been locked in a pandemic, is once again facing serious isolation due to the outbreak of the Russian-Ukrainian conflict. The global loss of confidence, which is dramatically accelerating in a war situation, is a further serious challenge compared to the pandemic experience. What role can alternative dispute resolution play in this situation? Are the technological changes imposed by the pandemic useful for alternative dispute resolution?

Keywords

Alternative Dispute Resolution; Loss of Trust; Online Dispute Resolution; Pandemic; War Conflict.

1 Introduction

This paper examines the mechanisms of the pandemic's impact, typically in response to the challenges posed by social distancing constraints, which have been manifested in traditional justice systems and in the field of alternative dispute resolution ("ADR"). The COVID-19 pandemic presented new challenges to legal systems and the administration of justice, difficulties that made it clear that traditional justice was no longer viable.

In the background of conflictual situations, in addition to family problems experienced due to interconnectedness, disputes over health care, we have witnessed a number of changes in consumption patterns, the purchase of goods and the framework for work. If we were to use a single term to capture the essence of these changes, we could describe the phenomenon as the rise of digitalisation. This paper briefly describes the three eras of legal informatics, which will bring us closer to understanding the changes we are experiencing and to tolerating the challenges they present. It also discusses, among other things, how judicial systems have been and are able to draw from the existing experience of online ADR in the context of forced online solutions, and how alternative ways of dealing with the accumulated caseload can be used to ensure access to justice.

In addition to the pandemic, the study also looks at the determining crisis of our time, the armed conflict between Russia and Ukraine, which is leading to a major confrontation in world politics and the global economy. It is easy to see that violence will not solve the complex and global scale of the problem of the spiral of loss of confidence caused by the war, which is growing more and more severe every day. It is essential to launch a process of dialogue-based reconciliation as soon as possible, in which ADR practices can play an important role.

2 The Nature of Conflicts

Each of our lives and our roles in them, framed by a different set of rules in many areas, show the guidelines expected and to be followed. Living in society, we know and experience that our rights and obligations are regulated both formally and informally. In the many stages of the socialisation arena, we are given increasingly definite frameworks, which we sometimes find easier and sometimes harder to bear.[1]

When we think about human relationships, we find that there are countless dynamics that can emerge. Relationships are formed, broken, closed or renewed with renewed vigour. People, situations and perspectives are

1 SMITH, E. R., MACKIE, D. M., CLAYPOOL, H. M. *Szociálpszichológia* [Social psychology]. Budapest: Eötvös Kiadó, 2016, pp. 55–58.

constantly subject to change, and these influences inevitably leave their mark on our relationships. Some people are afraid of change, and others openly confront it. The recognition and awareness of differences in situations, and the conflicts that arise as a result of manifested differences, are the consequence of these differences. Conflicts are a natural part of human relationships.[2]

We can experience conflict situations both intrapsychologically and in our social relationships – interpersonally, at group level and in society. Relationship conflicts are typically rooted in the breakdown of interpersonal relationships, conflicts of interest, differences in values, territorial reasons, as well as information gaps and structural conflicts. It can be said that conflicts arise as a consequence of existing differences, not as a cause of them.[3]

Sociology of law deals, among other things, with the types of conflicts that will typically become legal disputes and the judicial or extra-judicial paths that the parties can take to resolve them. What we see is that in a number of cases where there is a conflict, the parties either do nothing – leaving the conflict open – or, going as far as to take the matter into their own hands, take the decision into their own hands. Some will be open to discussing the conflict, while others will litigate. Which path is chosen will depend to a large extent on whether the relationship is a one-off or a long-term one, whether the relationship is co-dependent or hierarchical, and whether the conflict in a long-term relationship is a conflict of the whole person or just a particular part of the person's life. Judicial recourse is more likely in one-off relationships, whereas in long-term relationships it is the co-dependency relationships that are more likely to be litigious, as well as the conflict manifested in each role being more "amenable" to litigation.[4] The parties' responses to conflict are influenced by the dynamics of cooperation[5] and competition[6].

2 BARCY, M. *Konfliktusok és előítéletek. A vonzások és taszítások világa* [Conflicts and prejudices. The world of attractions and repulsions]. Budapest: Oriold és Társai Kiadó és Szolgáltató Kft., 2012, pp. 15–17.

3 Ibid., pp. 19–24.

4 POKOL, B. A jog elkerülésének útjai. Mediáció, egyezségkötés [Ways to avoid the law. Mediation, conciliation]. *Jogelméleti Szemle* [online]. 2002, no. 1 [cit. 3. 1. 2022]. Available at: http://jesz.ajk.elte.hu/pokol9.html

5 A form of interdependence in a social relationship where the parties seek the greatest gain (win-win situation) in resolving the conflict.

6 A form of interdependence in a social relationship where one party's gain results in the other party's loss (zero-sum game) in dealing with a given situation.

3 Conflict Resolution

In situations where opinions clash, we talk about debate. It is important that those involved – people or groups – feel that they have different views on the subject in question, which they wish to bring into conflict with each other. Depending on the emotional involvement, these interactions can be both heated and calm. Conflict occurs when, on a given issue, the parties are forced by interdependence to settle the situation, otherwise a conflict of interest or value would become inevitable. In these conflict situations, the parties may no longer be able to resolve their differences directly with each other in a structured communication process.[7]

When a conflict transforms into a legal dispute – in the vast majority of cases – the parties can choose to use the state justice system or, to avoid it, opt for an ADR procedure. The optional procedures differ in the way in which the third party involved in the case is involved in the process, in the form and involvement of the third party, in the conclusion of the case, in the binding nature of the agreement and in the guarantees of enforceability.[8]

Sociology of law identifies four ways of dealing with conflicts. Negotiation is when the parties discuss the situation directly between themselves. In mediation, the conflict is resolved with the help of an impartial third party. In arbitration, an independent party intervenes on the basis of a mandate to make a binding decision on the parties to which they are subject. The enforcement of rights through the use of the state courts ends in a judgment.[9]

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7 PALLAI, K. Vitarendezés és konfliktuskezelés – jegyzet/gyakorlati segédlet [Dispute and conflict management – note/practical guide]. *Pallai* [online]. 2011, p. 8 [cit. 17. 3. 2022]. Available at: http://www.pallai.hu/wp-content/uploads/2010/11/2011-Pallai-vitarendez%C3%A9s-jegyzet-BCE.pdf

8 GRÁNER, Zs. Az alternatív vitarendezés lehetséges útjai a polgári-gazdasági jogviták tekintetében, fókuszban a választottbíráskodással [Possible avenues for alternative dispute resolution in civil and economic disputes, with a focus on arbitration]. *Székesfehérvári Törvényszék* [online]. 2020, pp. 2–3 [cit. 17. 3. 2022]. Available at: https://szekesfehervar-itorvenyszek.birosag.hu/sites/default/files/news/az_alternativ_vitarendezes_lehetseges_utjai.pdf

9 POKOL, B. A jog elkerülésének útjai. Mediáció, egyezségkötés [Ways to avoid the law. Mediation, conciliation]. *Jogelméleti Szemle* [online]. 2002, no. 1 [cit. 3. 1. 2022]. Available at: http://jesz.ajk.elte.hu/pokol9.html

"The term conflict, as used in mediation, refers to situations of tension in which the aspirations, views, thinking, etc. *of two people (groups) seem to be irreconcilable. Conflict does not therefore require that the incompatibility actually exists; it is sufficient if the actors perceive it as such. So, conflict is really a construct, it is all decided in our minds. The actors in a conflict never decide on their own actions on the basis of the real picture: the decision is always based on their perception of the situation as they see it, of the other party."*[10]

One possible means of resolving conflicts is the mixed strategy game,[11] where the parties do not choose to compete, to play a zero-sum game,[12] but are able to keep each others' needs in mind. The game is not without its dangers: the scales can tip either way as the motives[13] of the parties, stuck in the situation, clash. If rivalry and resentment in a battle dominated by emotions prevents the common interest (a good enough agreement achieved through cooperation) from being seen, then emotions can sweep everything away. On an extreme range of emotions, strange patterns of human behaviour can emerge. In order to stop and then reverse the escalation of a conflict, it is essential that the parties talk to each other. In the midst of accusations and resentments, a convulsive insistence on one's own truths prevents the parties from seeing clearly. One possible means of achieving cooperation is for the parties to see that their goals are the same.[14]

10 JENEI, Á. A "Nehéz" ügyfelek kezelése [Dealing with difficult customers]. In: JENEI, Á. (ed.). *Ügyfélszolgálati készségfejlesztés. Tréning háttéranyag*. Nemzeti Közszolgálati Egyetem, 2017, p. 29. Available at: https://nkerepo.uni-nke.hu/xmlui/bitstream/handle/123456789/6852/%DCgyf%E9lszolg%E1lati%20k%E9szs%E9gfejleszt%E9s.pdf;jsessionid=4AA195D85D3BF057966DDF4B62020EA3?sequence=1 [cit. 16. 2. 2022].

11 The mixed strategy is a strategy of momentary mood, of intuitive decision, guided by chance itself. This is what mediation achieves.

12 The simplest type of game theory is the two-player zero-sum game. In this game, two players can only win at each other's expense. The balance of gains and losses will always be zero.

13 Motivation is the internal drive behind behaviour that shapes our actions through the influence of a number of factors. Behaviour generated by motivation along the lines of needs can be based on both biological (primary) and social (secondary) motivation. In addition to biological motivation, we can also speak of intrinsic motivation and extrinsic motivation. From the perspective of expectancy-value theory, we can say that motivation is rooted in the successful completion of a given task, and in the personal experience of the value of the outcome. – ZIMBARDO, P., JOHNSON, R., McCANN, V. *Pszichológia mindenkinek – Motiváció, érzelmek, személyiség, közösség* [Psychology for all – Motivation, emotions, personality, community]. Budapest: Libri Kiadó, 2018, pp. 10–12.

14 BARCZY, M., SZAMOS, E. *"Mediare necesse est". A mediáció technikái és társadalmi alkalmazása* ["Mediare necesse est". Mediation techniques and their social application]. Budapest: Animula, 2002, pp. 18–20.

Linear thinking focuses on logical connections, which follow the correct conclusions. In contrast, lateral thinking[15] is creative thinking itself. If we are able to think in this way about the world and ourselves in it, about the conflict, about the difficulty we are in – we are no longer pursuing our own truth in a closed-minded way, but we are seeking efficiency, we are striving for it. Right-logical thinking, the "arrogance of established patterns", one by one, inhibit the emergence of new ideas and solutions. Mediation, combining the techniques of lateral thinking, helps to give the parties a new perspective from which they can see the stucknesses in their own lives in a different light, and helps them to find a way forward from the many proposals for solutions that the parties themselves work out, to a path that gives each party to the conflict the experience of a good enough solution.[16] The mediator tries to achieve a paradigm shift in the way the parties work together, in their attitude towards the problem, helping them to enter into a working alliance to resolve their conflict together.[17]

Among the many techniques of mediation, interpretation is the one that aims to resolve the conflict by translating the emotions of the opposing parties in a way that is understandable to the other party, so that both parties can understand the same thing. Without this common language, mediation cannot fulfil its purpose. In this substantive phase, we attempt to turn positions into needs and interests; accusations and insults into facts; and qualifications into descriptions. The process is able to minimise emotional overheating, thus giving the parties the opportunity to cooperate effectively and to reach an acceptable agreement.[18]

15 Lateral thinking – "brainstorming" – is the branch of creativity responsible for the exchange of ideas, perceptions, and concepts.

16 BUTLER-BOWDON, T. *Pszichológia dióhéjban* [Psychology in a nutshell]. Budapest: HVG Kiadó Zrt., 2007, pp. 71–76; see also KOMLÓSI, P., ANTAL, O. Válni? Miért? Hogyan? [A divorce? Why? How?]. *Glossa Iuridica*, 2016, Vol. 3, no. 3–4, p. 102.

17 STRASSER, F., RANDOLPH, P. *Mediáció: a konfliktusmegoldás lélektani aspektusai* [Mediation: A Psychological Insight into Conflict Resolution]. Budapest: Nyitott Könyvműhely Kiadó, 2005, 205 p.; see also KOMLÓSI, P., ANTAL, O. Válni? Miért? Hogyan? [A divorce? Why? How?]. *Glossa Iuridica*. 2016, Vol. 3, no. 3–4, p. 102.

18 KERTÉSZ, T. *Mediáció a gyakorlatban* [Mediation in practice]. Miskolc: Bíbor, 2010, 261 p.; see also KOMLÓSI, P., ANTAL, O. Válni? Miért? Hogyan? [A divorce? Why? How?]. *Glossa Iuridica*, 2016, Vol. 3, no. 3–4, p. 102.

The circular questioning technique, borrowed from family therapy, can help to clarify the facts by focusing on the how. In this way, the importance of the "polyphony" of events is highlighted, which can also help to clarify different readings of the same story.[19]

It is through finding and emphasising common ground in the face of differences, through working out and accepting alternatives to a decision, when I am able to formulate and say what would be right for me, above and beyond the reflection of your point of view, when I no longer have to convince others of our own truth, because we are able to see that there can be more truths. The competition becomes almost pointless and the win-win can make sense.[20]

The sociology of law distinguishes four alternatives for approaching conflicts and their resolution: negotiation, mediation, arbitration, and the ordinary judicial process. While in the first case the parties settle their conflicts through direct negotiation, in the mediation process it is an independent third party who assists in conflict resolution. The third option is when the third party involved in the dispute (an arbitrator) is already authorised to decide the case and the parties submit to it. In contrast, the state way, the fourth option, is where the court decides by judgment. As the path of options shifts more and more in this direction, the formalisation of the resolution path increases, and the parties increasingly lose control of the dispute resolution by placing it in the hands of an external third party. Dispute resolution becomes more norm-oriented, while discretion in the negotiating position is reduced.[21]

19 FAVALORO, G. J. A mediáció mint családterápiás módszer? [Mediation as a family therapy method?]. In: KERTÉSZ, T. (ed.). *Mediációs szöveggyűjtemény* [Collection of mediation texts]. Budapest: Partners Hungary Alapítvány, 2001, pp. 142–150; see also KOMLÓSI, P., ANTAL, O. Válni? Miért? Hogyan? [A divorce? Why? How?]. *Glossa Iuridica*, 2016, Vol. 3, no. 3–4, p. 102.

20 LOVAS, Zs., HERCZOG, M. *Mediáció, avagy a fájdalommentes konfliktuskezelés* [Mediation, or painless conflict management]. Budapest: Wolters Kluwer, 2019, 208 p.; see also KOMLÓSI, P., ANTAL, O. Válni? Miért? Hogyan? [A divorce? Why? How?]. *Glossa Iuridica*, 2016, Vol. 3, no. 3–4, p. 103.

21 POKOL, B. A jog elkerülésének útjai. Mediáció, egyezségkötés [Ways to avoid the law. Mediation, conciliation]. *Jogelméleti Szemle* [online]. 2002, no. 1 [cit. 3. 1. 2022]. Available at: http://jesz.ajk.elte.hu/pokol9.html

4 Economic and Trade Impacts of Pandemic and War Conflict

International trade was/is characterized by a high degree of volatility and uncertainty due to the impact of the COVID-19 pandemic. In 2020, the changes in the pattern of trade and the downturn were of a magnitude that typically occurs over a 4–5 year period. The trade collapse in the first half of the year affected different sectors in different ways. It was observed that trade in services typically declined – although some sectors showed an upturn (down for travel and tourism services; up for telecommunications and information technology services) – and the structure of trade in goods changed, while demand also shifted in this direction.[22]

From mid-2021, the pace of recovery in the world trade was uneven across countries. Consumer spending over this period – a shift towards "home nesting"[23] goods versus a move away from interpersonal interactions – is unlikely to result in a lasting survival. At the same time, the widespread changes in digitalization, which have affected both the world of work and the private sector, are likely to have a lasting impact on the way international trade is conducted, and on the composition of demand for both goods and services. The heterogeneity of the changes experienced will require a high degree of uncertainty and adjustment costs for governments, businesses, and consumers, encouraging them to adopt additional risk mitigation strategies.[24]

22 OECD Policy Responses to Coronavirus (COVID-19). International trade during the COVID-19 pandemic: Big shifts and uncertainty. *OECD* [online]. 10. 3. 2022 [cit. 25. 5. 2022]. Available at: https://www.oecd.org/coronavirus/policy-responses/international-trade-during-the-covid-19-pandemic-big-shifts-and-uncertainty-d1131663/

23 The "home nesting", i.e., spending on home offices, gym equipment, and renovations, that has become a feature of the pandemic, will continue, *McKinsey* reports, as many companies have begun to take advantage of the "home office" opportunities, with the result that many high earners are not expected back in the office full-time. – ISSA, G., WALDERSEE, V. 'Home nesting' and telehealth spending to keep rising post-pandemic, McKinsey survey finds. *Reuters* [online]. 18. 3. 2021 [cit. 26. 5. 2022]. Available at: https://www.reuters.com/article/us-health-coronavirus-consumer-idUSKBN2BA0FR

24 OECD Policy Responses to Coronavirus (COVID-19). International trade during the COVID-19 pandemic: Big shifts and uncertainty. *OECD* [online]. 10. 3. 2022 [cit. 25. 5. 2022]. Available at: https://www.oecd.org/coronavirus/policy-responses/international-trade-during-the-covid-19-pandemic-big-shifts-and-uncertainty-d1131663/

Today we are also facing a new shock of uncertain duration and magnitude. In addition to the humanitarian crisis, Russia's military aggression against Ukraine has also had significant economic consequences. In some respects, Russia and Ukraine have only a small[25] direct role in the world economy, but they are major producers and exporters of key foodstuffs,[26] minerals and energy, so the economic and financial shock has already been significant. World prices for oil, gas, mineral oil, and wheat have risen sharply. The pre-war forecast was that global growth in key macroeconomic variables would have returned to the pre-COVID-19 pandemic levels by 2023. Full employment was projected to recover, and inflation rates were expected to reach levels close to policy targets in most OECD economies.[27]

The turmoil since the beginning of the conflict, which has affected global markets in the EU and worldwide, has raised concerns about energy and food security, but has also had a significant impact on the mobility of people and goods within the EU. The Council also attaches particular importance to supporting regions affected by the reduction of exports from Russia and Ukraine, while maintaining free trade in agricultural products on both European and international markets. At the same time, it firmly maintains that *"the use of force and the alteration of borders through the use of coercion have no place in the 21st century. Tensions and conflicts must be resolved only through dialogue and diplomacy."*[28] On 24 May 2022, the Council adopted a regulation allowing temporary trade liberalization and other trade concessions for certain Ukrainian products for a period of one year. The measures will allow the EU

25 Together account for only about 2% of global GDP at market prices.

26 Russia and Ukraine together account for around 30% of the world wheat exports, 20% of maize, mineral fertilizers and natural gas, and 11% of oil. Russia is a key supplier of palladium for automotive catalytic converters and nickel for steel production. Russia and Ukraine are also a source of inert gases, such as argon and neon, which are used in the manufacture of semiconductors, and are major producers of titanium sponge. Supply chains worldwide depend on exports of metals from Russia and Ukraine. Both countries also have significant global uranium reserves.

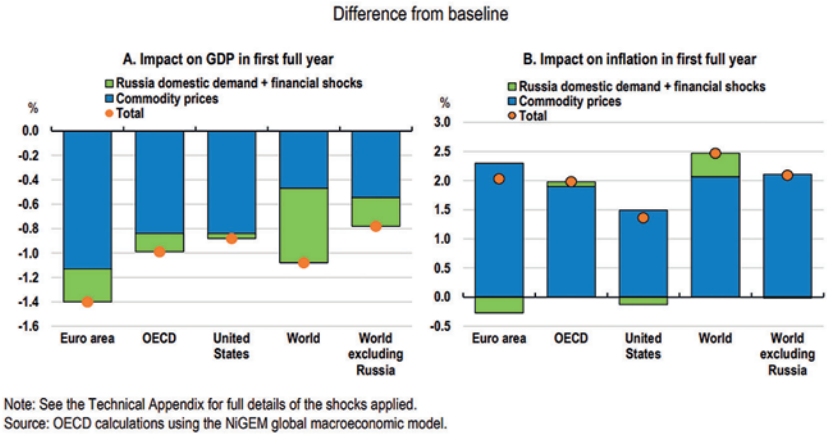
27 OECD Economic Outlook, Interim Report: Economic and Social Impacts and Policy Implications of the War in Ukraine. *OECD* [online]. March 2022, p. 3 [cit. 27. 5. 2022]. Available at: https://www.oecd.org/economy/Interim-economic-outlook-report-march-2022.pdf

28 EU response to Russia's invasion of Ukraine. *European Council* [online]. [cit. 27. 5. 2022]. Available at: https://www.consilium.europa.eu/hu/policies/eu-response-ukraine-invasion/

to provide significant support to the Ukrainian economy. The war makes the task of policy makers more difficult.[29]

The significant economic costs of conflict and increased uncertainty add to the already existing challenges faced by policymakers in the face of rising inflationary pressures and an unbalanced recovery from the pandemic. Particular attention will need to be paid to mitigating the impact of the crisis on consumers and businesses, as rising inflation limits the room for maneuver for monetary policy. The war is expected to slow down the global recovery from the COVID-19 pandemic and further increase inflation worldwide.

Figure no. 1: The conflict implies a substantial hit to the global growth and stronger inflation[30]

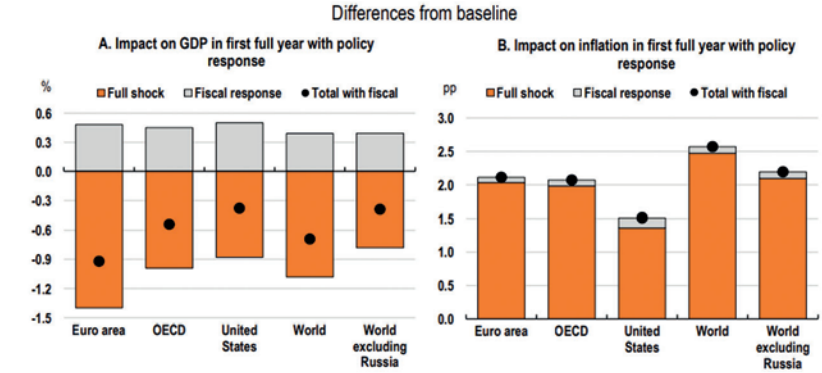


Note: See the Technical Appendix for full details of the shocks applied.
Source: OECD calculations using the NiGEM global macroeconomic model.

29 For more information, see ibid.

30 Illustrative simulations suggest that global growth could fall by more than 1 percentage point and global inflation could rise by nearly 2.5 percentage points in the first full year after the conflict starts. These estimates are based on the assumption that the shocks to commodity and financial markets caused by the shocks in the first two weeks of the conflict will persist for at least a year, resulting in a deep recession in Russia, a fall in output of more than 10% and a rise in inflation of nearly 15 percentage points. See OECD Economic Outlook, Interim Report: Economic and Social Impacts and Policy Implications of the War in Ukraine. *OECD* [online]. March 2022, p. 7 [cit. 27. 5. 2022]. Available at: https://www.oecd.org/economy/Interim-economic-outlook-report-march-2022.pdf

Figure no. 2: A well-targeted fiscal expansion would help to cushion the impact of the conflict[31]



Note: See Technical Appendix for details of the shocks applied.
Source: OECD calculations using the NiGEM global macroeconomic model.

5 The Rise of E-commerce[32] During the COVID-19 Pandemic

Looking at the recent shopping habits, we see that there has been a clear increase in transactions in the online space. This number has further increased as a result of the COVID-19 pandemic, given that a significant

31 Illustrative simulations of a well-targeted increase in final government expenditure by 0.5% of GDP for one year in all OECD economies over the coming years show that this could offset about half of the estimated output decline that would result from the coming decades without a significant increase in inflation. Non-OECD economies would also benefit, albeit to a lesser extent, even if they do not have sufficient fiscal space to implement further fiscal easing. See OECD Economic Outlook, Interim Report: Economic and Social Impacts and Policy Implications of the War in Ukraine. *OECD* [online]. March 2022, p. 11 [cit. 27. 5. 2022]. Available at: https://www.oecd.org/economy/Interim-economic-outlook-report-march-2022.pdf

32 E-commerce (electronic commerce, internet commerce) refers to the sale or purchase of goods and services over the Internet and the transfer of data and money for these transactions online. E-commerce is typically used for the online sale of tangible goods but also includes all commercial transactions that are conducted online. E-commerce enables simple transactions between businesses and between businesses and consumers. – GHOZALI, M., ISPRIYARSO, B. The Online Arbitration in E-Commerce Dispute Resolution During Covid-19 Pandemic. *Jurnal Daulat Hukum* [online]. 2021, Vol. 4, no. 3, p. 158 [cit. 25. 4. 2022]. Available at: http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/RH/article/viewFile/16266/5686

number of people have shifted to managing their necessary interactions through electronic platforms. The reduction of physical contact to reduce human health risks has clearly had the effect of dramatically increasing the amount of buying and selling in the online space.[33]

When considering the benefits of e-commerce, it is important to highlight the possibility of faster and more convenient shopping, the continuous improvement in the choice of products and services, better access to information – all of which contribute to building trust and a more competitive market, factors that can both meet consumer needs and improve business performance. At the same time, we must recognise that e-commerce also entails a number of risks, alongside its undeniable benefits. Unfortunately, the practicality of its use cannot always guarantee the safety of the goods that consumers buy. In many cases, the goods ordered do not match the photograph. In the vast majority of cases, the consumer has to pay the full or partial amount in advance without being able to see the condition or quality of the goods. Online payments also offer many opportunities for fraud and abuse, which have been exploited to the full during the pandemic.[34]

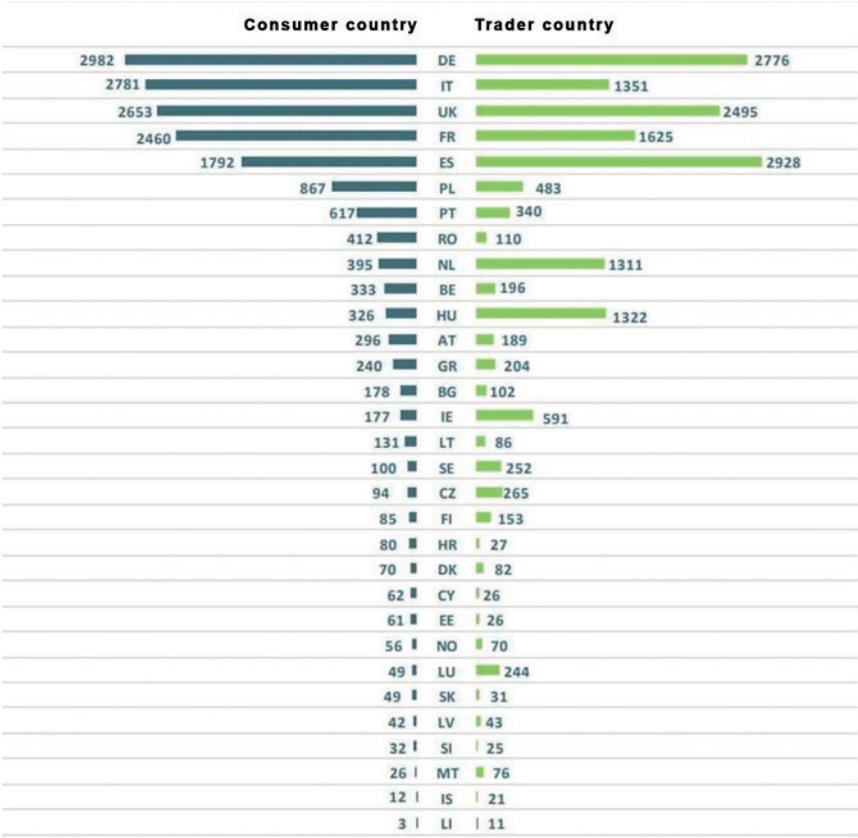
The growth in e-commerce has automatically led to an increase in the number of disputes and the rise of online dispute resolution ("ODR"), as people may legitimately want to be able to resolve their disputes in the space where they arose. As the transactions in question have an international element and are typically low-value, everyday transactions, traditional judicial dispute resolution is not well suited to deal effectively with cross-border online disputes in a way that respects legal certainty.[35]

33 GHOZALI, M., ISPRIYARSO, B. The Online Arbitration in E-Commerce Dispute Resolution During Covid-19 Pandemic. *Jurnal Daulat Hukum* [online]. 2021, Vol. 4, no. 3, p. 157 [cit. 25. 4. 2022]. Available at: http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/RH/article/viewFile/16266/5686

34 Ibid., pp. 159–161.

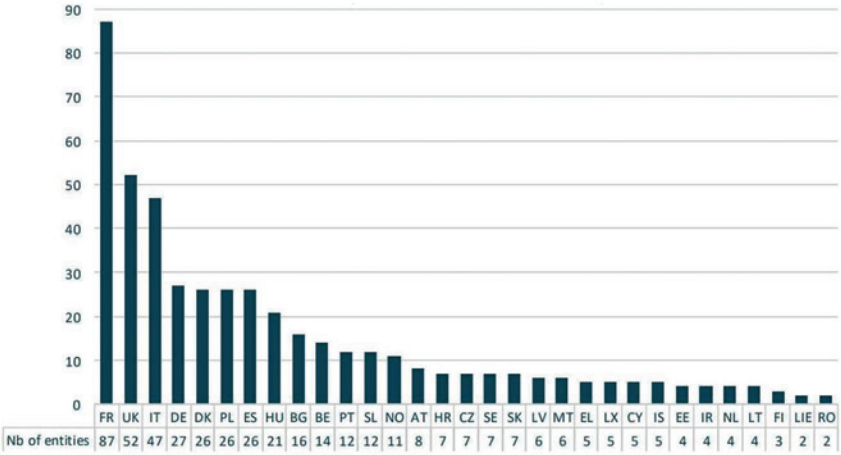
35 MILASSIN, L. Fogyasztóvédelem és az online vitamegoldó eljárás [Consumer protection and the online dispute resolution process]. *Iustum Aequum Salutare* [online]. 2014, Vol. 10, no. 2, p. 95 [cit. 1. 2. 2022]. Available at: https://epa.oszk.hu/02400/02445/00032/pdf/EPA02445_ias_2014_02_095-104.pdf

Figure no. 3: Number of complaints per consumer and trader country[36]



36 50% of the complaints on the ODR platform are cross-border, this is clearly reflected in the graph above. As for certain countries, there is a large difference between the number of complaints by the country of the consumer or of the trader. 89% of complaints formally launched on the platform were automatically closed after the 30-day legal deadline for the trader to eventually agree to proceed to an ADR procedure. 6% were refused by the trader and 4% withdrawn by consumer. As a result, only 1% of the complaints reached an ADR body. However, in a survey of all consumers who launched a complaint (or direct talks), 20% of respondents said that their dispute had been resolved either on the platform or outside the platform, and further 19% responded that they were continuing discussions with the trader. See Functioning of the European ODR Platform. Statistical report 2020. *European Commission* [online]. December 2021, p. 4 [cit. 30. 9. 2022]. Available at: https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf

Figure no. 4: Number of ADR entities published on the ODR platform[37] (as of 31 December 2020)



6 IT Developments in the Legal Sector

When looking at the eras of legal technologies, we can distinguish three distinct periods of development.[38]

37 This figure is about the functioning of the European ODR platform regarding all new cases and visits made in 2020 (and what happened to the cases subsequently). The ODR platform provides a user-friendly means for consumers to submit complaints to a trader related to an online purchase. It contains a multilingual register of 468 quality ADR bodies currently active across the EU, Liechtenstein, and Norway. It also offers information on other consumer redress possibilities. 2020 was the last year when the ODR platform was accessible for resolving the disputes by ADR entities established in the UK, and for the disputes involving either UK consumers or traders. The platform saw 3.3 million unique visitors in 2020, an average of 275,000 unique visitors per month. See Functioning of the European ODR Platform. Statistical report 2020. *European Commission* [online]. December 2021, p. 1 [cit. 30. 9. 2022]. Available at: https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf

38 ZŐDI, Zs. A járvány, a jogi szféra és a technológia. Hogyan vészelték át a jogrendszerek a járványt, mekkora szerepe volt ebben a technológiának, és mennyire lesznek tartósak a változások? [The epidemic, the legal sphere and technology. How have legal systems weathered the epidemic, how much has technology played a role and how long will the changes last?]. *In Medias Res* [online]. 2020, Vol. 9, no. 2, pp. 340–341 [cit. 20. 9. 2022]. Available at: http://real.mtak.hu/126123/1/imr-2020-02-09.pdf; Note: The paper does not intend to go into the exact chronology of these eras in different parts of the world, but merely notes that the dynamics of development in the US and the rest of the world have been different. Differences of 10–20–30 years could be seen in the dimensions of the comparison.

The first era was characterised by rudimentary office automation solutions that allowed for the partial automation of certain processes. These included various filing and record-keeping systems (for clients and cases), word processors and spreadsheets for document production, as well as legal repositories and legal databases (1970s in the US, 1990s in the rest of the world).[39]

The second era was ushered in by the emergence of the Internet, which was characterised by the development and implementation of online communication and electronic communication. The emergence of client information interfaces, legal databases for the public, and the dawn of the paperless era, the world of e-suits and the possibility of fully electronic communication. In some non-adversarial proceedings, it was also possible to carry out fully electronic and fully automated procedures (e.g., company proceedings in Hungary). Certain online case management systems (such as online document viewing) and automatic document creation software became available, as well as certain courtroom techniques such as video conferencing and presentation systems. One of the key advantages of document assembly is its ability to provide data ready for online (automated/semi-automated) dispute resolution procedures, a process that can move the process towards a "data-driven court".[40]

The third era – the current one – is marked by the emergence and application of visualisation and artificial intelligence. What we are seeing is technology moving out of its former domain of speeding up processes, increasing efficiency and facilitating communication, and moving into areas and subjects that it had not originally intended to change. These are called

39 ZŐDI, Zs. A járvány, a jogi szféra és a technológia. Hogyan vészelték át a jogrendszerek a járványt, mekkora szerepe volt ebben a technológiának, és mennyire lesznek tartósak a változások? [The epidemic, the legal sphere and technology. How have legal systems weathered the epidemic, how much has technology played a role and how long will the changes last?]. *In Medias Res* [online]. 2020, Vol. 9, no. 2, pp. 340, 342 [cit. 20. 9. 2022]. Available at: http://real.mtak.hu/126123/1/imr-2020-02-09.pdf

40 Ibid., pp. 340–344.

disruptive technologies.[41] The most important innovations of the era are artificial intelligence and ODR systems, given that some ODR software also uses artificial intelligence.[42]

ODR systems typically have two components: software and a human operator. Such systems typically provide assistance for low-value, low-volume, simple-to-judge transactions. Typically, an arbitrator steps in only when the automated process stalls. The software can manage a big part of the process. It links the parties to a dispute, guiding them into a specific structure and a defined course of action. It guides the process with relevant questions, essential factual data, electronic forms, and a dispute management algorithm, at the end of which it may propose a solution to the parties. In the case of mixed systems, a mediator is also involved in the process, for example, when the automated process fails to reach an agreement between the parties.[43]

Looking at the period in question, we see that the pandemic hit the legal systems at different stages. It accelerated the solutions of the second era and brought to the fore the possibilities of the third era.

Sourdin distinguishes three levels of the digital taxonomy of justice. The first level is the level of enabling technologies, which is the most primitive. Its purpose is primarily to inform. It includes, among others, online legal

41 The term disruptive refers to creative disruption, i.e., the application of solutions in which new technologies and business models disrupt or even radically transform existing ways of doing things, and thus affect the business value of products and services. Disruptive technology makes market trends, hidden correlations, customer needs and opinions visible, allowing for the personalisation of products and services not only at the marketing level but also at the production level, which is a significant driver of purchasing power and customer satisfaction. Today, this technology is mostly digital. – PAJOR, G. Működőképes az üzleti stratégiád a digitális világban? Mit jelent a diszruptív technológia? És mi köze a digitális átalakuláshoz [Is your business strategy viable in the digital world? What does disruptive technology mean? And what it has to do with digital transformation]. *BITPORT* [online]. 10. 7. 2015 [cit. 20. 9. 2022]. Available at: https://bitport.hu/mukodokepes-az-uzleti-strategiad-a-digitalis-vilagban.html

42 ZÓDI, Zs. A járvány, a jogi szféra és a technológia. Hogyan vészelték át a jogrendszerek a járványt, mekkora szerepe volt ebben a technológiának, és mennyire lesznek tartósak a változások? [The epidemic, the legal sphere and technology. How have legal systems weathered the epidemic, how much has technology played a role and how long will the changes last?]. *In Medias Res* [online]. 2020, Vol. 9, no. 2, pp. 344–346 [cit. 20. 9. 2022]. Available at: http://real.mtak.hu/126123/1/imr-2020-02-09.pdf

43 Ibid.

applications and apps. The second level is that of substitute technologies which replace legal professionals and their work, such as e-government processes and online mediation services. The third, most advanced level, is disruptive technologies where the work of legal professionals is changed. These include artificial intelligence and algorithm-based decision-making programmes that could radically transform the future of justice.[44]

The table below shows how different justice systems around the world have responded to COVID-19, according to *Sourdin's* breakdown.

Table no. 1: Global court responses[45]

Response	Jurisdiction	Response Details
Supportive Technologies	**North America**	
	United States Federal Circuit Court of Appeals	All cases scheduled to be heard in April, May and June 2020 were to be conducted remotely, and parties were no longer required to lodge additional hard copy documents where they had been filed electronically. In addition, to facilitate open court principles, the Court also provided live audio access to arguments, with daily access information published on the Court's website. The conferencing technologies used by the Judiciary included "AT&T Conferencing, Court Call, Skype for Business, Cisco Jabber, and Zoom".
	United States Supreme Court	Beginning May 2020, the Court heard all oral arguments remotely by telephone conference. The Court also provided a "live audio feed of the arguments to FOX News, the Associated Press, and C-SPAN" which, in turn, provided "a simultaneous feed for the oral arguments to livestream on various media platforms".

44 SOURDIN, T., ZELEZNIKOW, J. Courts, Mediation and COVID-19. *SSRN* [online]. 8. 5. 2020, pp. 5–6 [cit. 29. 9. 2022]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595910

45 SOURDIN, T., LI, B., McNAMARA, D. M. Court innovations and access to justice in times of crisis. *Health Policy and Technology* [online]. 2020, Vol. 9, no. 4, pp. 447–453 [cit. 29. 9. 2022]. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/#bib0018

Response	Jurisdiction	Response Details
	New York City, USA Criminal Court	As of 25 March 2020, the Court conducted all criminal arraignments through videoconferencing technology. A virtual court model was implemented in every county on 6 April 2020, utilising audio-visual and telephone communications as well as the digital exchange of documents. Chief Judge DiFiore stated that virtual operations would remain an integral part of court systems despite the gradual opening of courts from July 2020 onwards.
	State of New York, Court of Appeals	On 11 May 2020 the Court issued a Notice to the Bar amending its Rules of Practice to "require, for motions and responses to jurisdictional inquiries, submissions in digital format via a Companion Filing Upload Portal". The Court of Appeals also accepted submissions by mail and electronically. Oral arguments would continue to be webcast live until the September session.
	Ontario Superior Court of Justice	On 2 April 2020 the Court dispensed with the requirement to file documents in hard copy; confirmed acceptance of electronically signed documents; permitted electronic service of documents where personal service is required; and heard matters virtually by way of telephone or videoconference. The Court also made Ministry-funded family mediation services virtually available for parties.
	Asia	
	Supreme Court of India	"Important matters" were heard via videoconferencing and limitation periods were temporarily suspended by the Court.
	Qatar	Proceedings were heard remotely using videoconferencing technology.
	Dubai	As of 19 April 2020, hearings were conducted electronically through Microsoft Teams, allowing parties to be heard via videoconference.
	Oceania	
	High Court of Australia	Cases commenced on or after 1 January 2020 were to lodge all documents online using the Digital Lodgement System Portal. Registry services were provided online or via telephone; documents were to be filed electronically with the Court; and the Court temporarily allowed electronic signatures on documents.

Response	Jurisdiction	Response Details
	Northern Territory Supreme Court	All pre-trial hearings, mentions, and directions were conducted by audio-visual link or telephone conference. Until the Odyssey Integrated Case Management System was implemented in October 2020, all documents in civil matters will continue hadto be filed electronically.
	New South Wales Supreme Court	From 24 March 2020, there were no personal appearances in matters save for "exceptional circumstances" and all documents were to be provided by electronic means. The Evidence (Audio and Audio Visual Links) Act 1998 (NSW) was amended to permit witnesses or legal practitioners to appear via audio-visual or digital technology if the court so directs.
	Supreme Court of Queensland	Parties and practitioners were only to make physical appearances where the matter could not be "practicably dealt with by telephone or video". In addition, between 1 March 2020 and 30 September 2020, testators were able to "execute documents in the presence of witnesses via audio-visual link".
	Supreme Court of Victoria	Civil proceedings were heard remotely using WebEx, Skype or Zoom and criminal hearings were heard via WebEx or existing video link technology. In addition, documents were filed electronically with the Court and, to facilitate remote access, the Court accepted unsworn affidavits, provided they met certain requirements published on the Court's website.
	Family Court and Federal Circuit Court of Australia	Hearings were conducted virtually using Microsoft Teams and/or AAPT Teleconferencing. In addition, to facilitate matters being dealt with electronically, parties were to "e-file", "e-lodge" or e-mail all documents. The Courts also accepted affidavits (other than where part of a divorce application) and financial statements that were signed without a qualified witness' signature, if the deponent of the document was available via telephone, videoconference or in person at a subsequent date.
	District Court of New Zealand	A Practice Note was issued on 23 April 2020 temporarily enabling judges of the Court to make directions as to the form of participation of any person at hearing or trial (whether by telephone or audio-visual link).

Response	Jurisdiction	Response Details
	Africa	
	Supreme Court of Uganda	The Chief Justice issued a directive on 19 March 2020 enabling judgments and rulings to be issued to the parties via email or WhatsApp. On 29 April 2020 the Chief Justice issued guidelines pertaining to the judiciary's use of online hearings.
	South African Superior Courts	The Office of the Chief Justice on 27 January 2020 implemented an online cloud-based collaborative solution enabling Digital Case Management and Evidence Management systems for the High Courts. On 16 April 2020 a direction was issued permitting "unopposed applications already enrolled for hearing" to be heard by videoconference and directing parties to opposed applications to "file their heads of argument electronically".
	Europe	
	The UK Family Court and Family Division of the High Court	The UK created a "Remote Access Family Court" which allowed hearings to be conducted virtually using, for example, Skype for Business. These remote hearings were supported by "e-bundling" technology through the implementation of the Cloud Video Platform in July 2020 in civil, family and criminal courtrooms. This platform allows judges and parties to access documents that are filed electronically.
	Italian Supreme Court	Initially, all court activities were suspended. However, as of 16 April 2020 "e-trial measures" were implemented "for any type of court activity, both civil and criminal". Consequently, such matters were exclusively held on "secure online platforms", which enabled parties to appear via videoconferencing technology.
	Republic of Ireland Criminal Courts	Defendants in custody appeared before the Central and Special Criminal Court through videoconferencing technology. The use of remote hearings was predominantly confined to the Supreme Court, Court of Appeal and High Court until courts reopened in September.
	Hungarian Civil and Administrative Courts	On 31 March 2020 the Hungarian government issued a decree ordering that hearings were to be conducted electronically (through videoconferencing) until the courts would reopen.

Response	Jurisdiction	Response Details
Replacement Technologies	**North America**	
	British Columbia's Civil Resolution Tribunal	The Civil Resolution Tribunal (CRT) is an online dispute resolution tribunal that hears – *inter alia* – simple personal injury, employment, construction, and property matters. Applicants apply online to have their dispute resolved by the Tribunal. The system then automatically classifies the dispute and provides applicants with the necessary documents to file their claim. Thereafter, parties can lodge submissions and evidence for the tribunal member to assess it online. Indeed, if an oral hearing is required, it is conducted via Skype. While the Tribunal has been in operation before COVID-19, its inherently digital nature has allowed it to "remain fully operational" since the outbreak.
Disruptive Technologies	**Asia**	
	Beijing Internet Court	The Beijing Internet Court is one of three "virtual courts" in China. These Courts engage in what is termed "e-litigation" procedures, which enable the entire litigation process from "filing to ruling and mediation" to be conducted online. The system operates 24 hours a day and, since the pandemic, has been investigating procedures to "set protocols of online litigation proceedings in cyberspace". This Court also has what is termed a "mobile micro court". This enables parties to appear via WeChat – China's leading social media platform – and is of especial benefit for individuals who do not have easy access to a computer during the COVID-19 outbreak. "Case pushing", "nudging" and "decision correction" technology is in place in some courts and has not been a COVID-19 addition (see discussion below).

7 How Has the COVID-19 Pandemic Affected Litigation and ADR?

The pandemic has brought about global change in all aspects of life, challenging the justice system in our country and around the world. It can be observed that the response to health emergencies has been met with different degrees of pressure on the courts in different countries. In some countries, IT solutions enabling online courts had already started to be deployed before the pandemic, while in others it was a rapid response to the current challenges. The legislative framework that allowed for this rapid response and ensured the use of telecommunication tools for remote hearings was able to innovate as necessary. Despite the divergent paths, we can still see that courts around the world have adapted quickly to the COVID-19 protocols. Despite the health risks and logistical obstacles to face-to-face trials, they have sought to develop a myriad of ways to deliver justice. The *remotecourts.org* site has collected current court solutions, allowing countries to share experience and be inspired by the different solutions. The EU has published a comprehensive table on how Member States are using electronic technologies and tools in the epidemiological situation.

Table no. 2: Digital tools in Member States[46]

Member State	E-Justice measures
Austria	Immediate infrastructure and application-related steps were taken in order to strengthen and secure especially home office, video conferencing, sufficient bandwidth and connectivity, as well as secure transmission of confidential or sensitive information. Notaries may perform all their services, such as authenticate documents and draft notarial deeds, by means of electronic communication. The notary has to establish a stable video communication channel with the party and observe certain security precautions during the identification process. So far, this electronic procedure has only been permissible for the foundation of a limited liability company.
Belgium	-

46 Digital solutions during the pandemic. *European Commission* [online]. [cit. 29. 5. 2022]. Available at: https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/digital-solutions-during-pandemic_en

Member State	E-Justice measures
Bulgaria	The Supreme Judicial Council has issued orders for filing documents to courts and the prosecutor's office by mail or electronically, as well as for consultation on the phone or electronically. For the mentioned hearings, summons is served by telephone or electronically. The services provided by the Commercial register and other registers are accessible online.
Croatia	Communication with parties and all participants in court proceedings is done electronically as a rule. In cases requiring meeting or hearing in person, all precautionary measures imposed by the health authorities are taken. Technical means of distance communication available to judges and courts, including within the court (email, videoconferencing, etc.), should be used. All lawyers, citizens, and other users of eKomunikacija (eCommunication) are able to view the content of all documents, if the content is available in the case management system. Electronic communication is in use in all commercial, municipal, and county courts and in the High Commercial Court of the Republic of Croatia. Lawyers/attorneys at law, insolvency practitioners, notaries, court experts, assessors, and legal entities are able to send submissions and attachments to the court; receive court documents; perform remote insight into court cases; and other. Currently, only lawyers, court experts and assessors, insolvency practitioners, and legal entities can send submissions to the court. ePredmet (eFile) provides all citizens with information on the course and dynamics of resolving cases in ordinary proceedings and legal proceedings, but not insight into the content of court documents. Technical prerequisites for the e-communication service are provided by the Ministry of Justice.
Cyprus	-
Czech Republic	Hearings which cannot be postponed are carried out strictly in line with the restrictions posed by the Government, i.e., the public is excluded, examination of witnesses or the accused is carried out via videoconference, etc.
Denmark	-

Member State	E-Justice measures
Estonia	The courts, prosecutor's offices, prisons, and legal professionals are already provided with the necessary equipment for teleworking. Additionally, everyone with an Estonian ID has digital access to governmental services, documents can be signed and exchanged digitally in a secure way. Firstly, all courthouses remained open, although with limited opening hours. The judges and other court staff could carry out most of the proceedings in writing from home thanks to the information system and digital court file application. Secondly, to raise the capacity to hold video conferences, virtual meeting rooms have been created for the ministry, courts, prosecution offices, and prisons. Thirdly, judicial cooperation in both civil and criminal matters is carried out via emails as much as possible.
Finland	The Finnish judicial bodies (courts, prosecutors) conduct all contacts primarily via electronic services, and on-the-spot client services have been either paused or reduced significantly. The courts are holding hearings by remote means to the largest possible extent provided by the law. Necessary and critical cases are given priority.
France	An order issued on 25 March 2020, on the adjustment of procedural arrangements during the crisis provides for the possibility of transferring the jurisdiction of a court that is not able to function to another, or the use of hearings by videoconference.
Germany	-
Greece	-
Hungary	The scope of written communication was extended. Modern communication tools for procedural acts that require direct oral contribution were enabled and encouraged.
Ireland	The ICT infrastructure necessary to facilitate remote court hearings which nonetheless comply with the constitutional obligation that justice be administered in public has been put in place.
Italy	With regard to hearings, all pending proceedings have been postponed ex officio up to 15 April, or 30 June if it has been so decided by the heads of office, except those that have been declared urgent by the judge on a case-by-case basis or those considered by the law as top priority. In these cases, the parties' effective participation and the protection of their procedural rights, in particular with regard to inmates, are guaranteed by videoconference systems, with simultaneous audio and video of all the persons present, and by confidential communication systems between the defendant and his/her defense counsel.
Latvia	-

Member State	E-Justice measures
Lithuania	The bailiffs are already required to perform and register all actions of the enforcement process electronically and attempts aimed at enabling notaries to approve most transactions by electronic means are underway.
Luxembourg	-
Malta	-
Netherlands	Measures aiming to facilitate the functioning of Justice have been taken, for instance, with the introduction of hearings via videoconference and court proceedings in writing.
Poland	-
Portugal	-
Romania	-
Slovakia	Law firms can be open even though many lawyers work from home. Electronic, telephonic, and other means of communication without physical contact are preferred. Notarial office hours are limited, it is advised to consult them by phone or email. Bailiffs have strengthened their capacities for telephonic and electronic contact with the public.
Slovenia	
Spain	IT solutions and communication tools have been provided or reinforced in order to facilitate teleworking of judges, prosecutors, and other legal actors.
Sweden	The use of digital communication tools, and video and telephone conferences in proceedings has increased.

The rapid growth of ODR over the past few years proves that ODR is an effective method of resolving disputes as opposed to traditional litigation. We can see that many courts and ADR centres were ready to change their structures before the pandemic broke out. The changed circumstances, however, have brought the possibility of amicable dispute resolution into even sharper focus, creating a sense of awareness among the parties, given that a significant proportion of them felt financial pressure which made them more willing to resort to ADR to avoid lengthy and costly court proceedings.[47]

47 ARINZE-UMOBI, C. N., OKONKWO, I. T. Alternative Dispute Resolution Practice in Nigeria and the Effect of Covid-19 Pandemic. *International Journal of Law and Clinical Legal Education* [online]. 2021, Vol. 2, pp. 83–84 [cit. 29. 5. 2022]. Available at: https://www.nigerianjournalsonline.com/index.php/IJOLACLE/article/view/1717

ADR is a simple procedure that typically offers alternative routes to litigation in civil or commercial disputes. Mediation offers each party to a dispute the opportunity to resolve their dispute together so that they can maintain good relations in the future. The year 2020 was certainly a challenging one for many businesses and individuals. The challenges posed by the pandemic have led to increased interest among disputing parties in the use of ADR mechanisms. In response to the pandemic, mediators have turned to ODR to bridge the gap.[48]

8 Alternative Dispute Resolution

The primary function of traditional courts is to resolve disputes and conflicts impartially and fairly and to sanction violations. However, *Susskind* observes that court procedures are slow, expensive, and difficult for ordinary people to access. It seems as if the court system is not the most appropriate way to resolve disputes between people. He sees this as the reason for the presence and popularity of ADR forums, which are multiplying rapidly. He identifies three main factors behind this process. In his opinion, court procedures are extremely outdated, while at the same time the nature of modern law – too rapid changes in legislation – makes the process almost incomprehensible to the ordinary person, not to mention the complex and incomprehensible legal language. Be that as it may, the world is changing, and legal and judicial systems cannot escape this change. The pandemic and the responses to its challenges, as well as developments in information technology in the legal sphere, show that ADR is becoming a much more prominent focus of interest and solution than previously thought.[49]

48 ARINZE-UMOBI, C. N., OKONKWO, I. T. Alternative Dispute Resolution Practice in Nigeria and the Effect of Covid-19 Pandemic. *International Journal of Law and Clinical Legal Education* [online]. 2021, Vol. 2, p. 84 [cit. 29. 5. 2022]. Available at: https://www.nigerianjournalsonline.com/index.php/IJOLACLE/article/view/1717

49 ZÓDI, Zs. A járvány, a jogi szféra és a technológia. Hogyan vészelték át a jogrendszerek a járványt, mekkora szerepe volt ebben a technológiának, és mennyire lesznek tartósak a változások? [The epidemic, the legal sphere and technology. How have legal systems weathered the epidemic, how much has technology played a role and how long will the changes last?]. *In Medias Res* [online]. 2020, Vol. 9, no. 2, pp. 352–354 [cit. 20. 9. 2022]. Available at: http://real.mtak.hu/126123/1/imr-2020-02-09.pdf

In many countries, we see mandatory use of ADR procedures before court proceedings are initiated, but also mandatory use of ADR processes to interrupt proceedings that have already started. We see that it is the legislator himself who is guiding citizens towards such a resolution of their conflicts and disputes as a real alternative, supporting their personal responsibility.[50]

ADR is a procedural option that can be used as a substitute for judicial enforcement and can provide a mutually beneficial solution for the opposing parties.

8.1 Mediation Directive[51]

As early as 1999 (Tampere European Council), the European Council called on the Member States to develop alternative out-of-court procedures to improve access to justice for EU citizens. The source of law governing mediation in cross-border[52] civil and commercial cases is the Mediation Directive.[53]

This alternative procedure, tailored to the needs of the parties, can ensure a cost-effective and quick out-of-court settlement of disputes for the parties involved. The rationale behind allowing mediation is, *inter alia*, that agreements resulting from mediation are more likely to be respected by the parties, while at the same time the relationship affected by the conflict is more likely to be saved. However, these benefits are even more striking in situations with cross-border elements. The Mediation Directive creates the possibility of a balanced relationship between mediation and judicial proceedings by encouraging mediation and facilitating the use of the procedure.[54]

The provisions of the Mediation Directive cannot be applied to rights and obligations which are not freely determined by the parties (family law, labour

50 SOURDIN, T., LI, B., McNAMARA, D. M. Court innovations and access to justice in times of crisis [online]. *Health Policy and Technology*, 2020, Vol. 9, no. 4, pp. 447–453 [cit. 29. 9. 2022]. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/#bib0018

51 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters ("Mediation Directive").

52 A cross-border dispute is a dispute *"in which at least one of the parties is domiciled or habitually resident in a Member State other than that of the other party at the time when: the parties agree to use mediation after the dispute has arisen; mediation is ordered by a court; an obligation to use mediation arises under national law; or the parties are invited to use mediation"*. – Article 2 Mediation Directive.

53 Points 1–3 Mediation Directive Preamble.

54 Point 6 Mediation Directive Preamble.

law). Nor does it cover tax, customs or administrative matters, liability for acts or omissions of the State in the exercise of its public powers *(acta iure imperii)*. At the same time, the Mediation Directive indicates, in the interests of legal certainty, the point in time which is essential for determining whether or not a dispute, which the parties wish to settle by mediation, is a cross-border dispute.[55]

From the point of view of the enforceability of agreements resulting from mediation, mediation should not be considered as a less effective alternative to judicial proceedings, in the sense that the enforcement of agreements resulting from mediation would depend on the good faith of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement declared enforceable. However, these rules should be without prejudice to the rules of the Member States on the enforcement of agreements resulting from mediation.[56] The content of the agreement may be made enforceable by a court or other competent authority by judgment, decision or authentic instrument in accordance with the law of the Member State in which the application is made.[57]

Given that confidentiality is a requirement in the mediation process, Member States should ensure that neither mediators nor persons involved in the administration of the process are subsequently required to provide evidence in civil and commercial court or arbitration proceedings of information that has been obtained during or in connection with the mediation process, unless otherwise agreed by the parties. However, exceptions may be made where overriding reasons relating to public policy in the Member State concerned so require (in particular, where it is necessary to protect the interests of children or to prevent harm to the physical or psychological integrity of persons) or where disclosure of the content of an agreement resulting from mediation is necessary for the implementation or enforcement of the agreement.[58]

In order to encourage the use of mediation, it is necessary to adapt the rules on limitation periods in the Member States so that they do not prevent parties from going to court or arbitration if their mediation attempts have

55 Art. 1 Mediation Directive.
56 Point 19 Mediation Directive Preamble.
57 Art. 6 Mediation Directive.
58 Art. 7 Mediation Directive.

failed.[59] Member States should encourage mediators to provide information to the public about the organisations offering mediation services and lawyers to inform their clients about mediation.[60]

8.2 Directive on Consumer ADR[61]

Ensuring a high level of consumer protection is enshrined in both the Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union (TFEU).[62] The TFEU defines the internal market as an area without internal frontiers where the free movement of goods and services is ensured, but where it should also provide added value for consumers through better quality, more choice, reasonable prices and high safety standards. In this way, the regulation aims to promote a high level of consumer protection.[63]

ADR is a simple, fast and inexpensive way to resolve disputes between traders and consumers outside the courts. Member States should ensure that ADR forums provide fair, practical and proportionate solutions to disputes with both the consumer and the trader, based on an objective assessment of the circumstances of the complaint and with due regard for the rights of the parties. Despite the possibilities and the legislation, we see that the level of development and use of ADR is not uniform across the EU. A large proportion of consumers and traders are still not aware of the alternative redress mechanisms available to them and only a small proportion of citizens know how to lodge a complaint with an ADR forum.[64]

The aim of the ADR Directive is to promote the proper functioning of the internal market through the achievement of a high level of consumer protection by ensuring that consumers can bring their complaints against traders voluntarily before bodies offering independent, impartial, transparent, effective, prompt, and fair ADR procedures. However, the ADR Directive

59 Point 24 Mediation Directive Preamble.
60 Art. 9 Mediation Directive.
61 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) ("ADR Directive").
62 Point 1 ADR Directive Preamble.
63 Point 2 ADR Directive Preamble.
64 Point 5 ADR Directive Preamble.

is without prejudice to national legislation which makes participation in such procedures compulsory, provided that such legislation does not prevent parties from exercising their right to justice.[65]

The scope of the ADR Directive covers the out-of-court settlement of domestic or cross-border disputes between traders established in the EU and consumers residing in the EU concerning contractual obligations arising out of sales or service contracts through the intervention of an ADR forum, whereby the ADR forum proposes or prescribes a solution or brings the parties together to facilitate an out-of-court settlement.[66]

Among other things, the ADR Directive does not apply to non-economic services of general interest;[67] disputes between traders; direct negotiation between the consumer and the trader; attempts by a judge to settle a dispute in the course of legal proceedings concerning the dispute; as well as in proceedings brought by the trader against the consumer; and in relation to health services provided by health professionals to patients for the assessment, maintenance or improvement of their state of health, including the prescription, dispensing and supply of medicines and medical devices, or by public providers of continuing education or higher education.[68]

The development of properly functioning ADR in the EU is essential to strengthen consumer confidence in the internal market, including in the area of online commerce, and to unlock the potential and opportunities of cross-border and online trade. The development of ADR should build on existing ADR procedures in the Member States, while respecting the legal traditions of the Member States. An ADR procedure[69] is a procedure that meets the requirements set out in the ADR Directive and is conducted by an ADR forum.[70]

65 Art. 1 ADR Directive.

66 Art. 2 para. 1 ADR Directive.

67 Non-economic services are services that are not provided for economic consideration. Consequently, non-economic services of general interest provided free of charge by or on behalf of the State do not fall within the scope of the ADR Directive, irrespective of the legal form in which they are provided.

68 Art. 2 para. 2 ADR Directive.

69 Art. 2 letter g) ADR Directive.

70 Alternative Dispute Resolution forum is any body, however named, established on a permanent basis, dealing with the settlement of disputes by alternative dispute resolution and listed. – Art. 4 letter h) ADR Directive.

Member States have the possibility to allow ADR forums to have procedural rules that allow them to refuse to settle a dispute on certain grounds. In the case where the consumer has not attempted to contact the trader concerned to discuss his complaint (has not sought to resolve the matter directly with the trader in the first instance). The dispute is frivolous or vexatious in nature. The dispute is or has been dealt with by another ADR forum or court. The value of the claim is below or above a predetermined threshold. The consumer has not lodged the complaint with the ADR forum within a predetermined time limit, which shall not be less than one year from the date on which the consumer lodged the complaint with the trader; and where the resolution of such a dispute would otherwise seriously undermine the effectiveness of the ADR forum.[71]

In order to be efficient and effective, Member States should ensure that parties have access to ADR procedures both online and offline, regardless of where they are located. The procedure can be used without compulsory legal representation, but this does not deprive the parties of the possibility to be represented or assisted by a third party at any stage of the procedure. ADR is available to consumers free of charge or for a nominal fee.

8.3 Regulation on Consumer ODR[72]

A high level of consumer protection is expected and regulated in the EU. However, in order to ensure that consumers have confidence in the digital dimension of the internal market and can take advantage of its benefits, it is necessary to ensure that consumers have simple, efficient, fast and cost-effective means of resolving disputes arising from the online sale of goods and services. This is particularly important for cross-border purchases.[73]

The aim of the ODR Regulation is to contribute to the proper functioning of the internal market, and in particular its digital dimension, by achieving

71 Art. 5 and 8 ADR Directive.

72 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) ("ODR Regulation").

73 Points 1–2 ODR Regulation Preamble.

a high level of consumer protection through the creation of a European online platform[74] to facilitate the independent, impartial, transparent, efficient, swift, and fair online out-of-court settlement of disputes between consumers and traders.[75]

The ODR Regulation covers the out-of-court settlement of disputes between consumers established in the EU and traders established in the EU in relation to obligations arising from online sales or service contracts.[76]

8.4 Online Dispute Resolution Platform[77]

In the pre-COVID era, there was a general reluctance to engage in virtual activities, but this has changed significantly with the new world order in terms of the way disputes are resolved. Online Dispute Resolution is a form of ADR that allows for the resolution of disputes over the Internet or any telecommunication device without the parties to the dispute having to be physically present at a given time and place. ODR techniques were already being used worldwide before the pandemic outbreak to resolve a wide range of disputes, typically consumer disputes, and its rules and infrastructure were well developed and in place before the outbreak of the COVID-19 pandemic.[78]

The ODR Platform will help consumers to resolve complaints about products and services bought online through ADR bodies. As of 9 January 2016, all online shops in the EU are required to place a link to the platform on their website, allowing European consumers to submit their complaints electronically to an ADR organisation.[79] The ODR Platform

74 ODR Regulation provides the framework for online dispute resolution, the creation of the EU ODR platform and the date (9 January 2016) as of which each e-shop in the EU must provide a link to the platform to its website that would give to the European consumers the access to electronically submit their complaints to an ADR entity.

75 Art. 1 ODR Regulation.

76 Art. 2 ODR Regulation.

77 Online Dispute Resolution. *European Commission* [online]. [cit. 20. 9. 2022]. Available at: https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks

78 GHOZALI, M., ISPRIYARSO, B. The Online Arbitration in E-Commerce Dispute Resolution During Covid-19 Pandemic. *Jurnal Daulat Hukum* [online]. 2021, Vol. 4, no. 3, pp. 160–166 [cit. 25. 4. 2022]. Available at: http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/RH/article/viewFile/16266/5686

79 Online Dispute Resolution. *European Commission* [online]. [cit. 20. 9. 2022]. Available at: https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks

is an out-of-court dispute resolution tool for consumers residing in the EU and service providers established in the EU. The Platform is free to use and available in all official EU languages. In the procedure, the consumer and the trader must jointly choose the body they want to work with.[80]

9 International Outlook

The work of the United Nations Commission on International Trade Law ("UNCITRAL"), which plays a key role in international legal harmonisation and development, is also important in the field of ADR. It started working on the regulation of ODR, as described above, in 2010. It has recognised the importance of consumer protection aspects, contrary to the position of the EU, but has not made it a priority. In the context of ODR, the question was whether the regulation should have a consumer protection focus or not, and whether the next stage of quasi-judicial redress in the event of unsuccessful dispute resolution should be mandatory arbitration or whether there should be more alternatives. At the same time, the question has been raised as to how the mandatory arbitration clause should be enforced in the event of a dispute. This is understood to mean that it should only be mandatory if it was known to the consumer before the transaction was concluded, or mandatory if the parties can agree on it after the transaction has been concluded. Finally, whether it is appropriate to regulate disputes between trader-consumer and trader-dealer differently. The clash of views observed throughout the process has been a major obstacle to global regulation.[81]

The UNCITRAL Model Arbitration Rules (1976, amended 2010, 2013) and the UNCITRAL Model Law on International Commercial Arbitration (1985, amended 2006) are the most important instruments for the standardisation of arbitration procedures.

80 Online Dispute Resolution. *European Commission* [online]. [cit. 20. 9. 2022]. Available at: https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks

81 MILASSIN, L. Fogyasztóvédelem és az online vitamegoldó eljárás [Consumer protection and the online dispute resolution process]. *Iustum Aequum Salutare* [online]. 2014, Vol. 10, no. 2, pp. 95–97 [cit. 1. 2. 2022]. Available at: https://epa.oszk.hu/02400/02445/00032/pdf/EPA02445_ias_2014_02_095-104.pdf

The UNCITRAL Conciliation Rules (1980) set out a framework within which parties could settle disputes arising from their commercial relations. The Model Law on International Commercial Conciliation (2002, amended in 2018) was designed to assist states in modernising their legislation on mediation.[82]

10 Online Dispute Resolution in Practice (Past–Present–Future)

Online dispute resolution has clearly gained in importance in the pandemic period. Typically, existing systems[83] were to be used but, at the same time, some systems were improved and transformed into user-friendly systems based on user feedback,[84] and some completely new solutions were introduced in response to the situation.[85]

We see many cases where the impact of the interdependency has led to an increase in certain types of cases (e.g., in Australia, 42% of married couples have experienced a deterioration in their relationship, with a clear increase in divorce). An existing system, AMICA, provides assistance to parties in the divorce process on issues of parental custody and property division, and also grants advice and suggestions. The system is responsible

82 GRÁNER, Zs. Az alternatív vitarendezés lehetséges útjai a polgári-gazdasági jogviták tekintetében, fókuszban a választottbíráskodással [Possible avenues for alternative dispute resolution in civil and economic disputes, with a focus on arbitration]. *Székesfehérvári Törvényszék* [online]. 2020, p. 8 [cit. 17. 3. 2022]. Available at: https://szekesfehervaritorvenyszek.birosag.hu/sites/default/files/news/az_alternativ_vitarendezes_lehetseges_utjai.pdf

83 In Australia AMICA-ADIEU-LUMI systems. See Australia Wants AI to Handle Divorces – Here's Why. *The Nextweb* [online]. 10. 10. 2020 [cit. 27. 9. 2022]. Available at: https://thenextweb.com/neural/2020/10/10/australia-wants-ai-to-handle-divorces-heres-why-syndication/

84 In the state of Utah, the system has been in place since 2018 and is used in cases involving loan defaults. See BUTLER, S. et al. The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report. *The University of Arizona James E. Rogers College of Law* [online]. 8. 9. 2020, 188 p. [cit. 27. 9. 2022]. Available at: https://law.arizona.edu/sites/default/files/i4J_Utah_ODR_Report.pdf

85 ZŐDI, Zs. A járvány, a jogi szféra és a technológia. Hogyan vészelték át a jogrendszerek a járványt, mekkora szerepe volt ebben a technológiának, és mennyire lesznek tartósak a változások? [The epidemic, the legal sphere and technology. How have legal systems weathered the epidemic, how much has technology played a role and how long will the changes last?]. *In Medias Res* [online]. 2020, Vol. 9, no. 2, p. 351 [cit. 20. 9. 2022]. Available at: http://real.mtak.hu/126123/1/imr-2020-02-09.pdf

for collecting and organising relevant data. ADIEU is able to collect the documents necessary for the division of property on the basis of the client's authorisation. Typical examples are previous tax returns, land registry data, registered movable property and bank statements. Once the process is complete, it is the LUMI that will make proposals to the parties, which will prepare and enable a settlement to be reached.[86]

A new option introduced in Michigan is the MI Resolve system which provides assistance in cases where typically two parties are in dispute and there is no attorney representation. These can include, but are not limited to, small claims, small debts, and rent disputes between tenant and landlord. The system itself works in a hybrid way, which means that once the data has been collected, a mediator is involved in the process to help the parties move towards an agreement.[87]

In China, we find a specific system where ADR and ODR systems are directly linked to the court system and are not organised on an external, alternative basis. At the time of the pandemic, China adopted a measure to move court proceedings to the online space in order to facilitate better access to justice. It is likely that this rapid and smooth transition was driven

86 ZŐDI, Zs. A járvány, a jogi szféra és a technológia. Hogyan vészelték át a jogrendszerek a járványt, mekkora szerepe volt ebben a technológiának, és mennyire lesznek tartósak a változások? [The epidemic, the legal sphere and technology. How have legal systems weathered the epidemic, how much has technology played a role and how long will the changes last?]. *In Medias Res* [online]. 2020, Vol. 9, no. 2, pp. 350–351 [cit. 20. 9. 2022]. Available at: http://real.mtak.hu/126123/1/imr-2020-02-09.pdf

87 Ibid., p. 351.

by the development of a "smart court" system,[88] which has been providing full online services to parties since 2019.[89]

The many advantages of ODR and justice cannot be overlooked, but the difficulties that arise must also be taken into account. When studying this subject, one cannot help but wonder whether access to justice in this dimension is really guaranteed to all on an equal footing. We must also mention the differences in the level of development between urban and rural areas, the digital divide between the older and younger generations, and the limitations of Internet use for those with literacy and financial problems. In addition, infrastructure differences in judicial systems can have a significant impact on the quality of justice services.[90] On the technical side, we see that the key issues are security, system reliability, non-intrusive data transmission, adequate resolution and the possibility of recording. Other issues that have caused problems include system freezes, line breaks, possible unauthorised access and pixelation. In the communication space, the fragmentation of metacommunication and the loss of much of the body language are undeniable drawbacks. Overall, however, we can say that

88 The notion of a "smart court" relates to *"the organisational, constructional and operational pattern of people's courts that is based on advanced innovations with the purposes of achieving fair judiciary and justice for people by means of supporting online intelligent court services throughout the whole dispute resolution process in a transparent environment."* – See Supreme People's Court, Opinion on Accelerating the Building of Smart Court, April 2017. In: SOURDIN, T., LI, B., McNAMARA, D. M. Court innovations and access to justice in times of crisis. *Health Policy and Technology* [online]. 2020, Vol. 9, no. 4, pp. 447–453 [cit. 29. 9. 2022]. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/#bib0018
The characteristics of a smart court include *"ensuring the fairness and efficiency of the judiciary and improving judicial credibility, making the most out of technologies, including the Internet, cloud computing, big data, and AI, promoting the modernisation and capability of China's trial system, and achieving the highly intelligent functioning and management of people's courts."* – See Supreme People's Court Work Report. Addressed to the National People's Congress by Chief Justice Qiang Zhou. In: SOURDIN, T., LI, B., McNAMARA, D. M. Court innovations and access to justice in times of crisis. *Health Policy and Technology* [online]. 2020, Vol. 9, no. 4, pp. 447–453 [cit. 29. 9. 2022]. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/#bib0018

89 SOURDIN, T., LI, B., McNAMARA, D. M. Court innovations and access to justice in times of crisis. *Health Policy and Technology* [online]. 2020, Vol. 9, no. 4, pp. 447–453 [cit. 29. 9. 2022]. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/#bib0018

90 Ibid.

despite the drawbacks, the benefits have been able to outweigh the concerns in terms of epidemiological security, time and cost efficiency.[91]

11 Conclusion

Conflicts are a natural part of human relations, and in many cases they have a legal dimension. Whether the parties concerned choose to resolve their dispute through the ordinary judicial route or through an ADR procedure depends to a large extent on the nature of the dispute, the person's sense of responsibility and his or her sense of control.

The changed circumstances have created a new situation in our personal lives, in our workplace and in our social relationships. Around the world, we see that the economic transformation has been in favour of digitalisation. Digital platforms for trading goods and services are becoming increasingly important. The role of information intermediaries in trade is becoming increasingly important as they provide a means to resolve conflicts online, thereby protecting the rights of consumers and traders. Large commercial companies (such as eBay, Amazon and Aliexpress) have already set up their own online commercial arbitration tribunals, which allow them to save time and reduce costs by eliminating the need to go to court.[92]

Experience shows that in the future, virtual mediation will be the main basis for dispute resolution even when things return to normal. Statistics show that virtual mediation has improved the efficiency of dispute resolution.[93] We can see that the legislator is also pushing citizens towards personal responsibility,

91 ZŐDI, Zs. A járvány, a jogi szféra és a technológia. Hogyan vészelték át a jogrendszerek a járványt, mekkora szerepe volt ebben a technológiának, és mennyire lesznek tartósak a változások? [The epidemic, the legal sphere and technology. How have legal systems weathered the epidemic, how much has technology played a role and how long will the changes last?]. *In Medias Res* [online]. 2020, Vol. 9, no. 2, pp. 348–350 [cit. 20. 9. 2022]. Available at: http://real.mtak.hu/126123/1/imr-2020-02-09.pdf

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93 ARINZE-UMOBI, C. N., OKONKWO, I. T. Alternative Dispute Resolution Practice in Nigeria and the Effect of Covid-19 Pandemic. *International Journal of Law and Clinical Legal Education* [online]. 2021, Vol. 2, pp. 83–84 [cit. 29. 5. 2022]. Available at: https://www.nigerianjournalsonline.com/index.php/IJOLACLE/article/view/1717

and that it encourages, and in some cases even expects, personal consultation between the parties in conflict as a condition for initiating proceedings. There is also a clear tendency on the part of consumers to prefer ODR to face-to-face dispute resolution, particularly because they are able to obtain the same result for themselves through a simpler procedure than they would have obtained in person. From an economic point of view, it can be concluded that ODR has started to grow up alongside online commerce, which is much larger in volume than traditional forms of commerce, in the sense that the number of disputes being resolved in this context is increasing. There can be no doubt that this is also due to the fact that ADR is a real alternative for the parties to the conflict.[94]

Looking to the future, we see a trajectory of the world moving towards data-driven courts over traditional document-based ones. More and more cases will be automated than ever before, which will inevitably have an impact on legislation. This will also lead to even more data-driven dispute resolution methods. There are already fully data-driven ODR systems that operate entirely without human intervention. The third era of legal informatics will clearly move in this direction.[95]

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Contact – e-mail

dr.antal.orsolya@gmail.com

ORCID

0000-0002-5414-3985

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The Singapore Convention: A Giant Leap for Mediation or Just Too Good to Be True

Hana Kršňáková

Faculty of Law, Charles University, Czech Republic

Abstract

In this article, the author will explore the potential of the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the "Singapore Convention on Mediation" in reaching its desired goal – becoming an essential instrument in the facilitation of international trade and support the wide recognition of mediation as an international and domestic commercial dispute resolution practice. Hence becoming what was and still is the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards for the international trade arbitration. Through the analysis of the history and current state of the Singapore Convention, its guiding provisions, and their correlation with the basic principles of mediation, the author will evaluate the utilization and legitimacy of international business mediation in cross-border disputes after the Singapore Convention.

Keywords

Alternative Dispute Resolution; International Business; Mediation; Singapore Convention.

1 Introduction

The importance of alternative dispute resolutions (ADR) grows steadily in today's interconnected and interdependent world. Many business relationships are taking place across borders and it is becoming even more important to find ways and means of resolving cross-border disputes in a timely and cost-efficient matter. As a result, international business

mediation is being selected as the dispute resolution mechanism in a growing number of cases. However, there are still certain barriers in place which hinder the even wider and faster expansion of international business mediation, especially in places and jurisdictions, where business mediation does not have a long-standing tradition. As expressed in several studies and conferences such as the Global Pound Conference (2016–2017)[1], International Mediation Institute Survey (2017)[2] and the International Dispute Resolution Survey (2019)[3], one of the said barriers to international business mediation was the lack of a cross-border mechanism for giving legal effect to international mediated settlement agreements.[4]

One of the first multilateral instruments regulating mediation were the Conciliation Rules[5] introduced by the United Nations Commission on International Trade Law ("UNCITRAL") in 1980[6]. With the increasing use of mediation as an alternative dispute resolution tool, the regulation of mediation in commercial disputes is also evolving and increasing in numbers. We can see a regional increase in legal rules and regulations of commercial mediation in the 21st century, for example, the EU Mediation Directive

1 Global Data Trends and Regional Differences. *Global Pound Conference Series* [online]. 2018 [cit. 25. 5. 2022]. Available at: https://www.pwc.com/gx/en/forensics/gpc-2018-pwc.pdf

2 Among other results, the survey found that 90.5% of the surveyed saw the absence of an international enforcement mechanism for mediated settlements as a deterring factor (some have even identified is as "major") to the growth of mediation as a mechanism for resolving cross-border disputes. In: IMI Survey Results Overview: How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements. *International Mediation Institute* [online]. 16. 1. 2017 [cit. 25. 5. 2022]. Available at: https://imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements/

3 ALEXANDER, N. et al. International Dispute Resolution Survey: Currents of Change 2019 Preliminary Report. *Singapore International Dispute Resolution Academy* [online]. 2019 [cit. 25. 5. 2022]. Available at: https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/SIDRA2019_IDR_Survey_Preliminary_Report.pdf

4 Though the data presented by the surveys and conferences seems unequivocal, it needs to be taken into account that the statistics leave out the question reflecting the presence or absence of actual enforcement problems. Hence, on one hand, an enforcement mechanism for international mediated settlement agreements is certainly missing, on the other hand, the data on the extent to which the actual enforcement is presenting a consistent overarching problem may be missing.

5 In some legal norms the term conciliation is used. The difference between conciliation and mediation will not be discussed in this article given its length. However, for the purpose of the reference to legal norms regulating commercial mediation, they can be considered as synonymous.

6 UNCITRAL Conciliation Rules (1980).

on Civil and Commercial aspect for Mediation (2008)[7] was put in place. However, as will be discussed in more detail in this article, a global mechanism for the enforcement of international settlement agreements resulting from mediation was still missing which was identified as a challenge to the wider use of mediation.[8] Hence, the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the "Singapore Convention on Mediation" ("Singapore Convention") was put into place. Until the Singapore Convention, no harmonized enforcement mechanism existed for mediated settlement agreements. Therefore, the only remedy for a party who was faced with an opponent refusing to honour the terms of such negotiated settlement was to bring an action for breach of contract and then seek to have the subsequent judgment enforced, potentially in multiple jurisdictions. This was in many cases an expensive and inefficient deterrent for parties to even consider mediation for the resolution of their disputes, so they instead turned to arbitration or litigation from the outset.

The Singapore Convection is expected by many to be a mediation parallel to United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). The question is if the Singapore Convention will be able to live up to those expectations. The various benefits of the Singapore Convention and hurdles potentially preventing the Singapore Convention from achieving its desired goal will be discussed further in this article.

2 Singapore Convention

2.1 History and Status of the Singapore Convention

The Singapore Convention is the first United Nations ("UN") multilateral treaty focused on the enforcement of mediated settlement agreements.

7 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

8 See for example: Information Brochure. Singapore Convention on Mediation. *UNCITRAL* [online]. P. 1 [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/accession_kit_october_2019_website.pdf, or UNITED NATIONS. Report of the United Nations Commission on International Trade Law. Forty-seventh session (7–18 July 2014). *United Nations General Assembly* [online]. 2014 [cit. 25. 5. 2022]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/053/54/PDF/V1405354.pdf?OpenElement

It presents to the parties as a uniform, minimalist, and efficient framework whose goal is to ensure for international mediated settlement agreements related to commercial disputes become binding and enforceable under a simplified and streamlined procedure.[9] Furthermore, the overarching goal of the Singapore Convention is to facilitate cross-border trade by providing an efficient tool – mediation – as an alternative method of resolving trade disputes. Ultimately, the Singapore Convention is to strengthen the access to justice in a rule-based commercial system and support the fulfillment of the UN Sustainable Development Goal 16 on peace, justice, and strong institutions.[10]

Article 1 of the Singapore Convention namely states cases to which it does not apply, which are (a) settlement agreements (i) concluded in the course of judicial or arbitral proceedings, and (ii) are enforceable as a court judgment or arbitral award; (b) settlement agreements (i) concluded for personal, family or household purposes; or (ii) relating to family, inheritance or employment law.[11] It is also important to note that the Singapore Convention does not address or regulate the mediation process itself.

Though adopted in December 2018, the journey of the Singapore Convention, which will be described in the following subsections of this article, started far back in 2014 at UNCITRAL's forty-seventh session.[12]

2.1.1 UNCITRAL Working Group II

The UNCITRAL Working Group II ("WG") was tasked in July 2014 at UNCITRAL's forty-seventh session to focus its work on the issue of the enforcement of international settlement agreements resulting

9 Convention Text. *United Nations* [online]. [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf

10 Information Brochure. Singapore Convention on Mediation. *UNCITRAL* [online]. [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/accession_kit_october_2019_website.pdf

11 Art. 1 para. 2, 3 Singapore Convention.

12 UNITED NATIONS. Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation. UNCITRAL. Sixty-second session. *United Nations General Assembly* [online]. 27. 11. 2014, p. 1 [cit. 25. 5. 2022]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/080/44/PDF/V1408044.pdf?OpenElement

from conciliation proceedings.[13] The WG was to report its findings and considerations on the feasibility and possible form of work in that area to UNCITRAL in 2015 at its forty-eighth session.[14]

The discussions of the WG continued through six of their sessions. The significance of the Singapore Convention is demonstrated by the fact that 90 Member States and 35 non-governmental organizations participated in those deliberations.[15] At last, the WG reached a compromise that was supported by UNCITRAL, and hence, the WG was tasked to prepare a draft convention on international settlement agreements resulting from mediation, as well as a draft amendment to the UNCITRAL Model Law on International Commercial Conciliation (2002). The Convention was finalized at the 2018 UNCITRAL's fifty-first session.[16]

2.1.2 UN General Assembly

The Singapore Convention was passed by consensus in the UN General Assembly in December 2018. At that time, the UN General Assembly also recommended that the Singapore Convention be known as the "Singapore Convention on Mediation", and also authorized the signing ceremony of the Singapore Convention to occur in Singapore on 7 August 2009.[17]

The significance of the Singapore Convention may be showcased by the fact that on the date the Singapore Convention was opened for signature already

13 UNITED NATIONS. Report of the United Nations Commission on International Trade Law. Forty-seventh session (7–18 July 2014). *United Nations General Assembly* [online]. 2014 [cit. 25. 5. 2022]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/053/54/PDF/V1405354.pdf?OpenElement

14 Convention Text. *Singapore Convention on Mediation* [online]. [cit. 25. 5. 2022]. Available at: https://www.singaporeconvention.org/jurisdictions

15 ALEXANDER, N. UN-Übereinkommens zur internationalen Durchsetzung von Mediationsvergleichen. *Zeitschrift für Konfliktmanagement* [online]. 2019, Vol. 22, no. 5, pp. 160–164 [cit. 25. 5. 2022]. Available at: https://www.degruyter.com/document/doi/10.9785/zkm-2019-220503/html

16 UNITED NATIONS. Report of the United Nations Commission on International Trade Law. Fifty-first session (25 June – 13 July 2018). *United Nations General Assembly* [online]. 2018 [cit. 25. 5. 2022]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/052/21/PDF/V1805221.pdf?OpenElement

17 UNITED NATIONS. Resolution adopted by the General Assembly on 20 December 2018. Seventy-third session. *United Nations General Assembly* [online]. 11. 1. 2019 [cit. 25. 5. 2022]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/456/53/PDF/N1845653.pdf?OpenElement

46 countries, including the world's two largest economies – the United States and China – as well as three of the four largest economies in Asia – China, India and South Korea – signed the Singapore Convention.[18] Furthermore, another 24 countries attended the signing ceremony in Singapore to show their support for the Singapore Convention.[19]

The Singapore Convention entered into force on 12 September 2020, only after 6 months after the day the third instrument of ratification was deposited by Qatar.[20] The first ratification documents were deposited by Singapore and Fiji.[21]

2.1.3 Current Status of the Singapore Convention

The Singapore Convention has been signed by 55 countries[22], of which ten[23] have also ratified it, hence becoming a party to the Singapore Convention. The Singapore Convention enters into force six months after its ratification by the given state. The latest ratification occurred in Kazakhstan and

18 UN Treaties Status. *UNCITRAL* [online]. [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

19 MINISTRY OF LAW. 46 States signed new international treaty on mediation. *Singapore Convention Week* [online]. 7. 8. 2019 [cit. 25. 5. 2022]. Available at: https://www.singaporeconventionweek.sg/newsroom/46-states-signed-new-international-treaty-on-mediation

20 HEETKAMP, S. J. Singapur-Übereinkommen in Kraft getreten. *Zeitschrift für Konfliktmanagement* [online]. 2020, Vol. 23, no. 5, pp. 168–172 [cit. 25. 5. 2022]. Available at: https://doi.org/10.9785/zkm-2020-230504

21 UN Treaties Status. *UNCITRAL* [online]. [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

22 Correct at time of publication. Those signatories are: Afghanistan, Armenia, Australia, Belarus, Belize, Brazil, Brunei, Chad, Chile, China, Colombia, Republic of the Congo, Democratic Republic of the Congo, Ecuador, Kingdom of Eswatini, Fiji, Gabon, Georgia, Ghana, Grenada, Guinea-Bissau, Haiti, Honduras, India, Iran, Israel, Jamaica, Jordan, Kazakhstan, Laos, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, Philippines, Qatar, Rwanda, South Korea, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, Sri Lanka, Timor Leste, Turkey, Uganda, Ukraine, the USA, Uruguay and Venezuela. In: UN Treaties Status. *UNCITRAL* [online]. [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

23 Correct at the time of publication. The parties to the Singapore Convention are: Belarus, Equador, Fiji, Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore and Turkey. In: UN Treaties Status. *UNCITRAL* [online]. [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

the Singapore Convention will enter into force here on 23 November 2022.[24] The number of signatories of the Singapore Convention in comparison to the New York Convention concerning the time for which the Singapore Convention is open for signature is impressive.

The current global situation in relation to the COVID-19 pandemic and the ongoing conflict taking place in Ukraine shifted the focus of the state representatives elsewhere. Even though the level and reason of the motivation of states to become a party to the Singapore Convention may be warry, should the Singapore Convention be successful, the focus of the states needs to be realigned. The incentives for the countries may present in a form of an overall increase in the states' international trade by minimizing frictions arising from commercial disputes which could be resolved by enforceable mediation settlements. Another motivation may be the aim of certain states to develop the dispute resolution industry and become an international trade hub. This may have been the case with China and Singapore, as well as with various Middle Eastern countries.

The significance of the Singapore Convention may be underlined by the fact that the signatories of the Convention include those opposing each other in many other international fora such as Iran and Israel, Qatar and Saudi Arabia, and others.[25] This shows that the inclusive, multilateral negotiation process ensured that the Singapore Convention is not only tailored to the practice (and practical aspects) of mediation but also accommodates different legal traditions.

2.2 Key Provisions, Their Benefits, and Challenges

To illustrate both the benefits and on the other hand the challenges of the Singapore Convention which may influence the achievement of the goals the Singapore Convention has set out to achieve, the author has selected certain articles of the Singapore Convention for further analysis. It is not a complete list of all the articles and potential associated discussion points.

24 UN Treaties Status. *UNCITRAL* [online]. [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status

25 Ibid.

2.2.1 Preamble and Article 1: Harmony With Other International Instruments

The Preamble of the Singapore Convention expresses one of its goals, which is to foster the *"harmonious international economic relations between states"*[26]. Hence, ensuring that the new legal framework stands next to bud does not interfere with the already existing legal instruments is crucial. If not regulated properly, this would lead to ambiguity in the process of enforcement, uncertainties among the parties, and as a result a lack of trust in the enforcement of the mediated settlement agreement. Therefore, the provision stating that only international commercial settlement agreements resulting from mediation can be enforced under the Singapore Convention is crucial to prevent the aforementioned risks and avoid potential overlap with existing conventions, notably the New York Convention and the Convention of 30 June 2005 on Choice of Court Agreements ("the Hague Choice of Court Convention"). Furthermore, Article 1 para. 3 letter b) of the Singapore Convention expressly excludes from its scope settlement agreements that have been recorded and are enforceable as arbitral awards, as well as agreements that have been approved by a court or concluded in the course of court proceedings and *"are enforceable as a judgment in the State of that court"*. Those provisions add to the overall clarity and understanding of the different enforcement mechanisms for the various alternative dispute resolution instruments and ensure the Singapore Convention fills in the existing gap but does not interfere with any prevalent international enforcement mechanisms.

2.2.2 Article 1: Reciprocity and No "Seat"

The key requirement for the settlement agreements to fall under the Singapore Convention is per Article 1 para. 1 of the Singapore Convention the fact that they must (i) stem from mediation and (ii) be international. The article further elaborates on what is considered "international" from the perspective of the Singapore Convention. It was crucial to define the meaning of "international", given there is no "seat" or "nationality" of the mediated settlement and hence the concept of a "foreign award"

26 Singapore Convention Preamble.

as we know it from the New York Convention cannot be applied here. The concept of a "seat" was considered, but rejected, by the WG, partly to avoid favouring one jurisdiction over others that the mediation might impact.[27]

Therefore, the location of the mediation, the place of a signature, and other location indications are not relevant. The lack of seat concept in international mediation and the Singapore Convention makes refusal grounds less exposed to judicial review from two courts to one.[28]

Given that the Singapore Convention will apply to international mediation settlements concluded and conducted anywhere in the world, this means the mediated settlement agreements may also stem from jurisdictions that have not ratified the Singapore Convention but whose enforcement is being sought out in a state which is a party to it. Hence, the Singapore Convention is not built upon the principle of reciprocity. This is a significant difference from other multilateral enforcement instruments such as the New York Convention or the Hague Choice of Court Convention and adds to the extent of the cases in which mediation may be used as a dispute resolution mechanism.

2.2.3 Article 2 and Article 4: Online Mediation

The Singapore Convention in its Article 2 para 1 and Article 4 para 2 sets out the principles allowing for the parties to effectively conduct online mediation and sign their settlement agreement electronically, for example, if they are not at the same location at the time of signature. Those provisions allow for the Singapore Convention to be applicable also in cases where disputes were settled through various online dispute resolution methods administered through different electronic communication channels (for example, text messaging, online conference calls, or dedicated online

27 ALEXANDER, N., CHONG, S. An Introduction to the Singapore Convention on Mediation – Perspectives from Singepore. *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* [online]. 2019, Vol. 22, no. 4, pp. 37–56 [cit. 25. 5. 2022]. Available at: https://www.bjutijdschriften.nl/tijdschrift/tijdschriftmediation/2018/4/TMD_1386-3878_2018_022_004_005

28 LIAO, M. Singapore Convention Series: Refusal Grounds In The UN Convention On International Settlement Agreements Resulting From Mediation [online]. *Kluwer Mediation Blog*. 12. 4. 2020 [cit. 25. 5. 2022]. Available at: http://mediationblog.kluwerarbitration.com/2020/04/12/singapore-convention-series-refusal-grounds-in-the-un-convention-on-international-settlement-agreements-resulting-from-mediation/

dispute resolution platforms). All so long as the parties can provide for the settlement agreement to be signed with a recognized electronic signature.[29] This allows for a simplified, cost and time-efficient processes, which may be useful among others for small claim disputes.

2.2.4 Article 4: A Result of Mediation

In connection with the above analysed article, Article 4 para. 1 letter b) of the Singapore Convention states that the party seeking relief shall provide to the competent authority evidence that the settlement agreement "resulted from mediation".

The parties may incur several difficulties when trying to provide evidence that the mediation settlement agreement resulted from mediation. Firstly, mediation is a voluntary process conducted in a form that is based on the needs of the parties. Certain mediations may be conducted over a period of time and the mediator may not be present for all the phases. It is not uncommon, especially in business mediations, for the mediator to be involved in the beginning and if the parties do not settle within the allocated period of time they may decide to continue their discussions without the mediator. The question is if this would then still qualify as resulting in mediation and if not how will the different phases be effectively separated and how will the court assess the connection between the mediation and the settlement.

Furthermore, this article provides a non-exhaustive list of said evidence such as "the mediator's signature on the settlement agreement" or "a document signed by the mediator indicating that the mediation was carried out". If the mediation was organized through an alternative dispute resolution institution, the evidence may take the form of attestation by that institution. In the absence of such forms of evidence, "any other evidence acceptable to the relevant authority may be relied on". The first two examples will be further discussed in more detail.

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29 Art. 4 para. 1, 2 Singapore Convention; ALEXANDER, N., CHONG, S. An Introduction to the Singapore Convention on Mediation – Perspectives from Singepore. *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* [online]. 2019, Vol. 22, no. 4, pp. 37–56 [cit. 25. 5. 2022]. Available at: https://www.bjutijdschriften.nl/tijdschrift/tijdschriftmediation/2018/4/TMD_1386-3878_2018_022_004_005

Mediation is a process where confidentiality is one of its leading principles. Therefore, both the parties and the mediator rely on the confidentiality of the whole process, and hence the fact that the mediator shall provide some form of confirmation related to the occurrence of mediation may prove to be problematic. Though providing a statement in front of the relevant authority differs from confirming the mediation itself took place, the Chinese Wall between mediators and their appearance in front of the court may be jeopardized.

Furthermore, it is also unclear during which stage of mediation should the signature on a document confirming the execution of the mediation take place. It could only be recommended to obtain this signature during the conclusion of the mediation, however, at that point parties may not know that such attestation may be needed. Therefore, the author sees it as crucial that the mediator discusses this with the parties already during the mediation process and any concerns can be addressed orally or in writing before the mediation settlement is signed.

2.2.5 Article 5: Standards for Mediators and Mediation

Similar to the provisions in the New York Convention, the Singapore Convention in its Article 5 allows only for limited grounds to refuse relief to streamline the enforcement process. As discussed in subchapter 2.2.2 to this article, the Singapore Convention does associate a "seat" with a mediated settlement agreement, essentially freeing it from the legal requirements of any given place of mediation. Even though this may bring certain advantages for the parties in the process, it also poses uncertainties for the parties in regards to what legal provisions, regulations, and/or standards will apply at the time of the enforcement of the international mediated settlement agreement. This may also prove problematic when seeking relief, specifically in cases listed in Article 5 para. 1 letter e) and Article 5 para. 1 letter f), where relief may be refused if the party against whom the relief is sought provides evidence that (i) there was a serious breach of the standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement[30]; or (ii) there was

30 Art. 5 para. 1 letter e) Singapore Convention.

a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.[31] This may be complicated in practice, given that different states may apply different standards or rules to mediators, their confidentiality obligations, or possibly some do not regulate the field at all.

3 Conclusion

The consensus reached among the UN Member States while passing the resolution on the adoption of the Singapore Convention is remarkable. Furthermore, the number, and the diverse geographical, economic, and political background of signatories of the Singapore Convention reached in the considered timeframe are truly impressive and only underline the potential the Singapore Convention has. Therefore, despite certain ambiguities and uncertainties in the wording of the Singapore Convention as described in the article, the Singapore Convention is an important step in removing the barriers to international commercial mediation settlement enforcement.

The Singapore Convention provides for certainty and stability of the parties in the international commercial mediation settlement enforcement. It also eliminated the need for duplicative litigation and streamlines the process of enforcement of the agreed settlement agreements. It takes into consideration the new ways of electronic communication and ways of doing business and provides the parties with the ability to conduct online mediation cost and time effectively, thus fulfilling one of the goals of the Singapore Convention. As a result, the Singapore Convention supports risk mitigation of the parties when entering into a cross-border business relationship by obliging the parties to the Singapore Convention to recognize the legal status of any international mediated settlement agreement.

On a global level, the Singapore Convention also strengthens the access to justice and the rule of law, it supports in particular the UN Sustainable

31 Art. 5 para. 1 letter f) Singapore Convention.

Development Goal 16 on peace, justice, and strong institutions. It also provides states with opportunities to become international trade centres by facilitating both domestic and international dispute resolution and hence providing for a stimulating business environment. All the benefits listed above do not only serve the disputing parties but also support the development of a mature, rules-based global economy.

The main focus now should be on refocusing the countries' representatives to restore the momentum the Singapore Convention had and extent the signatures of the Convention. Given the current global issues such as the COVID-19 or the conflict in Ukraine, the signature and ratification process of the Singapore Convention has slowed down significantly. However near-universal recognition of the Singapore Convention, similarly to the New York Convention, is crucial in fulfilling the high hopes certain stakeholders have of the impact of the Singapore Convention on international business.

The author believes that while it may take some more time to extend the number of parties to the Singapore Convention and therefore to see the true impact of the Singapore Convention on international trade and related cross-border dispute resolution, the Singapore Convention is a significant step in the right direction that will bring positive results in the field of international trade in the medium and long-term. It has the potential to fill the existing gap of enforcement options for mediation, in a way attempted by the New York Convention and the Hague Convention for litigation. However, only time will tell, if the Singapore Convention will really be able to truly fulfil its ultimate aim, to provide a unified and simple framework for disputing parties that establishes mediation as the primary alternative and effective method of resolving cross-border trade disputes and ultimately facilitates international trade.

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Contact – e-mail
lanikhana@centrum.cz

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Potential Nexus Between the Enforceability of Foreign Judgments and the Quality of Civil Justice in ASEAN

Lilla Király, Eszter Papp

Faculty of Law, Károli Gáspár University
of the Reformed Church in Hungary, Hungary

Abstract

To leverage the full potential of the ASEAN single market, the free flow of commercial judgments amongst the Member States, like in the EU, would be desirable. However, according to the state of things in 2022, judgments in ASEAN cannot circulate entirely freely within the Member States. This paper deals with one of the potential aspects that a state may consider when it decides whether to enforce a foreign judgment: the quality of civil justice in the country from which the judgment originates. The aim of this research is to ascertain if there is any correlation (and if so, what) between the ASEAN Member States' stances regarding the enforceability of commercial judgments rendered by the courts of another Member State and the quality of civil judicial service of the latter.

Keywords

ASEAN Single Market; Quality of Civil Justice; Foreign Judgments; Mutual Trust; Southeast Asia.

1 Introduction

The Association of Southeast Asian Nations ("ASEAN") is a regional integration of nations being the home of approximately 650 million people from different cultures, with different religious background, speaking

different languages.[1] The level of economic development of the ten ASEAN Members (i.e., Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam) and the legal traditions to which they belong (i.e., civil law, common law, Sharia law, and socialist law) also vary considerably.[2] Notwithstanding such diversity, by 2025, the ASEAN Economic Community aims to create a single market within which goods, services, and investments can freely circulate.[3] Therefore, the volume of intra-ASEAN trade as well as the number of potential cross-border commercial disputes are expected to grow.

To leverage the full potential of the single market, the free flow of commercial judgments amongst the ASEAN Member States, like in the European Union ("EU"), would be desirable. However, according to the state of things in 2022, judgments in ASEAN cannot circulate entirely freely within the Member States. Although there are several Member States which recognise and enforce judgments rendered by the courts of other Member States, such liberal approach toward foreign judgments does not exist in many other Member States. In practice, the unenforceability of a foreign judgment leads to parallel legal proceedings, which easily duplicate, triplicate lawyer's fees and other litigation costs, hence, increases the costs of doing business. The higher cost of doing business makes ASEAN less competitive than it could be.

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1 ASEAN Secretariat. ASEAN Key Figures 2021. *Association of Southeast Asian Nations* [online]. [cit. 30. 5. 2022]. Available at: https://asean.org/book/asean-key-figures-2021/

2 Regarding the economic diversity of ASEAN Member States, we refer to the World Bank's country classification by income level, wherein economies are classified into four income groups: low, lower-middle, upper-middle, and high income. This shows that amongst ASEAN economies, Brunei and Singapore are high-income countries, Malaysia and Thailand are upper-middle income countries and the remaining six economies, namely Cambodia, Indonesia, Laos, Myanmar, the Philippines, and Vietnam are lower-middle income countries. – World Bank Country and Lending Groups. *The World Bank* [online]. [cit. 30. 5. 2022]. Available at: https://datahelpdesk.worldbank.org/knowledgebase/articles/906519. Regarding the diversity of the legal systems of ASEAN Member States we note that civil law, common law, Sharia law, and socialist law are all present. About the historical development of Southeast Asian legal systems, see, for instance, YASUDA, N. Law and Development in ASEAN Countries. *ASEAN Economic Bulletin*. 1993, Vol. 10, no. 2, pp. 144–154; HARDING, A. Global Doctrine and Local Knowledge: Law in Southeast Asia. *The International and Comparative Law Quarterly*. 2002, Vol. 51, no. 1, pp. 35–53; Legal System in ASEAN. *ASEAN Law Association* [online]. [cit. 30. 5. 2022]. Available at: https://www.aseanlawassociation.org/legal-system-in-asean/

3 ASEAN Secretariat. ASEAN Economic Community Blueprint 2025. *Association of Southeast Asian Nations* [online]. [cit. 30. 5. 2022]. Available at: https://asean.org/book/asean-economic-community-blueprint-2025/

This paper deals with one of the potential aspects that a state may consider when deciding whether to enforce a foreign judgment. Such potential aspect is the quality of civil justice in the country from which the judgment originates.[4] Accordingly, the hypothesis of this research is that an ASEAN Member State having a higher quality of civil justice may be reluctant to recognise and enforce commercial judgments rendered by the courts of another Member State having a significantly lower quality of civil justice. Hence, the aim of this research is to ascertain if there is any connection (and if so, what) between the Member States' stances regarding the enforceability of commercial judgments rendered by the courts of another Member State and the quality of civil judicial service of the latter.

To answer this question, this paper provides an overview of the portability of foreign commercial judgments in ASEAN. This involves examining to what degree each Member State recognises and enforces commercial judgments from another Member State (Part 2). Considering the example of the EU, a regional integration of nations and a single market within which commercial judgments can freely circulate, we discuss the issue of mutual trust, which is the foundation of judicial cooperation in the EU (Part 3). Then, ASEAN-related data from global surveys, which indicate or can be associated with the quality of civil justice, will be explored. For such exercise, the EU Justice Scoreboard, which measures efficiency, quality of judicial service, and independence of the judiciary of each EU Member State, serves as a model (Part 4). Lastly, in the conclusion part, we respond to the question whether our hypothesis is true, i.e., whether an ASEAN Member State having a higher quality of civil justice is reluctant to recognise and enforce commercial judgments rendered by the courts of another Member State having a significantly lower quality of civil justice (Part 5).

2 Portability of Foreign Judgments Within ASEAN

There are several mechanisms through which the recognition and enforcement of foreign commercial judgments may be regulated. However, as will be shown, ASEAN is using such mechanisms only to a limited extent.

4 In this paper the term "civil justice" covers justice in civil and commercial cases.

Amongst multilateral conventions, there are at least two, namely the Convention of 30 June 2005 on Choice of Court Agreements ("HCCH 2005 Choice of Court Convention") and the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("HCCH 2019 Judgments Convention"), which deal with foreign commercial judgments. The HCCH 2005 Choice of Court Convention is aimed at ensuring the effectiveness of choice of court agreements (also known as "forum selection clauses") between parties to international commercial transactions. By doing so, the HCCH 2005 Choice of Court Convention provides greater certainty to businesses engaging in cross-border activities and therefore creates a legal environment which is more amenable to international trade and investment.[5] Amongst the ASEAN Member States, only Singapore is a signatory to this Convention. The HCCH 2019 Judgments Convention facilitates the effective international circulation of judgments in civil or commercial matters. By setting forth commonly accepted conditions for recognition and enforcement – and agreed grounds for refusal – the HCCH 2019 Judgments Convention provides legal certainty and predictability to parties involved in cross-border transactions, providing clarity as to whether and to what extent a judgment will be recognised and enforced in another jurisdiction. By ensuring the recognition and enforcement of foreign judgments, the HCCH 2019 Judgments Convention enhances access to justice by reducing legal timeframes, costs and risks in cross-border circumstances. It generally strengthens a positive national and international environment for multilateral trade, investment, and mobility.[6] To date, however, there are only six countries which have signed the HCCH 2019 Judgments Convention. None of them is an ASEAN Member State.[7]

The recognition and enforcement of foreign commercial judgments can also be regulated at the level of an association of nations. For example,

5 Outline. HCCH 2005 Choice of Court Convention. *HCCH* [online]. [cit. 30. 5. 2022]. Available at: https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf

6 Outline. HCCH 2019 Judgments Convention. *HCCH* [online]. [cit. 30. 5. 2022]. Available at: https://assets.hcch.net/docs/36b240ac-8228-481d-a33b-3716baf4c656.pdf

7 Status Table. Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. *HCCH* [online]. [cit. 30. 5. 2022]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=137

in the EU, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation (recast)") ensures the free portability of civil and commercial judgments. The Brussels I Regulation (recast) is a legal act that applies directly at the national level within EU countries and Member States do not need to create their own legislation to bring an EU regulation into force. It can happen since the Treaty of Amsterdam 1997 "communitised" judicial cooperation in civil matters. In other words, the EU has been empowered by the Member States to issue directly applicable regulations in the area of judicial cooperation in civil (including commercial) matters.[8] In ASEAN, judicial cooperation is not "communitised". This means that neither ASEAN as a whole nor any organisation of ASEAN have powers to regulate the question of recognition and enforcement of foreign judgments. Hence, should ASEAN intend to regulate this question uniformly on the level of the association of nations, as the EU has, it should do it based on mutual consent by a multilateral treaty that each Member State should sign. According to the state of things in 2022 in ASEAN, no such treaty exists. In other words, there is no ASEAN-wide treaty on the subject of recognition and enforcement of foreign judgments.

Bilateral treaties between ASEAN Member States can also be a potential level on which recognition and enforcement of foreign judgments could be regulated. However, it is not a frequently used method in ASEAN. This means that in 2022 there are only two bilateral treaties in ASEAN, which deal with the recognition and enforcement of civil and commercial judgments rendered by the courts of another ASEAN Member States. These are treaties between Vietnam and Laos, and Vietnam and Cambodia.[9]

In addition to bilateral treaties, there is another bilateral mechanism, known as the memorandum of guidance ("MOG"), through which

8 Judicial cooperation in civil matters. *EUR-Lex* [online]. [cit. 30. 5. 2022]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:judicial_cooperation_civil_matters

9 Agreement on Legal Assistance in Civil Matters between the Socialist Republic of Vietnam and the Kingdom of Cambodia signed on 21 January 2013. Agreement on Legal Assistance in Civil and Criminal Matters between the Socialist Republic of Vietnam and the Lao People's Democratic Republic signed on 6 July 1998.

the recognition and enforcement of foreign judgments can be regulated. There is one such MOG wherein both parties are ASEAN Member States, namely, the Memorandum of Guidance as to Enforcement of Money Judgments between the Supreme Court of the Union, Republic of the Union of Myanmar and the Supreme Court of the Republic of Singapore of 2020. As opposed to the above-mentioned bilateral treaties, MOGs are concluded by the Supreme Courts of the respective countries and not by the state governments. In addition, when compared with bilateral treaties after being ratified, MOGs are not binding legal sources. Nevertheless, MOGs are considered as an important source of soft law. *Anselmo Reyes*, the editor of Recognition and Enforcement of Judgments in Civil and Commercial Matters, a book published in 2019, analysing the applicable rules on the recognition and enforcement of foreign civil and commercial judgments in fifteen Asian jurisdictions, amongst which eight are ASEAN Member States, finds that: *"another method, one that may not be as time-consuming as entering into bilateral treaties, would be for judiciaries in different countries to enter into Memorandums of Guidance (MOGs) with one another, setting out in a non-legally binding document the criteria and procedures that a judiciary will apply when considering whether to recognise a judgement rendered by another judiciary. This method may be faster, because the MOGs are purely informal, being solely for the purpose of communicating information to members of the public interested in having a judgment recognised or enforced by the court of one or other party to an MOG. MOGs can therefore be entered into as between judiciaries on an administrative basis without need for government or legislative intervention or approval."* [10]

Based on the above, we can conclude that neither multilateral, nor bilateral mechanisms cover ASEAN in a way from which we could assess the portability of foreign commercial judgments. It is therefore unavoidable to look into the ASEAN Member States' internal laws. It is certainly not an easy exercise to assess ASEAN Member States' internal laws considering the variety of languages in which such laws are written (e.g., Malay, Khmer, Bahasa, Burmese, Thai, Vietnamese, Laotian, and English). What makes the research more difficult is also that the legal traditions to which ASEAN

10 REYES, A. Introduction: Towards a System for the Recognition and Enforcement of Judgments. In: REYES, A. (ed.). *Recognition and Enforcement of Judgments in Civil and Commercial Matters*. Oxford: Hart Publishing, 2019, pp. 16–17.

Member States belong also vary. The researcher must be familiar with legal sources in each jurisdiction, amongst which there are common law and civil law jurisdictions, and understand the hierarchy of the sources. Therefore, such assessment remains beyond the scope of our research, and, for the rest, we entirely rely on the findings of the Foreign Judgments Project ("Project") of the Singapore based Asian Business Law Institute ("ABLI").

The Project was launched in 2016 and resulted in two highly important publications: a compendium on the Recognition and Enforcement of Foreign Judgments in Asia ("Compendium") and the Asian Principles for the Recognition and Enforcement of Foreign Judgments ("Asian Principles") released in 2017 and 2020, respectively. The Project was led by *Adeline Chong*, an Associate Professor of Law at the School of Law of the Singapore Management University, whose research area includes private international law. The Compendium and the Asian Principles are the outputs of the first and the second phase of the Project, respectively. In the first phase of the Project, jurisdictional reporters, each being experts on private international law of their respective countries, either legal professionals or academic researchers, provided a chapter on the applicable rules for the recognition and enforcement of foreign judgments in their country. As such, the Compendium gives a snapshot on the rules of recognition and enforcement of foreign judgments which were in effect in 2017 in each of the surveyed fifteen jurisdictions. More importantly, the territorial scope of the Project covered all ten ASEAN Member States. The second phase of the Project then made a huge step forward by proposing thirteen principles which, based on the findings of the Compendium, could be regarded as a common denominator of a potential harmonised set of rules applicable to the recognition and enforcement of foreign commercial judgments in Asia.

Following the ABLI's Project's finding, in particular the country reports on ASEAN Member States which have been included in the Compendium, and the ABLI's publication released in February 2022 under the title "Ranking the Portability of ASEAN Judgments within ASEAN", in Table 1 we set out whether a judgment rendered in an ASEAN Member State ("Country of Origin") can be enforced in another ASEAN Member State ("Country

Addressed"), and if so, in which Member State it is enforceable.[11] In Table 1, a "tick sign" means that a judgment rendered by the courts of the Country of Origin is enforceable in the respective Country Addressed. Whereas an "× sign" means that a judgment rendered by the courts of the Country of Origin is not enforceable in the respective Country Addressed.

Table no. 1: Portability of foreign judgments amongst ASEAN Member States

		Country Addressed									
Country of Origin	Number of ASEAN jurisdictions recognising judgments from the Country of Origin	Brunei*	Cambodia	Indonesia	Laos	Malaysia*	Myanmar*	Philippines*	Singapore*	Thailand	Vietnam*
Brunei	5/9	–	×	×	×	✓	✓	✓	✓	×	✓
Cambodia	6/9	✓	–	×	×	✓	✓	✓	✓	×	✓
Indonesia	6/9	✓	×	–	×	✓	✓	✓	✓	×	✓
Laos	6/9	✓	×	×	–	✓	✓	✓	✓	×	✓
Malaysia	5/9	✓	×	×	×	–	✓	✓	✓	×	✓
Myanmar	5/9	✓	×	×	×	✓	–	✓	✓	×	✓
Philippines	5/9	✓	×	×	×	✓	✓	–	✓	×	✓
Singapore	5/9	✓	×	×	×	✓	✓	✓	–	×	✓
Thailand	6/9	✓	×	×	×	✓	✓	✓	✓	–	✓
Vietnam	7/9	✓	✓	×	✓	✓	✓	✓	✓	×	–

Source: Ranking the Portability of ASEAN Judgments within ASEAN. *Asian Business Law Institute* [online]. February 2022 [cit. 30. 5. 2022]. Available at: https://payhip.com/b/OkhoH

The second column of Table 1 indicates the number of ASEAN jurisdictions in which a judgment rendered in another ASEAN Member State is enforceable. Based on this indicator, it appears that Vietnamese judgments are the "most portable", they can be enforced in seven out of the nine other ASEAN jurisdictions. Vietnamese judgments are followed

11 Enforcement of Foreign Judgments in ASEAN: Ranking the Portability of ASEAN Judgments within ASEAN. *Asian Business Law Institute* [online]. February 2022 [cit. 30. 5. 2022]. Available at: https://payhip.com/b/OkhoH

by Cambodia, Indonesia, Laos, and Thailand, the judgments of which can be enforced in six ASEAN jurisdictions. Whereas judgments rendered by the courts of Brunei, Malaysia, Myanmar, the Philippines, and Singapore are only enforceable in five ASEAN jurisdictions.

When looking into the ten columns under the heading "Country Addressed", it becomes apparent that there are six ASEAN Member States which take a "liberal" approach as to the enforceability of foreign judgments, meaning that they do recognise and enforce foreign judgments. Such countries are Brunei, Malaysia, Myanmar, the Philippines, Singapore, and Vietnam. The Member States belonging to such "liberal block" have been marked with an "asterisk sign" in Table 1. Whereas the remaining four Member States, namely, Cambodia, Indonesia, Laos, and Thailand take an "illiberal" stance by, with two exceptions, not enforcing foreign judgments.

Four of the Member States in the "liberal block", namely Brunei, Malaysia, Myanmar and Singapore are former British colonies, and they follow the common law tradition. The Philippines is a mixed jurisdiction with common law roots, which is the result of its colonisation in the past by the United States. In common law, foreign money judgments are enforceable.[12] Vietnam is the only civil law jurisdiction in this block.

Amongst the ASEAN Member States which belong to the "illiberal block" there are two countries, Indonesia (a civil law country) and Thailand (a predominantly civil law legal system, but a hybrid of many influences), which do not recognise and enforce foreign judgments, because their laws do not allow for it. Whereas in principle, Cambodia and Laos do recognise and enforce foreign judgments, they interpret the prerequisite reciprocity in a restrictive manner. In practice, according to the Laos and Cambodia country reports embedded in ABLI's Compendium, reciprocity can only be established if there is a treaty providing for the mutual recognition and enforcement of foreign judgments. Since Cambodia and Laos each has only one bilateral treaty with Vietnam, in Cambodia and Laos only Vietnamese judgments can be enforced.

12 We must note, however, that in the Philippines the Rules of Civil Procedure of 1997 (i.e., a statutory source) provides for requirements which enable the enforcement of money judgments.

According to ABLI, there are two primary hurdles that prevent judgments rendered by the courts of one ASEAN Member State from being enforced by the courts of another ASEAN Member State. The first hurdle is the absence of laws for the enforcement of judgments. This is the case in Indonesia and Thailand which do not have laws that allow for the enforcement of foreign judgment from any country. The second hurdle is the rigid standard of reciprocity in Cambodia and Laos, which only enforce judgments from countries with which they have a bilateral agreement to do so.[13]

3 Mutual Trust: The Cornerstone of Judicial Cooperation in the EU

The principle of mutual trust means that one EU Member State can be sure that other Member States respect and ensure an equivalent level of certain common values, in particular the principles of freedom, democracy, respect for human rights, and the rule of law.[14] Mutual trust has its roots in Article 2 of the Treaty on European Union ("TEU"), which provides that: *"the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."* The EU's legal structure is based on the fundamental premise that each Member State shares with all the other Member States a set of common values on which the EU is founded, as stated in Article 2 of the TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

It can be said that mutual trust has become the cornerstone of the EU's legal system and it has been assigned the status of a principle, arguably a structural principle of EU constitutional law. This transpires from Opinion 2/13 on the Accession of the EU to the European Convention on Human

13 Enforcement of Foreign Judgments in ASEAN: Ranking the Portability of ASEAN Judgments within ASEAN. *Asian Business Law Institute* [online]. February 2022 [cit. 30. 5. 2022]. Available at: https://payhip.com/b/OkhoH

14 PRECHAL, S. Mutual Trust Before the Court of Justice of the European Union. *European Papers*. 2017, Vol. 2, no. 1, p. 81.

Rights wherein the Court of Justice of the European Union has stressed that *"the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law* […]. *Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU."*[15]

Judicial cooperation in civil and commercial matters, including the issue of portability of civil and commercial judgments within the EU, is also based on the principle of mutual trust.[16] It is noteworthy, however, that mutual trust in the field of judicial cooperation has not been born in a wink; it has been built up gradually.[17] Such gradual development can be captured, amongst others, in the changes through which the Brussels Regime (i.e., the instruments regulating the issues of jurisdiction and the recognition and enforcement of foreign civil and commercial judgments in the EU) has gone through from the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention") to the Brussels I Regulation (recast) of 2012.[18] Recognition and enforcement of judgments in civil and commercial matters was

15 Opinion 2/13 of the Court of Justice of the European Union of 18 December 2014, para. 191–192.

16 GOMBOS, K. *A jog érvényesülésének térsége – Az Európai Unió nemzetközi magánjogi szabályainak XXI. századi kihívásai.* Budapest: Wolters Kluwer, 2020, p. 93.

17 KENGYEL, M. *Brüsszeltől – Brüsszelig. Tanulmányok az európai polgári eljárásjog köréből.* Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2017, 288 p.

18 The Brussels Regime includes five legal instruments. All five legal instruments are broadly similar in content and application, with differences in their scope of application. They establish a general rule that individuals are to be sued in their state of domicile and then proceed to provide a list of exceptions. The instruments further provide for the recognition of judgments made in other countries.

originally accomplished within the European Communities by the Brussels Convention. The Brussels Convention was replaced by the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), which was the primary piece of legislation in the Brussels framework from 2002 until January 2015. Unlike the Brussels Convention, which was entered into on a treaty basis (i.e., as a multilateral treaty), the Brussels I Regulation is a regulation issued by the European Council and as such was directly applicable in all EU Member States excluding Denmark, which has a full opt-out right from implementing regulations under the Area of Freedom, Security and Justice, which was introduced into the European law under the Treaty of Amsterdam of 1997.[19] The Brussels I Regulation was considered a successful instrument on judicial cooperation in the EU. On 6 December 2012, however, the Council of the EU Justice Ministers adopted a recast of this regulation. The Brussels I Regulation (recast) has been applicable since 2015. It took a major step in the direction of abolishing the *exequatur* procedure (i.e., the procedure for the declaration of enforceability of a judgment in another Member State). Under the Brussels I Regulation (recast) a judgment given in a Member State that falls under the scope of its application (i.e., judgments rendered in civil and commercial matters) are recognised in the other Member States without any specific procedure, and, if enforceable in the Member State of origin, will be enforceable in the other Member States without any declaration of enforceability.[20]

The Brussels Regime's example above shows that EU Member States trust that fundamental rights are protected, and that the rule of law prevails in all other Member States. They have such trust in each other's national legal systems and institutional frameworks, including the judiciaries of other Member States. The question arises then as to whether such mutual trust in other Member States' judiciaries exists in ASEAN. Is there any basis

19 The area of freedom, security and justice is a collection of home affairs and justice policies designed to ensure security, rights and free movement within the EU.

20 TIMMER, L. J. Abolition of Exequatur under the Brussels I Regulation: Ill Conceived and Premature? *Journal of Private International Law*. 2013, Vol. 9, no. 1, p. 129.

for it? To answer this question, we have tried to ascertain the quality of civil justice in ASEAN Member States.[21]

4 Quality of Civil Justice in ASEAN Member States

The first question which necessarily arises concerns the measurement of the quality of civil justice. How can the quality (in the broad sense) of justice systems be measured? There is no single answer for this. Nevertheless, this paper will present the option which is used in the EU: the EU Justice Scoreboard. The EU Justice Scoreboard is an annual comparative information tool which was created to assist the EU and Member States to improve the effectiveness of their national justice systems by providing objective, reliable and comparable data on several indicators relevant for the assessment of the efficiency, quality and independence of justice systems in all Member States. The EU Justice Scoreboard does not present an overall single ranking of the Member States' judiciaries but gives an overview of how all the justice systems function, based on indicators that are of common interest and relevant for all Member States.[22] The main aspects of civil justice and the indicators thereof included in the EU Justice Scoreboard are summarised below in Table 2.

21 In this paper, quality is used in the broad sense by referring to the overall performance of the judiciary, covering aspects such as time, efficiency, and independence of the judicial body. This is opposed to the terminology of the EU Justice Scoreboard which measures the effectiveness of the national justice system of EU Member States based on (i) efficiency, (ii) quality (in the narrow sense) and (iii) independence thereof.

22 EU Justice Scoreboard 2021: digital tools help courts and prosecution services mitigate COVID-19 challenges [online]. *European Commission* [cit. 30. 5. 2022]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3523

Table no. 2: Aspects and indicators of civil justice in the EU Justice Scoreboard

Civil justice aspects		Indicators of civil justice	
(i)	Efficiency	Estimated length of proceedings	i.e., estimated average time in days needed to resolve a case
		Clearance rate	i.e., the ratio of the number of resolved cases to the number of incoming cases
		Number of pending cases	i.e., that remains to be dealt with at the end of the year
(ii)	Quality (in the narrow sense)	Accessibility	e.g., accessibility to legal aid, level of court fees and legal fees, the extent to which legal costs can be recovered, accessibility to alternative dispute resolution methods
		Resources	e.g., financial and human resources, availability of trainings
		Assessment tools	e.g., the use of surveys among court users and legal professionals
		Digitalisation	e.g., access to online information about the judicial system, use of digital tools by courts, online access to courts via secure electronic tools, online access to published judgments
(iii)	Independence	Perceived independence	e.g., perceived independence of courts and judges among the general public and among companies
		Structural independence	e.g., rules, particularly with regards to the composition of the court, the appointment of judges, length of service and grounds for abstention, rejection and dismissal of members of the judiciary

A comprehensive dataset on the quality of judicial services, such as the EU Justice Scoreboard, is not available in ASEAN. In other words, no "ASEAN Justice Scoreboard" exists. However, there are numerous global surveys which capture one or more indicators of judicial performance. Such global surveys are listed below in Table 3.

Table no. 3: Global surveys including indicators of civil justice

Publishing institution		Global survey (year of release)[23]
(i)	Transparency International	Corruption Perceptions Index (2021)[24]
(ii)	World Bank	Doing Business Index (2020)[25]
(iii)	World Bank	Worldwide Governance Indicators (2020)[26]
(iv)	World Economic Forum	Global Competitiveness Report (2019)[27]
(v)	World Justice Project	Rule of Law Index (2021)[28]

The global surveys listed in Table 3 cover most of the ASEAN Member States and they measure a wide range of civil justice aspects, such as (i) the length of proceedings, (ii) the accessibility and affordability of justice, (iii) the quality of judicial process (in a narrow sense), (iv) the efficiency of the legal framework in settling disputes, (v) the level of judicial independence, (vi) corruption, and (vii) the rule of law.[29] Such aspects of civil justice linked with the relevant indicators and global surveys can be seen below in Table 4.

23 The data collection period of these surveys varies either because the survey has been discontinued (e.g., World Bank's Doing Business Project), or was not published in 2021. Nevertheless, we used the most recent data available with respect to each survey.

24 Corruption Perceptions Index 2021. *Transparency International* [online]. [cit. 30. 5. 2022]. Available at: https://www.transparency.org/en/cpi/2021

25 Doing Business 2020: Comparing Business Regulation in 190 Economies. *World Bank Group* [online]. [cit. 30. 5. 2022]. Available at: https://openknowledge.worldbank.org/handle/10986/32436; Doing Business. *The World Bank* [online]. [cit. 30. 5. 2022]. Available at: https://archive.doingbusiness.org/en/doingbusiness

26 Worldwide Governance Indicators. *The World Bank* [online]. [cit. 30. 5. 2022]. Available at: http://info.worldbank.org/governance/wgi/; Worldwide Governance Indicators. Interactive Data Access. *The World Bank* [online]. [cit. 30. 5. 2022]. Available at: http://info.worldbank.org/governance/wgi/Home/Reports

27 Global Competitiveness Report 2019. *World Economic Forum* [online]. [cit. 30. 5. 2022]. Available at: http://reports.weforum.org/global-competitiveness-report-2019/competitiveness-rankings/#series=GCI4

28 Rule of Law Index 2021. *World Justice Project* [online]. [cit. 30. 5. 2022]. Available at: https://worldjusticeproject.org/rule-of-law-index/global

29 Such exceptions are the indicators of the World Justice Project's Rule of Law Index (2021), which do not include data regarding Brunei and Laos; The World Economic Forum's Global Competitiveness Report, which lacks data regarding Myanmar; and the Transparency International's Corruption Perceptions Index, which does not cover Brunei.

Table no. 4: Aspects of civil justice captured by global surveys including data regarding ASEAN Member States

Aspects of civil justice		**Indicators of global surveys capturing the respective aspect of civil justice**
(i)	Length of proceedings	The World Bank's Doing Business Index's enforcing contracts indicators including sub-indicators on the time necessary for resolving a commercial dispute through a local first-instance court and the time necessary for compulsory enforcement
		The World Justice Project's Rule of Law Index's civil justice indicator's sub-indicator: "civil justice is not subject to unreasonable delay"
(ii)	Accessibility and affordability	The World Bank's Doing Business Index's enforcing contracts indicator's sub-indicator on the costs of resolving a commercial dispute through a local first-instance court and the costs of compulsory enforcement
		The World Justice Project's Rule of Law Index's civil justice indicator's sub-indicator: "people can access and afford civil justice"
(iii)	Quality (in the narrow sense) of judicial process	The World Bank's Doing Business Index's enforcing contracts indicator's sub-indicator on the quality of judicial process
(iv)	Efficiency of the legal framework in settling disputes	The World Economic Forum's Global Competitiveness Report's indicator on the efficiency of the legal framework in settling disputes
(v)	Judicial independence	The World Economic Forum's Global Competitiveness Report's indicator on judicial independence
		The World Justice Project's Rule of Law Index's civil justice indicator's sub-indicator: "civil justice is free of improper government influence"
(vi)	Corruption	The World Bank's Worldwide Governance Indicator's control of corruption indicator
		The World Justice Project's Rule of Law Index's civil justice indicator's sub-indicator: "civil justice is free of corruption"
		Transparency International's Corruption Perceptions Index indicator on the perceived level of corruption
(vii)	Rule of law	The World Bank's Worldwide Governance Indicator's rule of law indicator
		The World Justice Project's Rule of Law Index's rule of law indicator

Certain aspects of civil justice are captured by more than one global survey. For instance, the length of judicial proceedings is measured by the World Bank's Doing Business Index and the World Justice Project's Rule of Law Index, or corruption is measured by three global surveys: the World Bank's Doing Business Index, the World Justice Project's Rule of Law Index, and the Transparency International's Corruption Perceptions Index. While other aspects, such as the quality (in the narrow sense) of the judicial process and the efficiency of the legal framework in settling disputes are only captured by one survey, the World Bank's Doing Business Index, and the World Economic Forum's Global Competitiveness Report, respectively.

Multiple surveys capturing the same aspect of civil justice allow us to fill the gap of information (if any) and/or spot consistencies and inconsistencies between the surveys. For instance, regarding the aspect of the length of legal proceedings (respective data can be found in Table 5.1), the World Bank's Doing Business Index fills the information gap regarding Brunei and Laos, the two economies which have not been covered by the World Justice Project's Rule of Law Index. In many cases, the findings of the various rankings are consistent. For instance, regarding corruption, all three surveys which capture this aspect of civil justice place Singapore the most and Cambodia the least free of corruption amongst ASEAN Member States. However, in some cases, there are discrepancies between the findings of the surveys despite the fact that they touch upon the same or very similar issues. For instance, regarding the accessibility and affordability of civil justice (respective data can be found in Table 5.1), according to the "people can access and afford civil justice" component of the World Justice Project's Rule of Law Index, Cambodia and Myanmar score the same (i.e., both economies score 0.35), which makes us wonder how these two countries could get the same score when, according to the "enforcing contracts" component of the World Bank's Doing Business Index, the cost of enforcement of a contract compared to the amount in controversy (i.e., the amount that the plaintiff is trying to assert through litigation) in Myanmar and Cambodia are 51.5% and 103.4% of the claim amount, respectively. Under the World Bank's Doing Business Index, this means that the costs of the enforcement of a contractual claim of $ 5,000, which arises from an order of custom-made furniture in respect of the quality of such furniture between

the seller and the buyer, in Myanmar and Cambodia amount to $ 2,575 and $ 5,170, respectively.[30] Such discrepancies make us draw conclusions from these surveys with cautiousness.

In Tables 5.1 and 5.2, we have gathered the scores achieved by each ASEAN Member States regarding the thirteen indicators of the global surveys listed in Table 3. For ease of reference, we indicate how such scores rank amongst the ASEAN Member States in Tables 5.1 and 5.2. The thirteen relevant indicators of the global surveys have been grouped into seven categories in accordance with Table 4, each corresponding to one aspect of civil justice.

Table no. 5.1: ASEAN Member States' ranks and scores in relevant global surveys[31]

ASEAN Member State	(i) Length of proceedings		(ii) Accessibility and affordability		(iii) Quality of judicial process	(iv) Efficiency of legal framework in settling disputes
	WB – DB 2020 Enforcing contracts – Time (Calendar days)	WJP – ROL 2021 – Civil justice is not subject to unreasonable delay (0–1)	WB – DB 2020 – Enforcing contracts – Cost/Claim value (%)	WJP – ROL 2021 – People can access and afford civil justice (0–1)	WB – DB 2020 – Enforcing contracts – Quality of judicial process (0–18)	WEF – GCR 2019 – Efficiency of legal framework in settling disputes (1–100)
Brunei	7th (540)	N/A[32]	6th (36.6)	N/A	3rd (11.5)	6th (49.9)
Cambodia	6th (483)	7th (0.29)	10th (103.4)	7th (0.35)	6th (4.5)	8th (33.8)
Indonesia	3rd (403)	3rd (0.52)	9th (70.3)	5th (0.5)	4th (8.9)	5th (51.1)
Laos	8th (828)	N/A	5th (31.6)	N/A	8th (3.5)	4th (52.2)
Malaysia	5th (425)	2nd (0.71)	7th (37.9)	3rd (0.57)	2nd (13)	2nd (69)
Myanmar	10th (1160)	5th (0.46)	8th (51.5)	6th (0.35)	8th (4)	N/A
Philippines	9th (962)	6th (0.35)	4th (31)	4th (0.53)	6th (7.5)	9th (33.5)
Singapore	1st (164)	1st (0.91)	2nd (25.8)	1st (0.63)	1st (15.5)	1st (86.6)
Thailand	4th (420)	8th (0.26)	1st (16.9)	2nd (0.6)	5th (8.5)	3rd (53.5)
Vietnam	2nd (400)	4th (0.49)	3rd (29)	5th (0.5)	6th (7.5)	7th (43)

30 Enforcing Contracts Methodology. *The World Bank* [online]. [cit. 30. 5. 2022]. Available at: https://archive.doingbusiness.org/en/methodology/enforcing-contracts

31 Abbreviations in Table 5.1: WB stands for World Bank; DB stands for Doing Business; WJP stands for World Justice Project; ROL stands for Rule of Law; WEF stands for World Economic Forum; and GCR stands for Global Competitiveness Report.

32 N/A means that data regarding a particular ASEAN Member State is "not available".

Table no. 5.2: ASEAN Member States' ranks and scores in relevant global survey[33]

ASEAN Member State	(v) Judicial independence		(vi) Corruption			(vii) Rule of law	
	WEF – GCR 2019 – Judicial Independence (1–100)	WJP – ROL 2021 – Civil justice is free of improper government influence (0–1)	WB – WGI 2020 – Control of corruption (1–100)	WJP – ROL 2021 – Civil justice is free of corruption (0–1)	TI – CPI 2021 (1–100)	WB – WGI 2020 – Rule of law (1–100)	WJP – ROL 2021 – Overall scores of rule of law (0–1)
Brunei	6th (48.8)	N/A	2nd (87)	N/A	N/A	2nd (80.3)	N/A
Cambodia	9th (28.6)	8th (0.16)	10th (11.1)	8th (0.12)	9th (23)	9th (17.8)	8th (0.32)
Indonesia	3rd (52.2)	3rd (0.49)	5th (38.9)	5th (0.4)	4th (38)	6th (41.8)	3rd (0.52)
Laos	4th (50.1)	N/A	9th (14.9)	N/A	7th (30)	8th (20.7)	N/A
Malaysia	2nd (68.7)	2nd (0.55)	3rd (62.5)	3rd (0.7)	2nd (48)	3rd (73.1)	2nd (0.57)
Myanmar	N/A	7th (0.21)	8th (27.9)	7th (0,3)	8th (28)	10th (10.6)	7th (0.39)
Philippines	8th (32.2)	5th (0.32)	7th (34.1)	4th (0.5)	6th (33)	7th (31.7)	6th (0.46)
Singapore	1st (77.4)	1st (0.68)	1st (99)	1st (0.85)	1st (85)	1st (98.6)	1st (0.78)
Thailand	5th (49.7)	4th (0.48)	6th (38.5)	2nd (0.72)	5th (35)	4th (57.7)	4th (0.5)
Vietnam	7th (40.9)	6th (0.31)	4th (42.3)	6th (0.34)	3rd (39)	5th (48.6)	5th (0.49)

Now we turn to the analysis of the data included in Tables 5.1 and 5.2. It appears that out of all the thirteen rankings examined, Singapore (a high-income country and a common-law jurisdiction) comes as the first or the second-best performer. In fact, Singapore has ranked twelve times as the best performer with respect to these indicators in ASEAN. The sole indicator under which Singapore has got the silver medal (and not gold) is the indicator by which the World Bank's Doing Business Index measures the costs of enforcement of a commercial contract. The enforcement of a commercial contract was found more affordable in Thailand (16.9% of the amount in controversy) than in Singapore (25.8% of the amount in controversy). However, if we compare the quality of the judicial process captured by the same survey in these countries, we find

33 Abbreviations in Table 5.2: WEF stands for World Economic Forum; GCR stands for Global Competitiveness Report; WJP stands for World Justice Project; ROL stands for Rule of Law; WB stands for World Bank; WGI stands for Worldwide Governance Indicator; TI stands for Transparency International; and CPI stands for Corruption Perceptions Index.

that out of the 18 achievable scores, Singapore and Thailand got 15.5 and 8.5, respectively. In respect of Singapore and Thailand, therefore, it can be said that for a somewhat higher price one may get a judicial service of a significantly better quality.

Singapore's excellent performance in these aspects does not come as a surprise. Singapore is a high-income country, and it can certainly afford spending more on its judiciary than, for instance, the Least Developed Countries ("LDC") in ASEAN (i.e., Cambodia, Laos, and Myanmar). In addition, for a long time, Singapore has sought to position itself as a neutral venue for dispute resolution between parties from different jurisdictions. Accordingly, it has created the necessary legislative and institutional framework. For example, the Singapore International Arbitration Centre has become one of the most prominent arbitral institutions worldwide, the Singapore International Commercial Court has been established to attract international businesses to take advantage of the well-designed court-based mechanism.[34] Singapore's strategic geographical location together with its well-developed and respected legal system and legal infrastructure made it well placed to become the Asian dispute resolution hub to cater for the growth in cross-border, multi-jurisdictional disputes in Asia. As to the performance level of its judiciary, Singapore is clearly not an average ASEAN Member State. In numbers, it means that, in each ranking, Singapore scores significantly higher than the median performance level of ASEAN Member States.

Besides Singapore, Malaysia's scores are also noteworthy. In seven cases amongst the thirteen rankings, Malaysia, an upper-middle-income common law jurisdiction, scored the second-best.

On the lower end of the rankings, there are Cambodia and Myanmar. Amongst the indicators examined, Cambodia (a lower-middle income LDC, a civil law jurisdiction) and Myanmar (a lower-middle income LDC, a common law jurisdiction) ranked the last or the penultimate place eleven and six times, respectively.

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34 Arbitration in Singapore. *Singapore International Commercial Centre* [online]. [cit. 30. 5. 2022]. Available at: https://www.siac.org.sg/about-us/why-siac/arbitration-in-singapore; Establishment of the SICC. *Singapore International Commercial Court* [online]. [cit. 30. 5. 2022]. Available at: https://www.sicc.gov.sg/about-the-sicc

Considering the extreme historical burden that the country had to overcome, Cambodia's weak performance with regard to the indicators in question does not come as a surprise either. 17 April 1975 marked a brutal break in the development of Cambodia's fledgling legal and judicial system when the Pol Pot-led Khmer Rouge[35] marched into Phnom Penh and seized control of the country. The country's borders were subsequently closed, and Cambodia was isolated for years. For quite a while, the international community did not know what was happening inside Cambodia's borders. The Khmer Rouge's aim was to build a communist agrarian society based on peasant equality. The Khmer Rouge abolished private property, eliminated the circulation of money. The urban population was forced into labour camps, and people who were literate and spoke languages were considered enemies of the regime and executed. The education system was completely ripped apart, claiming that it was not needed for rice production. In less than four years of the Khmer Rouge regime (officially known as Democratic Kampuchea), UN experts estimate that 2–3 million people had died without the country being at war,[36] while the Yale University's Cambodian Genocide Program estimates the number of victims under the regime at 1.7 million.[37] According to our knowledge, around 200,000 people were executed for political reasons, while the rest died because of intolerable working conditions, general hunger, and a complete lack of medical care. The Khmer Rouge ideology considered law to be unnecessary. In Pol Pot's Democratic Cambodia, there was no justice system. The late Professor Jörg Menzel, of the University of Bonn, put it aptly when he said that: *"It seems misleading to qualify the time of the Khmer Rouge rule as a legal system of extreme communist or Maoist nature, as the Khmer Rouge did not operate under any kind of 'legal' system. Whereas other extreme dictatorships like the German National Socialists or the Soviet Union under Stalin abused and perverted the legal structure for their evil purposes, the Khmer Rouge simply abolished the law."*[38] Michael

35 Khmer refers to the dominant ethnic Group In Cambodia, while Rouge (red) refers to leftism.

36 BALOGH, A. *Délkelet-Ázsia története*. Budapest: ELTE Eötvös Kiadó, 2018, pp. 427–433.

37 Cambodian Genocide Program. *Yale University* [online]. [cit. 30. 5. 2022]. Available at: https://gsp.yale.edu/case-studies/cambodian-genocide-program

38 MENZEL, J. Cambodian Law: Some Comparative and International Perspectives. In: PENG, H., PHALLACK, K., MENZEL, J. (eds.). *Introduction to Cambodian Law*. Phnom Penh: Konrad Adenauer-Stiftung, 2012, p. 484.

Vickery described this situation as a complete "legal vacuum".[39] San Francisco University Professor Emerita Dolores A. Donovan, who was involved in the rebuilding of Cambodia's legal system as a consultant in the 1990s, said: *"In 1975, the Khmer Rouge destroyed the Cambodian legal system. Legislators, prosecutors, judges, lawyers, and law professors were killed or forced to flee the country. Law books were destroyed and the buildings that had housed the courts and the law school were converted to other uses. At the end of the destruction and the massacres, an estimated six to ten legal professionals remained alive in Cambodia. The situation has improved only slightly since then. Cambodia now has laws, but they are few and far between. The country has established courts, but most of them are barely functioning. Likewise, persons have been appointed judges and prosecutors, but few of them are educated in the law. In one respect, the situation has deteriorated even further; because of attrition due to death, the number of fully trained legal professionals now present in Cambodia has declined to five. Moreover, Cambodia has no private lawyers."*[40] Since the 1990s, i.e., the period that Professor Donovan has described, Cambodia's judiciary has made significant progress. Such development can be thanked in a large part to the Japan International Cooperation Agency which provided technical assistance to the Royal Government of the Kingdom of Cambodia in establishing the court system and drafting Cambodia's new Code of Civil Procedure.[41] According to the present state of things, the Cambodian court system consists of three levels: Provincial/Municipal Courts, Appellate Courts, and the Supreme Court; and the same courts try both commercial cases and non-commercial civil cases, such as family disputes.[42] However, the Cambodian Ministry of Justice is currently working on the establishment

39 VICKERY, M. Kampuchea: Politics, Economics and Society. London: 1986, referred to in PHALLACK, K. Overview of the Cambodian Legal and Judicial System. In: PENG, H., PHALLACK, K., MENZEL, J. (eds.). *Introduction to Cambodian Law*. Phnom Penh: Konrad Adenauer-Stiftung, 2012, p. 8.

40 DONOVAN, D. A. Cambodia: Building a Legal System from Scratch. *The International Lawyer*. 1993, Vol. 27, no. 2, p. 445.

41 The Legal and Judicial Development Project (Phase 3). *Japan International Cooperation Agency* [online]. [cit. 30. 5. 2022]. Available at: https://www.jica.go.jp/project/english/cambodia/0701047/outline/index.html

42 Report of the International Bar Association's Human Rights Institute. Justice versus corruption. Challenges to the independence of the judiciary in Cambodia. *International Bar Association* [online]. September 2015 [cit. 30. 5. 2022]. Available at: http://ticambodia.org/library/wp-content/files_mf/1443694998JusticevcorruptioninCambodiaAug2015.pdf

of separate commercial courts, which is expected to further enhance the Cambodian court's capability in handling commercial disputes in a just and professional way.[43]

Despite the above analysis of the data included in Tables 5.1 and 5.2., it is to be noted that there are several weaknesses in the methods we used to compare the quality of civil justice in ASEAN Member States. For instance, aspects which have been captured by more indicators (e.g., indicators capturing corruption) are overrepresented when compared with equally important aspects which have been covered by only one survey (e.g., quality of justice in the narrow sense). Or, in some cases (albeit rare), there is a discrepancy between indicators measuring the same or very similar aspect of civil justice (e.g., regarding the aspect of accessibility and affordability of courts in Myanmar's and Cambodia's cases). This might be the result of the differences in the methodology adopted by the two global surveys that we have considered or the slight divergence in the surveys' sample taking period, which vary from 2019 to 2021. In addition, the World Justice Project's Rule of Law Index does not cover two ASEAN Member States, Brunei and Laos.

Further, it would be overly ambitious, and would most likely lead to an unfair result should we attempt to create an overall ranking of the ASEAN Member States based on the scores achieved regarding the indicators considered in Tables 5.1 and 5.2. This is because of the difficulty in determining the appropriate weight to be accorded to each aspect in a combined, single ranking, i.e., to decide, for instance, whether a perfect and unchallengeable judgment rendered in a very lengthy judicial proceeding is better than a judgment with slight errors rendered within a reasonable time. Or, whether it is better to have courts which are not accessible for all the citizens because of their high fees and costs or courts which are affordable and accessible in general, but occasionally apply corrupt practices.

43 TITH, K. Labour and Commercial Court to be operational at the end of this year. *Khmer Times* [online]. 5. 4. 2022 [cit. 30. 5. 2022]. Available at: https://www.khmertimeskh.com/501052967/labour-and-commercial-court-to-be-operational-at-the-end-of-this-year/

Nevertheless, all indicators analysed in Tables 5.1 and 5.2 capture crucial aspects of civil justice. This is because a court, which (i) is unable to hand down a judgment in a reasonable time, or (ii) not affordable or accessible for people, or (iii) cannot provide a service of quality, or (iv) the legal framework within which it operates is inefficient, or (v) wherein judges cannot work independently, or (vi) its officials are corrupt, or (vii) it operates in a country the adherence of which to the rule of law is weak, cannot ensure the fundamental right to a fair trial. We further argue that the scores achieved by Singapore/Malaysia and Cambodia/Myanmar, the top and the weakest performers in Tables 5.1 and 5.2, are so salient that despite the weaknesses of our method we can safely take the opinion that people who seek justice in Singapore or Malaysia have a greater chance to get a judicial service of higher quality compared to the overall quality of judicial process in Cambodia or Myanmar.

5 Conclusion

It appears that the two ASEAN Member States that this paper considers having the highest quality of civil justice (i.e., Singapore and Malaysia) do recognise and enforce commercial judgments rendered by the courts of the Member States that this paper has identified as the weakest performers (i.e., Cambodia and Myanmar) according to the aspects and indicators of civil justice quality set out in Table 4. Therefore, we can conclude that our initial hypothesis, which assumed that ASEAN Member States with more effective judiciaries would be reluctant to enforce judgments coming from weaker performing Member States, is not true. In our analysis, the wide gap which exists between the top and the weakest performing ASEAN Member States in terms of quality of civil justice does not appear as an insurmountable obstacle to the free portability of judgments within ASEAN. For instance, Singapore, instead of raising fences through which judgments from Myanmar cannot flow in, by signing the Singapore-Myanmar MOG in 2020 just further strengthened its willingness to enforce Myanmar judgments.[44]

44 Memorandum of Guidance as the Enforcement of Money Judgments Between the Supreme Court of the Union, Republic of the Union of Myanmar and The Supreme Court of the Republic of Singapore, 2020.

There is no contradiction between ABLI's and our findings. According to ABLI, the two primary hurdles of the free circulation of commercial judgments within ASEAN are the absence of laws for the enforcement of judgments in Indonesia and Thailand, and the rigid standards of reciprocity (i.e., the necessity of a treaty guaranteeing reciprocity) in Cambodia and Laos. Indeed, the obstacle is certainly not, as we erroneously assumed in our hypothesis, that ASEAN Member States with more effective judiciaries would be reluctant to enforce judgments coming from weaker performing judiciaries of other Member States.

If we take Singapore's and Cambodia's examples, where one Member State sits at the top and the other at the bottom of the global surveys rankings which we have examined, the case is rather the contrary. It is Cambodia, the Member State ranked the last or the penultimate place eleven times in the thirteen rankings examined (in Tables 5.1 and 5.2), which does not recognise and enforce judgments rendered by the courts of Singapore, the Member State scoring the best or the second best in all the rankings (in Tables 5.1 and 5.2). Not the other way around. Staying with this example, the question mark remains as to why Cambodia does not allow for the enforcement of Singapore judgments.

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Contact – e-mail

kiraly.lilla@kre.hu, eszter.papp.legal@gmail.com

ORCID

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Did the Preliminary Objections Judgment Resolve the Chagos Archipelago Sovereignty Dispute?

Peng Wang

Law School, Tsinghua University, China

Abstract

Noticing the conclusion of the Preliminary Objections Judgment in the case of *Mauritius vs. Maldives Maritime Delimitation*, this paper asks whether the Special Chamber's decision has resolved the sovereignty dispute over the Chagos Archipelago. It re-examines the conclusion that the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago is a mere assertion and the UK has no legal interest in it. This paper argues that the legal system has a self-reproducing nature by which the Special Chamber regenerates decisions already established in the legal system as the distinction between lawful and unlawful is the most fundamental determination of this system. In this sense, the confirmation of the Advisory Opinion of the International Court of Justice by the Special Chamber should be regarded as a consequence of its subjectivity and the fact that it almost distinguishes the legal system from other systems outside the law. From a perspective outside the legal system, the claim of courts that its role of "dispute settlement" is more like "case settlement", since courts are resolving disputes after legalization, not the disputes themselves. The *de facto* settlement of disputes should be based on the elimination of the interests or claims of the disputing parties. In this sense, dispute settlement depends on how the legal and political systems work together in a coupling relationship.

Keywords

Dispute Settlement; Dispute Disappearance; Legal System; Preliminary Objections in the Mauritius/Maldives Case; Chagos Archipelago Advisory Opinion.

1 Introduction

On 28 January 2021, the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) delivered a judgment in the Preliminary Objections phase of a dispute concerning the delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean (*Mauritius/Maldives*).[1] The Special Chamber rejected all the Maldives' objections, finding it had jurisdiction over the dispute.[2] The most controversial decision of the Preliminary Objections Judgment is its judgment on the first objection concerning the Chagos Archipelago sovereignty dispute. Due to the principle of "the land dominates the sea",[3] without resolution of the sovereignty dispute over the Chagos Archipelago, it will be challenging to deal with the maritime delimitation issue between Mauritius and the Maldives, so the Special Chamber is facing a "mixed dispute". The point is that the dispute over the sovereignty of the Chagos Archipelago is not between the parties to the case, Mauritius and the Maldives, but between Mauritius and the United Kingdom.

The Chagos Archipelago, about 500 kilometres from the Maldives in the Indian Ocean, is the subject of overlapping claims by the Maldives and Mauritius. In the Preliminary Objection, the Maldives asserted that the Special Chamber has no jurisdiction to determine such a dispute of sovereignty because *"the question of whether Mauritius is the 'coastal state' in respect of the Chagos Archipelago is not a dispute concerning the interpretation or application of UNCLOS"*,

1 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 354 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

2 Ibid.

3 Judgment of the ICJ of 16. 3. 2001, *Qatar vs. Bahrain (Maritime Delimitation and Territorial Questions)*. In: *International Court of Justice* [online]. P. 97, para. 185 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/87/087-20010316-JUD-01-00-EN.pdf; Judgment of the ICJ of 20. 2. 1969, *Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands (North Sea Continental Shelf)*. In: *International Court of Justice* [online]. P. 51, para. 96 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/52/052-19690220-JUD-01-00-EN.pdf; Judgment of the ICJ of 8. 10. 2007, *Nicaragua vs. Honduras (Territorial and Maritime Dispute in the Caribbean Sea)*. In: *International Court of Justice* [online]. Para. 113, 126 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/120/120-20071008-JUD-01-00-EN.pdf

and the decision of the Special Chamber will inevitably determine whether the United Kingdom is the sovereign of the Chagos Archipelago. Therefore, it is manifestly outside the jurisdiction of the Special Chamber under Article 288 of the United Nations Convention on the Law of the Sea ("UNCLOS") and so the Special Chamber cannot make a decision until the dispute on the sovereignty over the Chagos Archipelago is settled.[4] The Maldives stated that the United Kingdom may be an indispensable party with a legal interest in the dispute concerning the delimitation case between Mauritius and the Maldives,[5] thus hindering the jurisdiction of the Special Chamber under the Monetary Gold principle, according to which *"a court or tribunal cannot exercise its jurisdiction in the absence of an indispensable party"*[6]. Therefore, the ruling of the Preliminary Objection depends on *"the validity of the premise of Mauritius' sovereignty over the Chagos Archipelagos"*[7].

However, as the Special Chamber observed in the Preliminary Objections Judgment, the pronouncement that the General Assembly did not submit to the ICJ a bilateral dispute over sovereignty does not necessarily infer that the Advisory Opinion therefore has no relevance or implication for the issue of sovereignty.[8] The Special Chamber referred to the Chagos Advisory Opinion. It distinguished between the binding force and the legal effect of an Advisory Opinion of the ICJ.[9] The Special Chamber observed that,

4 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 105 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

5 Ibid., para. 81.

6 Ibid., para. 82; see also Judgment of the ICJ of 15. 6. 1954, *Italy vs. France, United Kingdom of Great Britain and Northern Ireland and United States of America (Case of the Monetary Gold Removed from Rome in 1943)*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/19/019-19540615-JUD-01-00-EN.pdf; Judgment of the ICJ of 30. 6. 1995, *Portugal vs. Australia (Case Concerning East Timor)*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf

7 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 114 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

8 Ibid., para. 166.

9 Ibid., para. 203.

in light of the Advisory Opinion, which determined the United Kingdom's continued administration of the Chagos Archipelago to be an unlawful act of a continuing character, the Special Chamber does not find the Maldives' argument as to the matter-of-fact existence of a sovereignty dispute over the Chagos Archipelago convincing.[10] The Special Chamber concluded that Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations.[11] The Special Chamber stated that the ICJ has determined that the Chagos Archipelago is part of the territory of Mauritius, so there remains no dispute concerning the sovereignty over the Chagos Archipelago.[12]

Then problems arose. The Advisory Opinion did not have the effect of settling the dispute directly,[13] which was recognized by the Special Chamber and the International Court of Justice; on the other hand, the court plays an important role in dispute settlement by judgment. Has the dispute over the sovereignty of the Chagos Archipelago been resolved through the Preliminary Objections Judgment of the Special Chamber? Or has it just disappeared, making it not possible to consider the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago anything more than "a mere assertion"? If the Special Chamber could regard the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago as a mere assertion, thereby establishing jurisdiction over the maritime delimitation between Mauritius and the Maldives, will this judgment result in a settlement or the disappearance of the Chagos Archipelago sovereignty dispute? If not, what prevented this from happening, and what consequences will entail for the Court?

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10 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 243, 245 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

11 Ibid., para. 246.

12 Ibid., para. 248.

13 Advisory Opinion of the ICJ of 8. 7. 1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/93/093-19960708-ADV-01-00-EN.pdf; Advisory Opinion of the ICJ of 9. 7. 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In: *International Court of Justice* [online]. Pp. 136, 162 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf

To discuss the questions above, this paper is divided into three parts. It first examines whether the reasonings of the Preliminary Objections Judgment can be seen as a way to make the dispute concerning the sovereignty of the Chagos Archipelago disappear. To this end, this paper will review the International Court of Justice's criteria for the disappearance of disputes, and examine whether the Preliminary Objection Judgment of the Special Chamber has settled the dispute or made it disappear. In addition to resolving disputes through substantive court judgments, there are two other criteria for the disappearance of disputes. Secondly, it examines in more detail the conclusion of the Preliminary Objections Judgment that the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago is a mere assertion, discussing whether it has the practical effect of making the dispute disappear. This part discusses the contribution the legal system can make in dispute resolution. Several disputes that the court decided on, but where it eventually settled for a contribution from the political system, will be mentioned. Third, a brief review of the United Nations ("UN") Charter illustrates the roles of the political system and the legal system in dispute settlement will be given. An example of a territorial dispute shows that proper mutual functioning between the political system and the legal system is needed for successful dispute settlement because of their coupling relationship.

2 The Preliminary Objections Judgment: Did It Reproduce the Decision of the ICJ or Make the Dispute Disappear?

There has been a protracted debate over the sovereignty of the Chagos Archipelago. Historically, the Chagos Archipelago was a dependency of Mauritius. Yet in 1965, the United Kingdom separated the Archipelago from Mauritius and brought it into the British Indian Ocean Territory (BIOT) as its colony.[14] Mauritius has been independent since 1968 but has not been able to regain its sovereignty over the Chagos Archipelago, although it made an initial claim in the 1980s. In 2010, the United Kingdom

14 Definitive treaty of peace and amity between His Britannic Majesty and His Most Christian Majesty, signed at Paris, the 30 May 1814.

announced it would establish a "marine protected area" around the Chagos Archipelago. Mauritius then initiated the *"Chagos Archipelago Marine Protected Area Arbitration Case"* under Annex VII of the UNCLOS. The tribunal found that the United Kingdom had violated some of its obligations under the UNCLOS by failing to negotiate with Mauritius to establish a marine protected area.[15] However, in the arbitral award, the arbitral tribunal refused to make a decision on the sovereignty of the Chagos Archipelago since it believed that the tribunal had no jurisdiction over sovereignty disputes, as sovereignty disputes have nothing to do with the interpretation or application of the Convention.[16]

In 2017, a UN General Assembly resolution invited the ICJ to issue an Advisory Opinion on the Separation of the Chagos Archipelago. The ICJ issued an Advisory Opinion in February 2019, finding that the separation of the Chagos Archipelago was illegal and that the decolonization process of Mauritius had not yet been completed.[17] The ICJ further stated that the continued administration of the Chagos Archipelago by the United Kingdom constituted an unlawful act of a continuing nature, and therefore *"the United Kingdom is obliged to end its administration of the Chagos Archipelago as soon as possible"*[18]. In May of the same year, the UN General Assembly passed a resolution declaring that *"the Chagos Archipelago is an integral part of Mauritius"* and demanded that the United Kingdom *"unconditionally withdraw its colonial administration from the Chagos Archipelago"* within six months.[19]

While recognizing that the Advisory Opinion and Chagos Arbitration do not have the legal effect of a "sovereignty dispute settlement", the Special Chamber concluded that the United Kingdom's continued

15 Award of the PCA of 18. 3. 2015, *The Republic of Mauritius vs. The United Kingdom of Great Britain and Northern Ireland (Chagos Marine Protected Area Arbitration).* In: *Permanent Court of Arbitration* [online]. Para. 417–420 [cit. 19. 5. 2022]. Available at: https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf

16 Ibid., para. 211–221, 544, 547.

17 Advisory Opinion of the ICJ of 25. 2. 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. In: *International Court of Justice* [online]. Para. 183 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf

18 Ibid., para. 172, 174, 177–178, 183.

19 Resolution adopted by the United Nations General Assembly on 22. 5. 2019, 73/295. *United Nations* [online]. Para. 2–3 [cit. 19. 5. 2022]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/151/29/PDF/N1915129.pdf?OpenElement

claim to sovereignty over the Chagos Archipelago was contrary to those determinations, and that Mauritius' sovereignty over the Chagos Archipelago could be inferred from the ICJ's determinations.[20] Some papers argued that the decision of the Special Chamber meant the dispute was settled by the Special Chamber[21] and criticized the Special Chamber for determining beyond its jurisdiction. However, the Special Chamber never claimed it was settling a dispute over the sovereignty of the Chagos Archipelago.

2.1 Three Circumstances of Dispute Disappearance

If the sovereignty dispute between the United Kingdom and Mauritius over the Chagos Archipelagos remains open, the acceptance of jurisdiction over the demarcation between Mauritius and the Maldives could mean an incidental exercise of jurisdiction over this dispute. The Special Chamber held that it could not and did not incidentally exercise its jurisdiction over the sovereignty dispute over the Chagos Archipelagos. However, the Special Chamber finally concluded that the United Kingdom was not an indispensable party to the present proceedings.[22] It appears that the dispute disappeared without an agreement between the parties or a judgment by the ICJ. Therefore, sorting out the circumstances of the disappearance of disputes will be an essential step towards clarifying the question about a long-standing dispute that disappeared when the Special Chamber established its jurisdiction. To discuss the disappearance of disputes, the concept of "dispute" needs to be understood first. It is easy to acknowledge

20 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 246 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

21 EICHBERGER, F. S. The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation Case-Judgment on Preliminary Objections. *Melbourne Journal of International Law*. 2021, Vol. 22, no. 2, p. 392. GAVER, C. D. Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives). *American Journal of International Law*. 2021, Vol. 115, no. 3, p. 523.

22 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 248 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

the existence of a dispute but hard to give a definition. However, determining the definition of dispute is crucial to a court's jurisdiction, whether the International Court of Justice or the Special Chamber of the ITLOS. Black's Law Dictionary defines "dispute" as "a conflict or controversy, esp. one that has given rise to a particular laws*uit" 23. The standards of the "existence of a dispute", which have been develope*d since the *Mavrommatis Palestine Concessions Case* in the Judgment of the Permanent Court of International Justice (PCIJ) in 1924, stated that a dispute arises when parties have *"a disagreement on the point of law or fact, a conflict of legal views or interests"*[24]. The ICJ stated in another case that a dispute refers to *"a situation in which the two sides held opposite views concerning the question of the performance or non-performance of certain treaty obligations"*[25].

The above-mentioned definition of a dispute was developed by the International Court of Justice to establish jurisdiction. The legal system only seeks to define disputes brought before courts, and uses the limitation of "in legal" or "in law". The focus of the court's work turned to how to resolve disputes after confirmation of the existence of a dispute. Yet as part of this process, the court can either uphold or deny the parties' claims, thus resolving the dispute, or determine that the dispute has disappeared due to other criteria. There are three circumstances of dispute disappearance.

2.1.1 Achievement of the Object of the Claim

There is a direct reference to the concept of a dispute's disappearance in the Nuclear Test Case, where the ICJ found that *"… the dispute has disappeared because the object of the claim has been achieved by other means"*[26]. The unilateral

23 CAMPBELL BLACK, H. *Black's Law Dictionary*. St. Paul: West Publishing Company, 1968, p. 558.

24 Judgment of the PCIJ of 30. 8. 1924, *Greece vs. The United Kingdom (Mavrommatis Palestine Concessions)*. In: *Jus Mundi* [online]. P. 11 [cit. 19. 5. 2022]. Available at: https://jusmundi.com/en/document/decision/en-the-mavrommatis-palestine-concessions-judgment-objection-to-the-jurisdiction-of-the-court-saturday-30th-august-1924#decision_932

25 Advisory Opinion of the ICJ of 30. 3. 1950, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*. In: *International Court of Justice* [online]. Pp. 65, 74 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/8/008-19500330-ADV-01-00-EN.pdf

26 Judgment of the ICJ of 20. 12. 1974, *Australia vs. France (Nuclear Tests Case)*. In: *International Court of Justice* [online]. Para. 55 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-00-EN.pdf

declarations made by the French government caused *"the object of the claim having disappeared, there is nothing on which to give judgment"*[27]. Australia *"asked the International Court of Justice to order that the French Republic shall not carry out any further such tests"*[28]. Yet the ICJ concluded that the object sought by Australia and New Zealand had been achieved since France, in various public statements, had announced its intention to carry out no further atmospheric nuclear tests after the completion of the 1974 series. Therefore, no further judicial action was required.[29] As a result, the first or original category of dispute disappearance is the "achievement of the object of the claims" during the arbitral or judicial process by other means parallel to the proceedings.

The court observed here that the object of the claims is the reason for the existence of the dispute between the parties. Hence the court's jurisdiction must be exercised on a contentious proceeding, but this was not satisfied in the case we are examining. A unilateral statement about a legal or factual situation could create a legal obligation. The validity of these statements does not require any subsequent exchange or acceptance by any country or even any response from other countries. It was by this declaration that France conveyed to the world, including Australia and New Zealand, its intention to effectively end its atmospheric nuclear tests. Therefore, the court's procedure for settling disputes with a judicial decision became unnecessary in that case. The court pointed out, in a more restrained manner, that although judicial settlement may provide a way to achieve international harmony in the event of conflict, unnecessary litigation may create obstacles to achieving such a balance. Therefore, the court refused further action and concluded that the dispute had disappeared. This is a typical case of a dispute disappearing without judicial settlement.

2.1.2 Mootness

The second category of dispute disappearance occurs when a dispute is rendered "moot", meaning the dispute has been *"deprived of practical*

27 Judgment of the ICJ of 20. 12. 1974, *Australia vs. France (Nuclear Tests Case)*. In: *International Court of Justice* [online]. Para. 59 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-00-EN.pdf

28 Ibid., para. 11.

29 Ibid., para. 56.

significance and made abstract or academic"[30], thus *"any adjudication is devoid of purpose"*[31]. For example, in the Northern Cameroon Case, the court found that the disputed treaty, the Trusteeship Agreement, had been terminated by General Assembly Resolution 1608(XV) before the party brought the case to the court. Therefore, the court declared that it *"may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties"* and that *"circumstances that have since arisen render any adjudication devoid of purpose. Any judgment which the Court might pronounce would be without object"*[32].

It is worth noting that not all international courts believe their actions should be limited by mootness, and conditions confirmed to be mootness are somewhat similar to the achievement of the object of the claims. In the European Union – Measures Related to Price Comparison Methodologies (DS 516)[33] – the European Union argued that since the rule claimed by China has already been repealed, *"any findings of the Panel on the repealed Article 2(7) would be of purely academic interest"*[34]. In this case, the repealing of the disputed legislation can be regarded either as an "achievement of the object of the claims" or "rendered academic for want of practical significance." However, even if trade restrictions are lifted or removed, the board continues its proceedings on investigating whether the

30 ROSENNE, S. *The Law and Practice of the International Court*. Leyden: Sijthoff, 1965, p. 309.

31 Preliminary Objections Judgment of the ICJ of 2. 12. 1963, *Cameroon vs. the United Kingdom (Case concerning the Northern Cameroons)*. In: *International Court of Justice* [online]. P. 38 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/48/048-19631202-JUD-01-00-EN.pdf

32 Ibid., p. 27.

33 Art. 2 para. 7 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union.

34 Second Written Submission by the European Union, Geneva, of 27. 2. 2018, Case DS516, *China vs. European Union*, *European Union – Measures Related to Price Comparison Methodologies*. In: *World Trade Organization* [online]. [cit. 19. 5. 2022]. Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm

regulations align with the World Trade Organisation ("WTO") agreement.[35] The essential obligations stipulated in the WTO agreement are objective targets, such as the prohibition of quantitative restriction and national treatment. The principle of the WTO agreement is that the world economy is interdependent,[36] and trade restrictions implemented by one country will influence the global trading system rather than only affect the parties to the dispute. Therefore, the WTO dispute settlement is expected to work as judicial supervision and a mechanism to ensure compliance with the WTO agreement.[37] On the contrary, the International Court of Justice is designed to solve bilateral disputes. The consent of the parties is a precondition for the establishment of the jurisdiction of the International Court of Justice.[38] Its rulings do not spill over into other jurisdictions as under WTO rules, and are thus constrained by mootness.

In addition, the European Court of Human Rights[39] and the European Court of Justice[40] have ruled on cases that have become moot.[41] The European

35 IWASAWA, Y. WTO Dispute Settlement as Judicial Supervision. *Journal of International Economic Law*. 2002, Vol. 5, no. 2, p. 295; see also GATT Panel Report of 14 March 1978, EC – Measures on Animal Feed Proteins, BISD 25S/49; GATT Panel Report of 10 November 1980, EC – Restrictions on Imports of Apples from Chile, BISD 27S/98; GATT Panel Report of 22 February 1982, US – Prohibition on Imports of Tuna and Tuna Products from Canada, BISD 29S/91; GATT Panel Report, EC – Restrictions on Imports of Dessert Apples, BISD 36S/93, adopted 21–22 June 1989; GATT Panel Report of 21–22 June 1989, EC – Restrictions on Imports of Apples, BISD 36S/135; GATT Panel Report, US – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil, BISD 39S/1 28; WTO Panel Report of 23 May 1997, US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R; WTO Panel & Appellate Body Reports of 10 January 2001, US – Import Measures on Certain Products front the European Communities, WT/DS 1 65/R & WT/DS 1 5/AB/R.

36 WTO Agreement; DELABARRE, M. Interdependence Between States and Economies: The International Response. *SSRN* [online]. 6. 10. 2021, p. 2 [cit. 19. 5. 2022]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3917586

37 IWASAWA, Y. WTO Dispute Settlement as Judicial Supervision. *Journal of International Economic Law*. 2002, Vol. 5, no. 2, p. 295.

38 Art. 36 Statute of the International Court of Justice.

39 Judgment of the European Court of Human Rights of 18. 1. 1978, *Ireland vs. United Kingdom*, Case No. 5310/71.

40 Judgment of the European Court of Justice of 9. 7. 1970, *Commission vs. France*, Case 26/69, pp. 575–76; Judgment of the European Court of Justice of 19. 12. 1961, *Commission vs. Italy*, Case 7/61, p. 326.

41 IWASAWA, Y. WTO Dispute Settlement as Judicial Supervision. *Journal of International Economic Law*. 2002, Vol. 5, no. 2, p. 296.

Court of Human Rights *"not only to decide those cases brought before* [it] *but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention"*[42]. They are judicial supervision organs for human rights.[43] Courts are exempt from restrictions of mootness only when they exercise the role of supervision, which is not the case with the International Court of Justice and the Special Chamber.

2.1.3 Dispute Settled by Judgment

The third circumstance of a disappearing dispute is the most common one. A dispute disappears when it is settled by a court with a judgment. International law regards the maintenance of international peace as its fundamental goal,[44] and the judiciary is expected to settle the dispute by peaceful means.[45] Yet the problem is that the legal system only seeks to define disputes brought before courts, and it may only resolve a part it has defined. As the ICJ indicated in the Hostage Case, *"it is for the Court to resolve any legal questions that may be in issue between parties to a dispute, and the resolution*

42 Judgment of the European Court of Human Rights of 18. 1. 1978, *Ireland vs. United Kingdom*, Case No. 5310/71, para. 154.

43 IWASAWA, Y. WTO Dispute Settlement as Judicial Supervision. *Journal of International Economic Law*. 2002, Vol. 5, no. 2, p. 296.

44 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1010; see also MERRILLS, J. G. *International Dispute Settlement*. Cambridge: Cambridge University Press, 1998, 354 p.; COLLIER, J. G., LOWE, V. *The Settlement of Disputes in International Law: Institutions and Procedures*. Oxford: Oxford University Press, 1999, 395 p.; UNITED NATIONS. *Handbook on the Peaceful Settlement of Dispute Between States*. New York: United Nations, 1992, 229 p.; HENKIN, L. *International Law cases and Materials*. St. Paul: West Publishing Company, 1993, Chapter 10; BOWETT, D. W. Contemporary Developments in Legal Techniques in the Settlement of Disputes. In: *Recueil des cours 1983*. The Hague, Boston, Leiden: Martinus Nijhoff Publishers, 1984, Vol. 180, p. 171; MURTY, B. S. "Settlement of Disputes". In: SØRENSEN, M. (ed.). *Manual of Public International Law*. London: Macmillan, 1968, p. 673; see also DAILLIER, P., PELLET, A., QUOC DINH, N. *Droit International Public*. Paris: LGDJ, 2002, p. 821; OELLERS-FRAHM, K., ZIMMERMANN, A. *Dispute Settlement in Public International Law*. Berlin: Springer, 2001, 2253 p.; ECONOMIDÈS, C. P. "L'Obligation de Reglement Pacifique des Differends Internationaux". In: *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*. Brussels: Bruylant, 1999, p. 405; PAZARTZIS, P. *Les engagements internationaux en matière de règlement pacifique des différends entre Etats*. Paris: LGDJ, 1992, 374 p.; BRUS, M., MULLER, S., WIEMERS, S. (eds.). The UN Decade of International Law: Reflections on International Dispute Settlement. Dordrecht: Springer, 1991, 168 p.

45 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1047.

of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute" [46].

The conclusion that the United Kingdom does not have any legal interest in the Chagos Archipelago is not based on any of the above criteria for the disappearance of the dispute. First, the sovereignty over the Chagos Archipelago that Mauritius claimed has not been achieved since the decolonization process has yet to be completed. Second, as far as the sovereignty of the Chagos Archipelago is concerned, there are still conflicting views between Mauritius and the United Kingdom. If both parties were willing to resolve the conflict through judicial bodies, a judgment on the sovereignty dispute would not be deprived of practical significance and made abstract or academic. The Special Chamber is here as a second-order observer, while the International Court of Justice became a primary observer when it issued the *Chagos Archipelago Advisory Opinion*. The International Court of Justice used the code of either lawful or unlawful to judge the United Kingdom's separation and continuing administration of the Chagos Archipelago, and identified the unlawful statutes of the United Kingdom's sovereignty interests over the Chagos Archipelago. When observing whether the United Kingdom has a legal interest in the Chagos Archipelago, which makes it an indispensable third party in the *Case Concerning the Maritime Delimitation Dispute between Mauritius and Maldives*, the Special Chamber, as a subject of the second-order observation, of course, also used the distinction of unlawful or lawful in relation to the United Kingdom's sovereignty interests in the Chagos Archipelago. However, unlike the ICJ as primary observer, it can obtain the materials used by the primary observer ICJ when making decisions and directly observe existing judgments it has made.

The various units in which the law operates and the interactions between them constitute a system, called the legal system. The system backtracks existing legal communications, creates new legal communications, and reproduces

46 Judgment of the ICJ of 24. 5. 1980, *United States of America vs. Iran (Case concerning United States Diplomatic and Consular Staff in Tehran)*. In: *International Court of Justice* [online]. Para. 40 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/64/064-19800524-JUD-01-00-EN.pdf

itself in a recursive manner.[47] All legal decisions, as communication within the legal system, must be made now, but the rationale for legal decisions indicates an essential direction in providing stable expectations for the parties' actions: the impact of this legal decision on the future. There are two explanations for the future here. It is the closest future that the Special Chamber establishes jurisdiction over the maritime delimitation case between Mauritius and the Maldives. Even if deciding whether it has such jurisdiction or not is acceptable, for the longer-term future the decolonization of the Chagos Archipelago and the return of the Chagos Archipelago to Mauritius was clearly stated in the Advisory Opinion, which is the future that the Special Chamber, as part of the international legal system, should promote. This paper argues that the Preliminary Objections Judgment is a reproduction of the opinion of the International Court of Justice within the international legal system. The Special Chamber is a part of this system. It can regenerate the elements conceived by the International Court of Justice, which is the principal judicial organ of the UN. The opinion of the International Court of Justice expressed in its Advisory Opinion – that the continued administration of the Chagos Archipelago by the United Kingdom is unlawful – was decided by the International Court of Justice in the legal system. This opinion has been stabilized as a premise for subsequent communication within the international legal system, and further constrains the Special Chamber's actions, guiding and reinforcing the subsequent selection and confirmation of information. This is not because the Special Chamber was bound by any rule of international law to follow interpretations of the ICJ or because the ICJ is a superior body to any other international court and tribunal as the *"principal judicial organ of the United Nations"*[48]. However, those courts are both in the legal system, as consistency is the essence of judicial reasoning[49] and also the essence of the legal system.

47 LUHMANN, N. The Unity of the Legal System. In: TEUBNER, G. (ed.). *Autopoietic Law – A New Approach to Law and Society.* Berlin: De Gruyter, 1987, pp. 12–35.

48 Art. 1 Statue of the International Court of Justice.

49 Joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al Khasawneh, Buergenthal and Elaraby. *Serbia and Montenegro vs. United Kingdom (Legality of Use of Force).* In: *International Court of Justice* [online]. P. 52 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/111/111-20041215-JUD-01-01-EN.pdf

New cases should conform to the legal norms summarized in the existing judicial practice for consistency and unity of the legal system. In this way, the previous legal communication not only limits the new legal communication but also provides guidance for the latter. In doing so, the legal system thus highlights its subjectivity, distinguishing it from other systems.

It should be noted that the International Court of Justice sometimes reflects on previous decisions and formulates new decisions different from them. However, such a decision must be based on a specific case, which is distinct from the former only because the condition of the specific case is different. New legal reasoning must be proposed to mend cracks in the legal system, but in this case, no reason that would have justified the separation and continued administration of the Chagos Archipelago by the United Kingdom as a lawful act emerged. Given that the Special Chamber does not have jurisdiction over the sovereignty dispute and the purpose of the Advisory Opinion of the International Court of Justice is not to directly resolve the dispute, the Preliminary Objections Judgment should be considered a reproduction of the opinion already established in the Advisory Opinion of the International Court of Justice. This reproduction precludes the possibility of the United Kingdom's claim to the Chagos Archipelago being accepted by the legal system and serves as preparation for the processing of the maritime delimitation dispute between Mauritius and the Maldives in the legal system. Could the Special Chamber have developed a new circumstance for the disappearance of a dispute by confirming that a party has no legal interest in the subject of the "dispute"? The Special Chamber is not an institution addressing territorial disputes and cannot represent the position of the International Court of Justice, so the author cannot jump to a conclusion, but this paper will go a step further by discussing whether this circumstance, if it holds, could make the dispute disappear.

3 The Court's Role: Settle the Dispute or Settle the Case?

The International Court of Justice has never confirmed a dispute between the United Kingdom and Mauritius over the sovereignty of the Chagos Islands. According to the International Court of Justice, divergent views

between the two sides do not mean that the International Court of Justice is dealing with a dispute.[50] In the Preliminary Objections Judgment, the Special Chamber considered that whatever interests the United Kingdom may still have concerning the Chagos Archipelago, they would not render the United Kingdom a state with sufficient legal interests.[51] While acknowledging that the United Kingdom still has substantial administration in place, the Special Chamber concluded in the Preliminary Objections Judgment that the United Kingdom has no legal interest in the Chagos Archipelago. The Special Chamber reproduced the opinion of the legal system in the Preliminary Objections Judgment, in which interests and legal interests were distinguished. Does this then mean that when a court resolves disputes, is there a distinction between disputes as such and legal disputes? This distinction will affect whether the dispute over the sovereignty of the Chagos Archipelago is de facto resolved. The legal documents holding that a court can directly put the dispute to an end are, for example, that *"the Award* […] *puts an end to the dispute definitively and without appeal"* [52] and *"the Award* […] *settles the dispute definitively and without appeal"* [53]. Even if the Special Chamber's preliminary dissenting judgment is a reproduction of existing opinions within the legal system, can it exclude the United Kingdom from sovereignty over the Chagos Archipelago, thus making the Chagos Archipelago sovereignty dispute disappear? The court's role in dispute settlement will be discussed from the perspective of outside law in this part.

50 Advisory Opinion of the ICJ of 25. 2. 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. In: *International Court of Justice* [online]. Para. 79–91 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf

51 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 247 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

52 Art. 54 Convention for the Pacific Settlement of International Disputes of 1899.

53 Art. 81 Convention for the Pacific Settlement of International Disputes of 1907.

3.1 The Disputes Submitted to the Court Are "Legalized" but Comprehensive in Nature

Political factors cannot but be entwined with questions of law.[54] The court was only concerned with establishing that the dispute in question was a legal dispute *"in the sense of a dispute capable of being settled by the application of principles and rules of international law"*[55]. In the Hostage Case, the court said it resolved legal questions rather than legal disputes. The court recognized that it deals with only one aspect of a conflict. The existence of other factors will not affect the positive action of the court: *"yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them"*[56]. The ICJ recognized that political and legal organs deal with aspects of the same basic situation.[57]

The court recognized that the judiciary resolves disputes at the legal level, and the legal level was used in this process. A distinction is sometimes made between legal and political disputes or justiciable and non-justiciable disputes.[58] Since it is difficult to highlight the general objective criteria differentiating the legal and political aspects, the settlement method determines the nature of the conflict. This process can only resolve a specific aspect of a dispute. Scholars have taken this observation further, noting that legal or other aspects of a dispute are shown in the resolution process. The dispute cannot differentiate its legal part from other parts, as there is no such distinction before entering the dispute settlement procedure. Kelsen stated,

54 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1065.

55 Judgment of the ICJ of 20. 12. 1988, *Nicaragua vs. Honduras (Case Concerning Border and Transborder Armed Actions)*. In: *International Court of Justice* [online]. Para. 52 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/74/074-19881220-JUD-01-00-EN.pdf

56 Judgment of the ICJ of 24. 5. 1980, *The United States of America vs. Iran (Case concerning United States Diplomatic and Consular Staff in Tehran)*. In: *International Court of Justice* [online]. Para. 37 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/64/064-19800524-JUD-01-00-EN.pdf

57 Judgment of the ICJ of 26. 10. 1984, *Nicaragua vs. The United States of America (Case Concerning Military and Paramilitary Activities in and Against Nicaragua)*. In: *International Court of Justice* [online]. Pp. 435–439 [cit. 19. 5. 2022]. https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf

58 LAUTERPACHT, H. *The Function of Law in the International Community*. Oxford: The Clarendon Press, 1933, pp. 19–20.

"the legal or political character of a dispute does not depend, as the traditional doctrine seems to assume, on the nature of the dispute, that is to say, on the subject matter to which the dispute refers, but on the nature of the norms to be applied in settlement of the dispute. A dispute is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law" [59]. Jennings expressed similar views: *"the rubric legal dispute should be understood as indicating not only something about the objective character of a dispute submitted to a court but much more the highly technical procedure whereby the court and the parties together reduce their dispute into a form which renders it manageable in an adversarial proceeding in a court of law"* [60].

On the other hand, disputes do not have a specific nature. It is the method of settling them that outlines the type of dispute. Higgins believes that there is little relevance in any definition of a political or legal question; what is relevant is the distinction between a political method and a legal method for solving a dispute.[61] Jennings takes this view further and observes that disputes are of legal nature due to the structuring process brought to court: *"cases brought before a court of law,* […] *invariably have a pleadings procedure by which the matter is indeed 'reduced' to a specific issue, or a series of such specific issues* […] *Everyone with experience of preparing such pleadings knows that the drafting of the submissions will be the moment of truth for some arguments which, before the imposition of this discipline, had seemed cogent"* [62]. Lauterpacht stated that *"the State is a political institution and all questions which affect it as a whole, in particular its relations with other States, are therefore political"* [63]. However, this will not prevent a court from taking active action to resolve a dispute with legal means. There are also various dispute resolution models, and the judicial method is one of them.

59 KELSEN. H. *Principles of International Law.* New York: Holt, Rinehart and Winston, 1966, p. 56.

60 JENNINGS, R. Y. The Proper Work and Purposes of the International Court of Justice. In: SMITH, R. M. *Cambodia's Foreign Policy.* Ithaca, New York: Cornell University Press, 1965, 273 p.; MULLER, A. S., RAIČ, D., THURÁNSZKY, J. M. (eds.). *The International Court of Justice: Its Future Role after Fifty Years.* The Hague, Boston: Brill, Martinus Nijhoff, 1997, pp. 33–45.

61 HIGGINS, R. Policy Considerations and the International Judicial Process. *The International and Comparative Law Quarterly.* 1968, Vol. 17, no. 1, p. 74.

62 JENNINGS, R. Y., quoted in SUGIHARA, T. The Judicial Function of the International Court of Justice. In: MULLER, A. S., RAIČ, D., THURÁNSZKY, J. M. (eds.). *The International Court of Justice: Its Future Role after Fifty Years.* The Hague, Boston: Brill, Martinus Nijhoff, 1997, p. 118.

63 FRY, J. D. *Legal Resolution of Nuclear Non-Proliferation Disputes.* Cambridge: Cambridge University Press, 2013, p. 411.

When the international court asserts it is settling a dispute, it is settling a dispute that can be described and constructed by law.[64] Within the legal system, courts use legal methods to resolve the legal aspects of disputes. This work begins when courts establish their jurisdiction over disputes. Yet even if the legal system can seek to ignore other aspects of the dispute, that does not mean that the political aspects of the dispute will be diminished as a result. The response of the political system is beyond the control of the legal system.

The Advisory Opinion of the International Court of Justice did not confirm the existence of a dispute between the United Kingdom and Mauritius over the sovereignty of the Chagos Archipelago. While acknowledging that there were divergent views, the International Court of Justice did not "legalize" this disagreement. Without it being legalized, it is difficult for the legal system to respond effectively, not to mention resolve it. The Special Chamber concluded that there is no legal interest for the United Kingdom as far as the Chagos Archipelago is concerned. If there is no legal interest, it is impossible to legalize the divergent views as a dispute that can be dealt with by the Special Chamber. The Special Chamber, therefore, stated that the UK's claim was a mere assertion, not making it a party to the dispute.

3.2 Conclusions of the Legal System May Be Rejected by the Political System

This article does not deny that *"sometimes, of course, when an international tribunal settles a legal question, the underlying dispute is also settled"*[65]. However, practice has shown that disputes have not been settled because the court's judgment was not accepted by the political system. Law and politics belong to different functional subsystems, and the communication within the system is dominated by different binary codes. Therefore, the conclusions of the legal system need not necessarily be accepted by the political system. The court completes its task through a judgment. However, due to the refusal of the political system, the adjudicated dispute has not disappeared,

64 GALTUNG, J. Institutionalized Conflict Resolution: A Theoretical Paradigm. *Journal of Peace Research*. 1965, Vol. 4, no. 2, pp. 348–397.

65 TUMONIS, V. *Judicial Decision-Making: Interdisciplinary Analysis with Special Reference to International Courts*. Doctoral thesis. Mykolas Romeris University, 2012, p. 111.

and the parties remain in a state of conflict. In some cases, the political system deliberately distorts the conclusions given by the legal system so that the conclusion of the dispute settlement cannot affect the operation of the political system, nor can they be accepted as the communication precondition of the political system.

The *Corfu Channel Case* could be used as an example. The court made a judgment in 1949[66] and determined the amount of compensation Albania should pay to Great Britain, but Albania refused to enforce the judgment. The dispute wasn't resolved until 1992, when the diplomatic relations between the two countries began to warm up.[67] A Memorandum of Understanding on Compensation between Albania and the United Kingdom was concluded on 29 October 1996, meaning the issues left over by the *Corfu Channel Case* were only resolved almost 50 years after the judgment was made.[68] There are also other examples of diplomatic asylum cases. In its judgment relating to a diplomatic asylum case of 1950, the court ruled that Colombia's asylum practices of unilaterally determining Haya de la Torre's status as a political prisoner violated the Havana Asylum Convention.[69] On the other hand, Peru failed to prove Haya de la Torre guilty of ordinary crimes and was under no obligation to ensure his safe departure. However, the court did not specify whether Colombia was obliged to transfer Haya de la Torre. Colombia's request for further explanation of the judgment has since been rejected by the court.[70] The court pointed out that the parties rather than the court should consider not only the specific implementation of the judgment based on legal considerations but also the practical possibility and political expediency, which are not among the judicial functions of the court.[71]

66 ROSENNE, S. *The Law and Practice of the International Court 1920-2005*. Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 233.

67 Ibid., p. 239.

68 SCHULTE, C. *Compliance with Decisions of the International Court of Justice*. Oxford: Oxford University Press, 2004, p. 98.

69 Judgment of the ICJ of 20. 11. 1950, *Colombia vs. Peru (Asylum case)*. In: *International Court of Justice* [online]. Pp. 287–289 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/7/007-19501120-JUD-01-00-FR.pdf

70 Request for the Interpretation of the Judgment of the ICJ of 20. 11. 1950, *Colombia vs. Peru*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/7/007-19501120-JUD-01-00-FR.pdf

71 Judgment of the ICJ of 13. 6. 1951, *Colombia vs. Peru (Haya de la Torre case)*. In: *International Court of Justice* [online]. Pp. 80–82 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/14/014-19510613-JUD-01-00-EN.pdf

A dispute between Thailand and Cambodia over the Temple of Preah Vihear was not resolved immediately after the court's judgment on 26 May 1961.[72] Thailand even strengthened military control over relevant border areas and took diplomatic and economic sanctions against the countries the three judges were from.[73] The authority and judgment of the International Court of Justice have been challenged by Thailand. The judicial solution may deteriorate the relations between the parties to a certain extent and intensify the conflict between the two sides. A gap between dispute settlement and court judgment also exists in international maritime law. In a fisheries jurisdiction case, Iceland's policy of expanding coastal fishing areas led to a dispute with Britain and Germany. Britain and Germany referred Iceland to the International Court of Justice. Based on the exchange of letters between Britain, Germany and Iceland in 1961, the first two countries questioned the legitimacy of Iceland's unilateral expansion of fishing areas.[74] The legal system sometimes chooses not to respond to signals from the political system due to its closed nature and self-referral between the different systems. Before the judgment of the International Court of Justice, Iceland and Britain reached a provisional agreement through an exchange of letters on 13 November 1973, allowing Britain to continue fishing in Iceland's 50-nautical-mile fishing area for two years.[75] However, a judgment of the International Court of Justice in 1974 was not affected by this provisional agreement, with the court holding that Iceland

72 Judgment of the ICJ of 15. 6. 1962, *Cambodia vs. Thailand (Case concerning the Temple of Preah Vihear)*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/45/045-19620615-JUD-01-00-EN.pdf

73 SMITH, R. M. *Cambodia's Foreign Policy*. Ithaca, New York: Cornell University Press, 1965, p. 150.

74 Exchange of notes constituting an agreement settling the fisheries dispute between the Government of Iceland and the Government of the United Kingdom of Great Britain and Northern Ireland. Reykjavik, 11 March 1961. *United Nations. Treaty Collection* [online]. [cit. 19. 5. 2022]. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20397/volume-397-I-5710-English.pdf; similarly Exchange of Notes constituting an Agreement concerning the Fishery Zone around Iceland, Reykjavik, 19. 7. 1961, 409 UNTS 47.

75 Judgment of the ICJ of 25. 7. 1974, *United Kingdom of Great Britain and Northern Ireland vs. Iceland (Fisheries Jurisdiction case)*. In: *International Court of Justice* [online]. Para. 35 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/55/055-19740725-JUD-01-00-EN.pdf

had no right to unilaterally exclude or restrict the traditional fishing rights of Britain and Germany in the relevant waters, but Iceland did not take action to comply with the judgment. The settlement of the dispute over fishery rights between Iceland and Britain was credited to an agreement signed by the two countries on 1 June 1976,[76] and the substantial resolution of the dispute between Iceland and Germany was through a compromise agreement of 28 November 1975.[77] In addition, the factors that escalated the cost of the conflict between the parties on fishery rights also included the development of the international law of the sea and the confirmation of the UNCLOS. However, the court's decision did not play a crucial part in the settlement of the dispute.

The incommensurability between court decisions and dispute resolution has led to discussions on the role of court decisions in dispute resolution. Scholars have different attitudes to this issue, but broadly they can be divided into optimistic and pessimistic. After a judgment is made, an optimistic person would say: *"Now that the judgment has, with the force of law, determined one of the major issues in question, it should, in my opinion, be possible for negotiations to be resumed to seek a peaceful solution to the dispute"*[78]. Pessimists will think that the role of court decisions is often overestimated in reality: *"It is too much to hope that the parties to a dispute would willingly agree to the resolution of the legal elements of their dispute by the international court as a preparation for settlement of the remaining political issues"*[79]. Yet in any case, no one would be so naive to conclude that after the judgment is made, one party will abandon its claim because of the legal differences that have been interpreted and adjudicated by the court, making the dispute disappear.

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76 Iceland-United Kingdom: Agreement Concerning British Fishing in the Icelandic Waters. *International Legal Materials*. 1976, Vol. 15, no. 4, p. 878.

77 Federal Republic of Germany-Iceland: Fisheries on the Extension of the Icelandic Fishery Limits to 200 Miles. *International Legal Materials*. 1976, Vol. 15, no. 1, pp. 43–47.

78 Separate Opinion of Judge Lachs to the ICJ Judgment of 24. 5. 1980, *The United States of America vs. Iran (Case Concerning United States Diplomatic and Consular Staff in Tehran)*. In: *International Court of Justice* [online]. P. 49 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/64/064-19800524-JUD-01-01-EN.pdf

79 BAXTER, R. The International Court of Justice: Introduction. *Virginia Journal of International Law*. 1971, Vol. 11, no. 3, p. 292.

3.3 Criteria for Dispute Settlement Within the Legal System: Res Judicata

The Special Chamber recognizes that the Advisory Opinion of the International Court of Justice cannot be considered legally binding but emphasizes the distinction between the binding and authoritative nature of the Advisory Opinion, holding that the Advisory Opinion entails an authoritative statement of international law on the questions with which it deals, and the judicial determinations made in advisory opinions carry no less weight and authority than those in judgments.[80] However, this paper argues that neither binding nature nor legal authority is sufficient to distinguish between advisory opinions and judgments. The fundamental difference between them lies in the *res judicata* effect.

Once a valid judgment has been issued, it has the effect of *res judicata* between the parties.[81] Both Article 94 of the UN Charter and Articles 59 and 60 of the Statute of the International Court of Justice provide for the binding nature and finality of the court's judgment and the effectiveness of *res judicata*. *Res judicata* and "bindingness" are different in the strict sense: *res judicata* is *"that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed"*[82]. The International Court of Justice further explained *res judicata* in its judgment, *"that principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose"*[83]. The court will not adjudicate on substantive

80 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 203 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

81 COLLIER, J. G., LOWE, V. *The Settlement of Disputes in International Law: Institutions and Procedures*. Oxford: Oxford University Press, 1999, p. 261.

82 ZIMMERMANN, A. et al. *The Statute of the International Court of Justice: A Commentary*. Oxford: Oxford University Press, 2012, p. 1427.

83 Judgment of the ICJ of 26. 2. 2007, *Bosnia and Herzegovina vs. Serbia and Montenegro (Application of the Convention on the Prevention and Punishment of the Crime of Genocide). International Court of Justice* [online]. Para. 115 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf

disputes that have already been determined. The parties will not sue again on conflicts already determined by the court. The principle of *res judicata* has the effect of concluding arguments and plays an essential role in maintaining the closedness of the legal system. "Cases that have been adjudicated cannot be prosecuted" frees judges from endless debates for the same dispute. Once a court has passed judgment on a dispute, what the legal system can do for dispute resolution has been completed, thus giving the judiciary the ability to resist pressure from the political system.

It is generally recognized that advisory opinions do not have a *res judicata* effect. Since the Advisory Opinion of the International Court of Justice does not have *res judicata*, and the Preliminary Objections Judgment delivered by the Special Chamber is a reproduction of the Advisory Opinion, the dispute concerning sovereignty was not resolved. The United Kingdom can, of course, request the International Court of Justice to make a judgment with a *res judicata* effect by jointly filing a lawsuit with Mauritius to the International Court of Justice. Yet it will be impossible for the United Kingdom to regain legal confirmation of its sovereignty over the Chagos Archipelago by such judgment because the International Court of Justice has already given a clear opinion in its Advisory Opinion of 2019, which was an opinion based on the most fundamental code in the legal system: lawful or unlawful. Since the legal system needs to provide stable expectations for the global community, the possibility of overturning this opinion is slim. From the perspective of the legal system, whether it is an advisory opinion or a court decision, it is, of course, a reflection of the court's efforts to resolve disputes through legal methods, and they are the same in terms of authority. It is impossible for the court to find a party lawful in an advisory opinion and unlawful in the judgment for the same dispute. The sovereignty dispute over the Chagos Archipelago was not resolved by court decision because it is well known that the Advisory Opinion of the International Court of Justice does not have the function of resolving disputes, and the Special Chamber has no jurisdiction over sovereignty disputes.

Binding force is not a valid criterion for distinguishing between judgments and advisory opinions. The legal system produces a so-called "binding decision", hoping that the decision will be accepted by the political system.

As, within the legal system, consistent requirements make it impossible for each unit of the legal system to ignore its judgments, a statement with authority is enough to attract attention. Once it leaves the legal system, the reaction of the political system is not up to the court to decide. Especially for a legal sector such as international law, which lacks an enforcement mechanism, it is difficult to say that a judgment of the International Court of Justice has the force to make it binding. As explained below, this "force" may come from the political system itself.

4 Different Functions of Legal System and Political System in Dispute Settlement

After the Special Chamber issued the Preliminary Objections Judgment, the United Kingdom objected to the Special Chamber's determination of the legal status of the Chagos Archipelago,[84] although the United Kingdom has been deprived of the legitimacy of its sovereignty over the Chagos Archipelago in the legal system. The United Kingdom continues to manage and control the Chagos Archipelago.[85] This fact reminds us that the legal and political systems are separate and cannot replace or be commensurate with each other. The law provides general normative expectations for the parties to a dispute, legitimizes specific claims in a dispute, or confirms that the conduct of a party to a dispute is unlawful, as in the Advisory Opinion for the British administration of the Chagos Archipelago. Law and politics have different functions for settling disputes in the international community. Therefore, the communication between the legal system and the political system is one choice within a vast horizon, and it is possible to reject, misinterpret, or not respond to decisions made in another system.

84 MILLS, C., BUTCHARD, P. Disputes over the British Indian Ocean Territory: February 2021 update. *UK Parliament* [online]. 8. 2. 2021 [cit. 30. 5. 2022]. Available at: https://commonslibrary.parliament.uk/research-briefings/cbp-9134/

85 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 247 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

4.1 Dispute Settlement in the Political System

The role of politics is also recognized in the dispute settlement mechanism.[86] According to the UN Charter, the Security Council shall, when it deems necessary, call upon the parties to settle their dispute by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.[87] Judicial settlement is an option for seeking a solution to a dispute. The political system may reject a judgment made by the international court, thus making it not binding in practical terms. The Commentary of the UN Charter refers to Professor Conforti and Focareellis' theory, suggesting that a dispute has failed to be resolved when *"the possibility of an agreement between the parties proves unrealistic"*[88]. If the Security Council deems that the continuance of the dispute is likely to endanger international peace and security, it will decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.[89] As the judicial organ of the UN system, the effectiveness of judgments and advisory opinions of the International Court of Justice depends on the Security Council as a political body which, in fact, appears to have the ultimate interpretive authority in dispute settlement.

The advantage of the political system in handling disputes is that it facilitates the implementation of a collective decision on disputes. Negotiation between the two parties to the dispute is considered the simplest and most helpful way of dispute settlement. Once the two parties reach a consensus on an understanding of the dispute and how to resolve it, it implies that serious efforts toward that end will be made.[90] The subsequent fulfilment will be much easier. The problem with the political system is that it struggles to provide stable expectations of behaviour. Countries have different political opinions and interests, and it is difficult to reach an agreement

86 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1047.
87 Art. 33 para. 1 UN Charter.
88 CONFORTI, B., FOCARELLI, C. *The Law and Practice of the United Nations*. Leiden: Martinus Nijhoff Publishers, 2010, p. 197.
89 Art. 37 UN Charter.
90 Kingdom of Greece v. Federal Republic of Germany. *International Law Reports*. 1974, Vol. 47, pp. 418, 454.

by diplomatic methods in which both parties share a consensus. However, the political system provides the possibility and factual guarantee for the implementation of the law. Without the Security Council as a political organ to exert pressure on the implementation of legal decisions, and without the implementation of the law by the domestic administration, it is difficult for the legal system to pass collectively binding decisions. This applies for the entire international community. In the forecited cases where decisions of the International Court of Justice may have an adverse effect on the settlement of disputes, it is through diplomacy that the political system has played a non-negligible role in implementing decisions of the International Court of Justice.

4.2 Cooperation Between the Political System and Legal System Is Required

This paper mainly discusses dispute settlement from the perspective of public international law because the author believes it is necessary to point out the limited role of the legal system in dispute settlement, which will in turn help international law scholars reflect on how the fundamental purpose of international law (the maintenance of peace) can be better achieved, especially noting the lack of powerful enforcement mechanisms in international law. Yet it does not mean that the stable expectations the legal system provides can be replaced by contributions from the political system in dispute settlement. Dispute settlement requires cooperation between the legal system and the political system. Under specific circumstances, the legal system and the political system also act at the same time.[91] The successful settlement of the Chad-Libya boundary dispute could be a good example.

Chad and Libya had a dispute over the sovereignty of the Aouzou Strip starting in 1973, with fierce armed conflict breaking out. The Organization of African Unity actively mediated the territorial dispute between Libya and Chad. In October 1988, Libya and Chad officially ended the war and agreed to resolve the boundary dispute peacefully. On 31 August 1989, Chad and Libya signed an agreement on principles for the peaceful settlement of the dispute. The two parties agreed to be heard by the International Court

91 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1011.

of Justice for a peaceful solution if the political method failed to settle the dispute within one year.[92] In the absence of a political settlement within the expected period, Libya and Chad submitted the matter to the International Court of Justice on 31 August and 3 September 1989, respectively, by notification of the Framework Agreement by the two parties.[93] The dispute between the two countries transitioned from seeking a political settlement to a new stage of seeking a judicial settlement.

The International Court of Justice delivered a decision on the boundary dispute between Libya and Chad on 3 February 1994, supporting Chad's view that the border between the two countries had been delimited by the "Franco-Libyan Treaty" of 10 August 1955.[94] Following the judgment, the two countries signed an agreement stipulating that Libya would retreat from the Aouzou Strip before 30 May 1994. The agreement also allowed the UN to monitor the withdrawal of Libya from the Aouzou Strip.[95] With the support of the Security Council and the UN, Libya and Chad delimited a common frontier following the International Court of Justice decision.[96] On 13 June 1994, the Council adopted resolution 926 (1994), confirming that the dispute over the territorial border between Libya and Chad had been resolved through acceptance and implementation by both parties.[97]

The settlement of this dispute was the result of the joint effort by both the political system and the legal system. However, the effect is coupling, which

92 See Report of the Secretary-General of 27. 4. 1994 Concerning the Agreement on the Implementation of the Judgment of the International Court of Justice Concerning the Territorial Dispute Between Chad and the Libyan Arab Jamahiriya, S/1994/512. *United Nations Peacekeeping* [online]. [cit. 19. 5. 2022]. Available at: https://peacekeeping.un.org/mission/past/n9419431.pdf; and generally RICCIARDI, M. Title to the Aouzou Strip: A Legal and Historical Analysis. *The Yale Journal of International Law*. 1992, Vol. 17, no. 2, p. 301.

93 Judgment of the ICJ of 3. 2. 1994, *Libya Arab Jamahiriya vs. Chad (Case concerning the territorial dispute)*. In: *International Court of Justice* [online]. Para. 18 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/83/083-19940203-JUD-01-00-EN.pdf

94 Ibid., para. 77.

95 Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad). *International Law Reports*. 1995, Vol. 100, p. 102.

96 Ibid., p. 103; see also the Letter dated 13. 4. 1994 from the Secretary-General addressed to the President of the Security Council, S/1994/432. *United Nations Peacekeeping* [online]. [cit. 19. 5. 2022]. Available at: https://peacekeeping.un.org/sites/default/files/past/n9417796.pdf

97 Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad). *International Law Reports*. 1995, Vol. 100, p. 111.

means they interact with each other, but their causal effects on the other's systems are neither necessary nor impossible. When two systems operate separately using different divisions of global society, the relationship between the two is coupling. Just as it is impossible to assert the Court's decision that the absence of a dispute between the parties will necessarily lead to settlement of the dispute, nor can we infer from the state's opposition that some change must occur in the legal system. Though the political system and the legal system have their own paces and schedules, we can still hope that communication between the two systems will produce the results we want.

5 Conclusion

The Preliminary Objections Judgment of the Special Chamber in the *Dispute Concerning the Maritime Delimitation Dispute between Mauritius and Maldives* does not meet the criteria used in the past practice of the International Court of Justice to judge the disappearance of a dispute. The Special Chamber does not have jurisdiction over such a territorial dispute, so cannot resolve it. The decision of the Special Chamber to deny that the United Kingdom could have any legal interest in the permanent delimitation between the Maldives and Mauritius of the maritime boundary around the Chagos Archipelago, which could make it an indispensable third party in the *Case Concerning the Maritime Delimitation Dispute between Mauritius and Maldives*, did not make the dispute concerning the sovereignty of the Chagos Archipelago disappear, nor did it resolve the sovereignty dispute, even if the Special Chamber took a positive attitude towards the settlement of the dispute. The decision of the Special Chamber should be seen as a reproduction of the existing observation of the legal system.

From the perspective of the political system, even a judgment does not necessarily result in a dispute being resolved. The information produced by the legal system, when it encounters the political system as an independent system, is at risk of being broadly rejected and misunderstood. Although the existing opinion that continued British administration of the Chagos Archipelago is unlawful and the obligation to complete the decolonization process has been confirmed by the Special Chamber within the legal system, neither the Advisory Opinion of the International Court of Justice nor

the Preliminary Objections Judgment of the Special Chamber concerning the Maritime Delimitation Dispute has a *res judicata* effect. The decision on the legal statutes of the sovereignty of the Chagos Archipelago may be challenged by the United Kingdom, even though the legal system and the political system do not support the United Kingdom's claim at present. However, the settlement of the dispute over the sovereignty of the Chagos Archipelago requires the cooperation of the political system. In this regard, the Security Council, as a political organ, plays a very important role, especially as a body that may have final interpretation and further processing powers over disputes.

The more far-reaching impact of the Special Chamber's decision is that it may significantly change the way parties seek to settle disputes. It may deter parties from pursuing a binding decision as judgment as, realizing that such a binding decision presents difficulties, the parties may increasingly prefer an advisory opinion that relies less on the debate and does not require the consent of both parties, changing the direction to the International Court of Justice for an authoritative decision within the legal system concerning the dispute. It is not yet foreseeable whether this will produce the undesirable consequence of less attention being paid to the parties' jurisdictional objections. Still, it may significantly affect how states involved in a dispute seek resolution. One concern is that various UN organs, such as the General Assembly and the Security Council, clearly have convenient conditions when requesting an advisory opinion from the International Court of Justice, which will make the role of the Security Council as a political body more prominent. If certain countries can carve out an advantage in these institutions, the resulting advice may be rejected or misinterpreted by potentially recalcitrant countries due to the lack of *res judicata*. This may interfere with the independence and closed nature of the legal system, which in turn would affect the ability of the political and legal systems to cooperate in resolving disputes.

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Contact – e-mail

wang-p20@mails.tsinghua.edu.cn

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The Order of Periodic Penalty Payments by the CJEU in Cases Filed by a State Against Another State

Marcin Dorochowicz

Faculty of Law and Administration,
Nicolaus Copernicus University, Poland

Abstract

The CJEU, recognizing rights arising from actions by a Member State against another Member State for failure to fulfil obligations under the Treaties, has the right to "prescribe any necessary interim measures" in cases it is examining. An interesting example of the exercise of this right is the decision of the vice-president of the CJEU of 21 May 2021, which imposed on the Republic of Poland a periodic penalty payment of € 500,000 per day. In the course of the proceedings before the CJEU, Poland raised the procedural charges discussed in this paper. The conclusion is that there are no obstacles to the adjudication of these measures.

Keywords

Court of Justice of the European Union; Interim Measures; Periodic Penalty Payments.

1 Introduction

The topic of the imposition of periodic penalty payments by the Court of Justice of the European Union ("CJEU") in cases arising from a complaint by a Member State against another Member State has recently been the subject of many statements by both politicians and specialists in European Union law in my country as a consequence of the case of the *Czech Republic vs. Republic of Poland,* C-121/21. Such events provoked in the Polish legal doctrine the consideration of the issue of the admissibility of the imposition

of periodic penalty payments by the CJEU in cases brought by a Member State against another Member State,[1] which are worth presenting with a commentary to readers in Europe.

The competence of the CJEU is to hold proceedings arising from actions by a Member State against another Member State for failure to fulfil obligations under the Treaties.[2] The Treaty on the Functioning of the European Union ("TFEU") gives *expressis verbis* the Court the power to *"prescribe any necessary interim measures"* in cases it is examining.[3]

The aim of this paper is to present the issue of the admissibility of an order by the vice-president of the CJEU for periodic penalty payments as interim measures in cases brought by a Member State against another Member State. Therefore, both arguments in favour of and against their admissibility will be presented. The issue of the legal admissibility of the application of periodic penalty payments requires analysis in two aspects. First, the trial body and, second, the active power of the Member State to make such an application. These issues were raised by the Republic of Poland in case C-121/21 and will therefore be discussed using it as an example.

The author will try to resolve this issue based on an analysis of the normative state and the views of the doctrine. Therefore, the formal-dogmatic method will be used.

2 Case of the *Czech Republic vs. the Republic of Poland* (C-121/21)

By making use of possibility in the Treaty, the Czech Republic brought an action against the Republic of Poland to seek the fulfilment of its obligations under Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. The Czech

1 BIERNAT, S. Zarządzenie tymczasowe w sprawie kopalni Turów. *Europejski Przegląd Sądowy*. 2021, Vol. 6, p. 1; BULAJSKI, R. Pół miliona euro kary dziennie za kopalnię Turów. Omówienie postanowienia TS z dnia 20 września 2021 r., C-121/21 R (Czechy p. Polsce). *LEX/el* [online]. [cit. 31. 5. 2022]. Available at: https://sip.lex.pl/komentarze-i-publikacje/omowienia/pol-miliona-euro-kary-dziennie-za-kopalnie-turow-omowienie-151374152

2 Art. 259 TFEU.

3 Art. 279 TFEU.

Republic, supported by the European Commission,[4] applied for a declaration that the Republic of Poland, by adopting measures as part of an administrative procedure aimed at extending the term of the mining concession for the Turów lignite mine (Poland)[5] until 2026,[6] has breached a number of pieces of EU legislation on environmental protection,[7] as well as the provisions of two other directives, and the principle of sincere cooperation within the meaning of Article 4 para. 3 Treaty on European Union ("TEU"). According to the applicant, Poland failed to fulfil its obligations by allowing the extension by six years of the development consent for the extraction of lignite without conducting an environmental impact assessment ("EIA"); by allowing the exclusion of the public concerned from the procedure for the grant of mining development consent for such extraction; by declaring the EIA decision for the continuation of lignite extraction until 2044 to be immediately enforceable; by failing to include in the EIA decision a potential procedure to be followed in the event exemptions are not granted for the bodies of water concerned under an EU directive; by failing to allow the intervention of the public concerned and of the Czech Republic in the procedure for the extension of the mining development consent for that mine by six years; by failing to publish the mining development consent granted until 2026 and failing to provide it to the Czech Republic in a comprehensible form; by failing to enable judicial review of the mining development consent granted until 2026; by failing to provide complete information in connection with the procedure for the granting of the mining development consent until 2026; by failing, in the mining development consent granted until 2026, to take sufficient regard of the EIA decision; and by failing to set sufficient environmental conditions in the mining development consent granted until 2026.

4 Order of the Vice-President of the CJEU of 19. 5. 2022, *Poland vs. the Czech Republic, supported by the European Commission*, Case C-121/21 R-RAP.

5 Poland. Concession No 65/94 of 27. 4. 1994, issued by the Minister of Environmental Protection, Natural Resources and Forestry, for the extraction of lignite from the "Turów" deposit, valid until 30 April 2020.

6 Poland. The decision of the Regional Director for Environmental Protection in Wroclaw of 21. 1. 2020 (as amended) establishing the environmental conditions for the project consisting in the continuation of the exploitation of the "Turów" lignite deposit in the Bogatynia commune.

7 Action brought on 26. 2. 2021, *Czech Republic vs. Republic of Poland*, Case C-121/21.

The dispute in the present case concerned the cross-border effects resulting from the mining activities of the Polish operator in the above-mentioned mine, which were the subject of disagreement between the two Member States. On the one hand, the Czech Republic claims that its citizens living close to the border unjustifiably suffer the environmental consequences of the mining activities, such as a significant fall in the groundwater table and subsidence. On the other hand, the Republic of Poland maintains that the closure of the mines would cause serious economic losses both in terms of energy supply and employment.[8]

At the request of the Czech Republic, by a decision of 21 May 2021, the vice-president of the Tribunal ordered the Republic of Poland to cease lignite mining activities at the Turów mine immediately, pending delivery of the judgment closing the proceedings.[9] It should be noted that the obligation of a Member State to refrain from certain actions that may constitute a breach of EU law is one of the eight types of interim measures distinguished in the doctrine.[10]

The Republic of Poland undoubtedly failed to fulfil its obligations under that order. The Czech Republic therefore applied to the CJEU to order the Republic of Poland to pay the EU budget a periodic penalty payment of € 5 million per day. On the basis of Article 279 of the TFEU, the Court has *expressis verbis* the power to *"prescribe any necessary interim measures"* in cases it is examining. This is a typical temporary measure.[11] For example, the provisions of Polish civil procedure stipulate that: *"If the subject of the security is not a pecuniary claim, the court shall grant security in such a way that it deems appropriate according to the circumstances."*[12]

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8 Opinion of the Advocate General Priita Pikamäe delivered on 3. 2. 2022, *Czech Republic vs. Republic of Poland*, Case C-121/21.

9 Order of the Vice-President of the CJEU of 21. 5. 2021, *Czech Republic vs. Republic of Poland*, Case C-121/21 R.

10 POSTULSKI, W. Systematyka środków tymczasowych. In: KORNOBIS-ROMANOWSKA, D., ŁACNY, J. (eds.). *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz, t. III (art. 223–358)*. Warszawa: Wolters Kluwer, 2012, Art. 279.

11 KAWCZYŃSKA, M. Spór o kopalnię Turów, czyli stosowanie i efektywność środków tymczasowych w postępowaniach dotyczących naruszenia prawa unijnego. *Europejski Przegląd Sądowy*. 2021, Vol. 11, pp. 24–38.

12 Poland. Art. 755 para. 1 Code of Civil Procedure (Act of 17. 11. 1964).

In the course of the proceedings before the CJEU, the Republic of Poland argued that, in its opinion, this application was inadmissible on the ground that, in proceedings for interim relief, only the Commission, as "guardian of the Treaties", may bring an application seeking imposition of a periodic penalty payment on a Member State.

This argument was not approved by the Tribunal and, by an order of 20 September 2021, the vice-president of the Tribunal imposed on the Republic of Poland a periodic penalty payment of € 500,000 per day. In the justification of this decision, he indicated that the Court hearing an application for interim measures must be able to ensure the effectiveness of an order directed at a party pursuant to Article 279 TFEU, by adopting any measure intended to ensure that the interim order is complied with by that party. Such a measure may entail, *inter alia*, provision for a periodic penalty payment to be imposed should that order not be respected by the relevant party.[13] After the ruling was issued, the Republic of Poland maintained its position regarding the inadmissibility of the application of a periodic penalty payment and is not paying it.

The main case between the Czech Republic and the Republic of Poland was closed with a settlement.[14] The agreement provides for the completion, by Poland, of the construction of a barrier preventing the outflow of groundwater, an earth embankment, and the payment of € 35 million in compensation.[15] Although the main issue is beyond the scope of this paper, it resulted in the removal of the complaint from the list of CJEU cases and the cessation of the charging of periodic fines, the total value of which was € 69 million. However, Poland did not pay these funds to the European Commission and officially stated that it would not do so. The Commission will therefore deduct this penalty from funds due from the EU budget.[16]

13 Differently SIKORA, A. *Sankcje finansowe w razie niewykonania wyroków Trybunału Sprawiedliwości Unii Europejskiej*. Warszawa: Wolters Kluwer, 2011, 378 p.

14 Order of the President of the CJEU of 4. 2. 2022, Deletion of the case C-121/21.

15 Koniec sporu o Turów. Polska wnioskuje do TSUE o zaprzestanie naliczania kar. *Gazeta Prawna* [online]. 4. 2. 2022 [cit. 31. 5. 2022]. Available at: https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8349936,czechy-turow-ugoda-umowa-skarga-tsue.html

16 Kary za Turów potrącone z unijnych funduszy dla Polski. W dwóch transzach. *TVN24* [online]. 6. 4. 2022 [cit. 31. 5. 2022]. Available at: https://tvn24.pl/biznes/z-kraju/kopalnia-turow-kary-komisja-europejska-potracila-kary-zunijnych-funduszy-dla-polski-informacje-ministerstwa-finansow-5665508

Poland is also not paying periodic fines of € 1 million a day imposed by the CJEU for failure to comply with the interim order[17] suspending the Disciplinary Chamber of the Supreme Court in a case initiated by the European Commission.[18] These funds have also been deducted by the European Commission[19] and found its place in the doctrine.[20]

The arguments made public by the Polish authorities were not based on legal issues. The government alleged that the application of such far-reaching interim measures, such as ordering the shutdown of the mine's operation in one day, posed a threat to the energy security of the State.[21]

3 Selected Issues of the Procedure for Imposing Periodic Penalty Payments

3.1 Trial Body

TFEU gives *expressis verbis* the Court the power to *"prescribe any necessary interim measures"* in cases it is examining.[22]

17 Order of the Vice-President of the CJEU of 27. 10. 2021, *European Commission vs. Republic of Poland*, Case C-204/21 R.

18 Order of the Vice-President of the CJEU of 14. 7. 2021, *European Commission vs. Republic of Poland*, Case C-204/21 R.

19 Potężna kara za Izbę Dyscyplinarną. Bruksela potrąciła ponad pół miliarda złotych ze środków dla Polski. *TVN24* [online]. 20. 5. 2022 [cit. 31. 5. 2022]. Available at: https://tvn24.pl/biznes/z-kraju/izba-dyscyplinarna-kary-komisja-europejska-potracila-ponad-pol-miliarda-zlotych-ze-srodkow-dla-polski-5719279

20 SOBCZAK, K. Izba Dyscyplinarna SN nie może sądzić sędziów. Omówienie postanowienia TS z dnia 8 kwietnia 2020 r., C-791/19 R (Komisja p. Polsce). *LEX/el* [online]. [cit. 31. 5. 2022]. Available at: https://sip.lex.pl/komentarze-i-publikacje/omowienia/izba-dyscyplinarna-sn-nie-moze-sadzic-sedziow-omowienie-151362698; SIWIERSKA, A. Odpowiedzialność dyscyplinarna sędziego w Polsce w świetle wyroku TS UE z 15 lipca 2021 R., C-791/19. Aspekty materialne i procesowe. *Radca Prawny*. 2021, Vol. 29, no. 4, pp. 11–28; GONTARSKI, W. Unijne środki tymczasowe: "status quo" a nie "status quo ante". Glosa do postanowienia TS z dnia 19 października 2018 r., C-619/18 R. *LEX/el* [online]. [cit. 31. 5. 2022]. Available at: https://sip.lex.pl/komentarze-i-publikacje/glosy/unijne-srodki-tymczasowe-status-quo-a-nie-status-quo-ante-glosa-do-386226949

21 Polski rząd zabezpiecza interesy energetyczne milionów Polaków. *Kancelaria Prezesa Rady Ministrów* [online]. 20. 9. 2021 [cit. 31. 5. 2022]. Available at: https://www.gov.pl/web/premier/polski-rzad-zabezpiecza-interesy-energetyczne-milionow-polakow; ZAWODZIŃSKI, K. Nakaz zaprzestania wydobycia węgla brunatnego w kopalni Turów nałożony w ramach środków tymczasowych zarządzonych w sprawie C-121/21 R (postanowienie Wiceprezes Trybunału Sprawiedliwości z dnia 21 maja 2021 r.). *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*. 2021, Vol. 10, no. 2, p. 115.

22 Art. 279 TFEU.

The allegation of the improper composition of the Court with regard to the application of interim measures and periodic penalty payments was raised both in the procedural position of the Republic of Poland and in public statements by the Polish government. The Rules of Procedure of the CJEU provide that the president decides independently or immediately refers an application to the Tribunal.[23] Identical regulations were contained in the Rules of the Court of Justice of the European Communities.[24] The single-person character of the adjudicating panel on interim measures was also accepted in the doctrine.[25]

The singularity of the judiciary always means greater susceptibility to external pressure. However, this can be excused in relation to interim measures, which *ex natura* must be adjudicated quickly, which would be significantly hindered – if not prevented – by collegiality of the composition. The issue of the formal and dogmatic interpretation of the Treaty is more problematic. It states that the Tribunal *"shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union. When provided for in the Statute, the Court of Justice may also sit as a full Court."*[26] This norm was also emphasized in the doctrine.[27] The interpretation of the Tribunal assumes that these are substantive decisions deciding on the merits of the case. On the other hand, the Republic of Poland expresses the view that this provision applies to all decisions of the Tribunal, including those based on Article 279 of the TFEU, i.e., interim measures.

The earlier doctrine indicated that when the vice-president of the CJEU issued the decision of 19. 10. 2018, *the Commission vs. Poland*, case C-619/18,

23 Art. 161 para. 1 Rules of Procedure of the CJEU.

24 Art. 85 Rules of the Court of Justice of the European Communities.

25 CASTILLO DE LA TORRE, F. Interim Measures in Community Courts: Recent Trends. *Common Market Law Review*. 2007, Vol. 44, no. 2, pp. 273–353; BAJOREK-ZIAJA, H. *Skarga do Europejskiego Trybunału Praw Człowieka oraz skarga do Trybunału Sprawiedliwości Unii Europejskiej*. Warszawa: LexisNexis, 2010, 318 p.; LIPIŃSKI, A. Glosa do postanowienia Wiceprezes Trybunału Sprawiedliwości Unii Europejskiej z 21.05.2021 r. (Republika Czeska v. Rzeczpospolita Polska, C-121/21). *Przegląd Ustawodawstwa Gospodarczego*. 2021, no. 6, p. 63.

26 Art. 160 para. 2 Rules of Procedure of the CJEU.

27 WILBRANDT-GOTOWICZ, M. B. *Instytucja pytań prawnych w sprawach sądowoadministracyjnych*. Warszawa: Wolters Kluwer, 2010, 535 p.

it was then confirmed by the Grand Chamber decision of the CJEU of 17. 12. 2018, *European Commission vs. Republic of Poland*, case C-619/18.[28]

It should be emphasized that Article 253 TFEU empowers the CJEU to establish its own rules of procedure which, however, require approval by the Council. In my opinion, it may provide for the recognition of incidental issues in a one-man panel.

3.2 Active Standing

The second issue, fundamental from the perspective of the EU system, was not analysed in the doctrine at all, but only expressed in the written position of the Republic of Poland. The Republic of Poland questioned the active standing of the Czech Republic to apply for the imposition of a periodic penalty payment.

The issue of the ability to apply for interim measures is governed by Article 160 para. 2 of the Rules of Procedure of the CJEU: an application for another interim measure, referred to in Art. 279 TFEU, is admissible only when the applicant is a party to the pending proceedings before the Court and where the application relates to those proceedings. The intervener's application in Case T-310/03 is considered inadmissible.[29] The same regulations were contained in the previously applicable regulations, i.e., Article 243 of the Treaty Establishing the European Community and the Rules of the Court of Justice of the European Communities.[30]

In the opinion of the Republic of Poland, only the European Commission is entitled to submit such an application. The Republic of Poland argued that the enforcement of CJEU judgments is a treaty obligation – such a view was also expressed earlier in the doctrine.[31] Therefore, the Commission – the "guardian of the Treaties" – is obliged to guard it. In the opinion

28 TABOROWSKI, M. *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej: studium przebudzenia systemu ponadnarodowego*. Warszawa: Wolters Kluwer, 2019, 483 p.

29 SASINOWSKA, B. Środki tymczasowe w postępowaniach z art. 226 i 230 TWE. *Europejski Przegląd Sądowy*. 2008, no. 2, pp. 18–27.

30 Art. 83 para. 2 Rules of the Court of Justice of the European Communities.

31 ZAWODZIŃSKI, K. Zarządzenie środków tymczasowych w sprawie ze skargi Komisji Europejskiej dotyczącej Puszczy Białowieskiej – Glosa do postanowienia TSUE z 20.11.2017R., C-441/17 R Komisja P. Polsce. *Palestra*. 2019, no. 1–2, pp. 143–151.

of the Republic of Poland, the regulations contained in the Rules of the Tribunal are therefore inconsistent with the TFEU.

Also in the doctrine commenting on the decision of the CJEU of 21 May 2021, doubts were raised as to whether the Czech Republic acted as a *parens patriae* for the inhabitants and entrepreneurs in the region located in the Turów mine environmental impact area, or – due to the lack of a complaint by the European Commission against Polish shortcomings – as a kind of "subsidiary guardian of treaties", which raised reservations in the doctrine as to the admissibility of the complaint.[32]

Indeed, in earlier views of world doctrine it was pointed out that: *"It remains to be seen how often the 'Commission' is going to request penalty payments under Article 279 TFEU* […] *to a large extent on whether national courts must provide a similarly enhanced interim relief as the Court has established under Article 279 TFEU. The decentralization of enforcement should not, however, overshadow the fact that the "Commission" still plays an important role. Sometimes infringement proceedings may be the most, or even only, effective means of enforcement. This is true in particular for cases in which domestic remedies are limited because of rule-of-law deficiencies, and a fortiori where those deficiencies concern the independence of the judiciary."*[33] Indeed, it was assumed that the applications for interim measures would be made by the Commission and not by the Member States.

These divagations did not only concern the procedural strategy of the Republic of Poland. While the lodging by Member States of complaints about infringement of EU law by another Member State is very rare, some have already occurred (eight such complaints have been brought so far). However, this is the first time that a Member State has decided to submit an application for interim measures in such a case. Applications for provisional protection are most often submitted in proceedings initiated under the procedure of direct actions against EU institutions, and only in a few cases in proceedings concerning infringement of EU law

32 ZAWODZIŃSKI, K. Nakaz zaprzestania wydobycia węgla brunatnego w kopalni Turów nałożony w ramach środków tymczasowych zarządzonych w sprawie C-121/21 R (postanowienie Wiceprezes Trybunału Sprawiedliwości z dnia 21 maja 2021 r.). *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*. 2021, Vol. 10, no. 2, p. 114.

33 WENNERÅS, P. Saving a forest and the rule of law: Commission v. Poland. *Common Market Law Review*. 2019, Vol. 56, no. 2, pp. 541–558.

initiated by the Commission against Member States. For the first time, the vice-president of the Tribunal also decided to strengthen the effectiveness of previously ordered security measures with a periodic penalty payment, payable until the execution of the decision or issuance of a decision in the main case. Thus, financial penalties have become an instrument to ensure the enforceability of interim measures, as in the case of Article 260 para. 2 and 3 TFEU, it is a remedy for the failure of Member States to fulfil their obligations under EU law.[34]

The position of the Republic of Poland is opposed by the statement cited in the doctrine that the distinction between a measure under Article 278 and under Article 279 has its source in the distinction between cases in the sphere of public law and private law: measures under Article 279, unlike measures under Article 278, are to protect individual interests and ensure the effectiveness of proceedings in private cases.[35] In the Polish doctrine, which criticized the CJEU's decision of 21 May 2021, it was also indicated that the dispute underlying case C-121/21 R seems to have a thoroughly civil-law character, which is supported mainly by the fact that it is not the Republic of Poland, but a company (although the State Treasury is the majority shareholder) that is extracting this coal and possibly causing environmental damage.[36]

When analysing this issue, it should be noted that Article 279 of the TFEU only states that *"the Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures"*. Therefore, the TFEU does not establish complaints at all in these cases – on the contrary, the literal wording of this provision seems to mean that the Tribunal may also order interim measures *ex officio*.

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34 KAWCZYŃSKA, M. Spór o kopalnię Turów, czyli stosowanie i efektywność środków tymczasowych w postępowaniach dotyczących naruszenia prawa unijnego. *Europejski Przegląd Sądowy*. 2021, Vol. 11, pp. 24–38.

35 DE LA SIERRA, S. Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right to Effective Court Protection. A Comparative Approach. *European Law Journal*. 2004, Vol. 10, no. 1, p. 46.

36 LIPIŃSKI, A. Glosa do postanowienia Wiceprezes Trybunału Sprawiedliwości Unii Europejskiej z 21.05.2021 r. (Republika Czeska v. Rzeczpospolita Polska, C-121/21). *Przegląd Ustawodawstwa Gospodarczego*. 2021, no. 6, pp. 61–66.

4 Conclusion

In conclusion, the imposition of periodic penalty payments by the vice-president of the CJEU in cases brought by a Member State against another Member State is *de lege lata* allowed and *de lege ferenda* does not require amendment of the TFEU or the Rules of Procedure of the CJEU. The finding in the doctrine that the Tribunal and the Court have broad powers in granting temporary legal protection under Article 279 TFEU[37] should be confirmed, while the judge hearing an application for interim measures is more powerful than the Court in the main case, since it is for the parties to a case to draw the necessary consequences from a judgment, whereas the judge hearing an application for interim measures may determine how the ordered measure needs to be executed.[38]

Commenting on Poland's failure to implement interim measures, the doctrine rightly argued that: *"It was the time of a unique accumulation of multifarious events which, when put together, may be considered a continuation towards even deeper crisis of the rule of law in Poland and our country's further divergence from European standards* […] *If the general impression of this review leaves one with a sense of chaos and uncertainty, and at times even of amazement and disbelief, rest assured that these feelings are fully justified."*[39] On the other hand, the very admissibility of their application in the realities of this case raises numerous doubts in the doctrine. While, in my opinion, the objections to the composition of the judge are not justified, I wonder whether a Member State should indeed be entitled – under the CJEU's rules of procedure – to apply for the imposition of periodic penalty payments when the Commission does not do so.

37 CASTILLO DE LA TORRE, F. Interim Measures in Community Courts: Recent Trends. *Common Market Law Review*. 2007, Vol. 44, no. 2, pp. 273–353; BRZEZIŃSKI, P. *Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej*. Warszawa: Wolters Kluwer, 2010, 464 p.; BULAJSKI, R. Kopalnia w Turowie z zakazem wydobywania węgla. Omówienie postanowienia TS z dnia 21 maja 2021 r., C-121/21 R (Czechy p. Polsce). *LEX/el* [online]. [cit. 31. 5. 2022]. Available at: https://sip.lex.pl/komentarze-i-publikacje/omowienia/kopalnia-w-turowie-z-zakazem-wydobywania-wegla-omowienie-151387126; LENAERTS, K., MASELIS, I., GUTMAN, K. *EU Procedural Law*. Oxford: Oxford University Press, 2014, p. 566.

38 CASTILLO DE LA TORRE, F. Interim Measures in Community Courts: Recent Trends. *Common Market Law Review*. 2007, Vol. 44, no. 2, pp. 273–353.

39 BIERNAT, S. Czas chaosu i niepewności. *Europejski Przegląd Sądowy*. 2021, Vol. 8, p. 1.

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Contact – e-mail
marcin.dorochowicz@krd.edu.pl

ORCID
0000-0003-2750-712X

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The Dichotomy of Obligations of Conduct and Result in International Investment Law

Zdeněk Nový

Faculty of Law, Masaryk University, Czech Republic

Abstract

The content of an international obligation must be ascertained before the investment tribunals have decided that the international obligation was breached. Whilst some obligations in investment treaties require a result to be attained by states or investors, other obligations require only their best efforts.

The dichotomy of obligations of conduct and result is a useful tool in analysing the content of international obligations derived from standards of treatment contained in investment treaties, thereby assisting in determining international responsibility.

Firstly, the standard of full protection and security is analysed through the lenses of the dichotomy. Secondly, the procedural obligations stemming from dispute resolution provisions are examined, including the obligation to submit to arbitration, the obligation to comply with arbitral awards, and the obligation to recognise and enforce the latter. Thirdly, the dichotomy serves to enhance the understanding of investors' obligations to respect human rights under investment treaties. The dichotomy may thus assist in establishing the content of the human rights' obligation in question, and thus the investor's responsibility for its breach.

Keywords

Dichotomy; International Obligation; Investment Protection; Obligation of Conduct; Obligation of Result; Primary Rules; Secondary Rules; State Responsibility.

1 Obligation of Conduct and Result as a Grand Dichotomy of International Law

The recognised legal theorist *Norberto Bobbio* dedicated one of his writings to "grand dichotomies".[1] He found it striking that dichotomies were omnipresent in social sciences, including the legal theory.[2] Their characteristic feature being that inclusion of the one part of the dichotomy means exclusion of the other part, and vice versa: *tertium non datur*.[3]

Dichotomy thus refers to a *"division of a whole into two parts, as with a class into two mutually exclusive and jointly exhaustive subclasses"*[4]. The purpose of dichotomies is to facilitate the understanding of the phenomenon as a one whole by analysing each of two parts separately.[5] Dichotomies may have an explanatory value to the extent one needs to understand the core of the problem. Yet, they may equally oversimplify reality, thus omitting details important for the understanding of the phenomenon.

In any case, dichotomies are alive and kicking in international legal theory.[6] One of grand dichotomies, which has regained attention of theorists

1 BOBBIO, N. *Dalla struttura alla funzione. Nuovi studi di teoria del diritto.* Milano: Edizione di Comunità, 1977, p. 145.

2 Ibid.

3 Ibid., pp. 147–148; For the roots and explanation of *tertium non datur* in formal logic see CAGLIOTTI, G. The Tertium Non Datur in Aristotle's Logic and in Physics. *Journal of the Mechanical Behavior of Materials* [online]. 1994, Vol. 5, no. 3, pp. 217–224 [cit. 27. 7. 2022]. Available at: https://www.degruyter.com/document/doi/10.1515/JMBM.1994.5.3.217/html

4 GRAILING, A. Dichotomy. In: HONDERICH, T. (ed.). *The Oxford Companion to Philosophy.* New York: Oxford University Press, 2005, p. 213.

5 See DESCARTES R. *A Discourse on the Method.* Oxford: Oxford University Press, 2006, p. 17: *"The second* [rule] *was to divide all the difficulties under examination into as many parts as possible, and as many as were required to solve them in the best way."*

6 This seems to have to do with the revived interest in the analysis of the content of obligations and their classification in the doctrine of international law. See generally D'ARGENT, P. Les obligations internationales. In: *Recueil des Cours 2021.* Boston, Leiden: Brill, Nijhoff, 2021, Vol. 417, pp. 150–202.

of international law, is that of obligations of conduct and obligations of result.[7]

International responsibility for breach of an obligation of conduct arises, if the subject bound by the international obligation does not undertake the conduct required by the latter.[8] Whereas obligation of result is violated if the subject of law does not eventually achieve the result prescribed by international law (see the detailed discussion below).

Nonetheless, compared to publications on general international law, the dichotomy has attracted only a limited attention in the area of international investment law.[9] Two explanations exist for this. First, distinguishing between the two kinds of international obligations is of no use in the field of international investment law. Second, this may be a gap in the academic debate. Bearing in mind the words of Sir *James Crawford* that *"whether there has been a breach of an obligation always depends on the precise terms of the obligation, and on the facts of the case. Taxonomy may assist in, but is no substitute for, the interpretation and application of primary rules"*[10], it will be sought to demonstrate that the dichotomy is a useful analytical tool also in international investment law.

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7 See CRAWFORD, J. *State Responsibility. The General Part.* Cambridge: Cambridge University Press, 2014, pp. 220–226; WOLFRUM, R. Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations. In: ARSANJANI, M. H. et al. (eds.). *Looking to the Future. Essays on International Law in Honor of W. Michael Reisman.* Leiden, Boston: Martinus Nijhoff Publishers, 2011, p. 366; ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility.* Oxford: Oxford University Press, 2010, pp. 371–378; FOCARELLI, C. *International Law*. Cheltenham: Edward Elgar, 2019, p. 600; BARBOZA, J. *Derecho internacional público.* Buenos Aires: Víctor P. de Zavalía, 2008, p. 411; PALOMBINO, F. M. *Introduzione al diritto internationale.* Bari: Laterza, 2019, p. 196.

8 Variations in terminology exist. The original French (domestic law) expressions are *"obligation de moyen"* and *"obligation de résultat"*. However, the recent publications in the field of international law use the expressions "obligation of conduct" and "obligation of result". It is also possible to find the expression of *"obligation de comportement"* in French-written, internationalist, literature, which may be translated as "obligation of conduct". The terminology "obligation of conduct" and "obligation of result" will be used throughout this paper.

9 The exception is BLANCO, S. M. *Full Protection and Security in International Investment Law*. Cham: Springer, 2019, p. 338.

10 CRAWFORD, J. *State Responsibility. The General Part.* Cambridge: Cambridge University Press, 2014, p. 223.

2 Methodological Discussion and Caveats

The key research question is whether the classification of an obligation as one of conduct or result may have an impact on finding states or investors responsible for violations of investment treaties.

In order to answer this question, a doctrinal research will be employed in this paper. It starts by exploring the roots of the dichotomy in domestic law and continues with the observation of the process of it becoming part of the domain of international law. Thereby, the meaning of the dichotomy is sought to be ascertained. Subsequently, it will be examined whether the dichotomy plays any role in the cases of the International Court of Justice ("ICJ"). Thereafter, regard will be had to the analysis of international obligations under investment treaties through the lenses of the dichotomy of obligations of conduct and result.

Overall, this paper will offer conclusions, which are based on a combination of deductive and inductive reasoning. The research results submitted in this paper do not claim conclusiveness. Rather, this paper attempts to open the discussion on the dichotomy on the terrain of international investment law.

It will be submitted that two criteria should be taken into account in classifying an international obligation as one of conduct or result. Firstly, the utility and effectiveness of international obligation are of paramount importance for the classification. Thus, the classification that gives the international obligation an *effet utile* is to preferred.

Secondly, another criterion is a viability and realisability of the international obligation by its addressee, for *ultra posse nemo tenetur*.[11] As a result, an international obligation in an investment treaty cannot be classified as one of conduct or result, if the former or the latter would make it objectively impossible for

11 For the meaning of the maxim see FELLMETH, A. X., HORWITZ, M. *Guide to Latin in International Law*. New York: Oxford University Press, 2009, p. 283.

the state or the investor to comply with it.[12] To prevent misunderstanding, however, this does not relieve the state or investor bound by the obligation to perform it in good faith as required by Article 26 of the VCLT.

The criteria of utility and reasonableness thus may inform the means of interpretation contained in the Article 31 para. 1 of the VCLT. Firstly, good faith as an overarching consideration in the use of the means of interpretation in the latter provision excludes the possibility of an unreasonable interpretation of treaty provisions.[13] This applies also to the content of international obligations contained therein. Secondly, in interpreting treaty terms containing international obligations, the object and purpose of the provision has to be taken into account in deciding whether the obligation is one of conduct or result.[14] Thus, the classification of the obligation in accordance with the purpose of the treaty provision containing it should be preferred.

Whilst the same international obligation might be classified as one of conduct in one point of time and as that of result in another, the use of the criteria of utility and reasonableness may help to reduce the risk of too frequent changes in the classification of an international obligation by international courts and arbitral tribunals.

Moreover, the dichotomy of obligations of conduct might not necessarily be seen as exhaustive.[15] For instance, international obligations of due

12 The idea that an obligation cannot come into existence, if its object is impossible, has its roots in Roman law. See BĚLOVSKÝ, P. *Obligace z kontraktu. Smlouva a její vymahatelnost v římském právu*. Praha: Auditorium, 2021, p. 166. Furthermore, the equivalent maxim *"ad impossibilia nemo tenetur"* is used in the law of international treaties with regard to "supervening impossibility of performance" under Article 61 of the Vienna Convention on the Law of Treaties ("VCLT"). It cannot be thus presumed that a treaty party has assumed an international obligation the former will not be able to perform. For a reflection of the maxim within Article 61 of the VCLT see GIEGERICH, T. Article 61. In: DÖRR, O., SCHMALENBACH, K. (eds.). *Vienna Convention on the Law of Treaties: A Commentary*. Berlin: Springer, 2012, p. 1052.

13 See YASSEEN, M. K. L'interpretation des traités d'après la Convention de Vienne sur le droit des traités. In: *Recueils des cours 1976*. Leiden: Brill, 1978, Vol. 151, p. 23; DÖRR, O. Article 31. In: DÖRR, O., SCHMALENBACH, K. (eds.). *Vienna Convention on the Law of Treaties: A Commentary*. Berlin: Springer, 2012, p. 548.

14 See DÖRR, O. Article 31. In: DÖRR, O., SCHMALENBACH, K. (eds.). *Vienna Convention on the Law of Treaties: A Commentary*. Berlin: Springer, 2012, p. 545.

15 See WOLFRUM, R. Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations. In: ARSANJANI, M. H. et al. (eds.). *Looking to the Future. Essays on International Law in Honor of W. Michael Reisman*. Leiden, Boston: Martinus Nijhoff Publishers, 2011, p. 366.

diligence may be found as a third kind of international obligation, different to obligations of conduct or result.[16] Thus, as Sir *James Crawford*, the former International Law Commission's Rapporteur for the international responsibility of states, rightly pointed out, international obligations constitute more of a "spectrum" than just two kinds of them.[17]

For the sake of clarity, however, no further decomposition of obligation of conduct into an obligation of conduct in a strict sense and obligation of due diligence or prevention as its specific manifestations will be sought for.[18] This further taxonomy may be legitimate. Yet, it does not change the fact that obligations of diligence and prevention are, after all, specific obligations of conduct.[19]

Furthermore, the dichotomy of obligations of conduct and result relates to the interpretation of the primary rules in an investment treaty.[20] Thus, investment treaties as the main source of rights and obligations of states and investors are subjected to interpretation under the VCLT's rules.[21] In the process of interpretation, the two obligations may help, it is argued, in clarifying the content of state and investors' obligations in the investment treaty.

As the distinction between obligation of conduct and result concerns the content of the international obligation included in a treaty provision (primary rule), it is assumed that the dichotomy may be applied equally to state and investors' obligations; and that notwithstanding the fact that the investors'

16 FOCARELLI, C. *International Law*. Cheltenham: Edward Elgar, 2019, p. 600.

17 CRAWFORD, J. *State Responsibility. The General Part*. Cambridge: Cambridge University Press, 2014, p. 223.

18 That a link exists between obligations of conduct and result on the one hand and obligation of due diligence on the other hand has been mentioned by ŠTURMA, P. "Náležitá péče" v mezinárodním právu: obecný pojem s variabilním obsahem. *Právník*. 2021, Vol. 160, no. 6, p. 402.

19 Along similar lines, DISTEFANO, G. *Fundamental of Public International Law. A Sketch of the international Legal Order*. Leiden, Boston: Brill, Nijhoff, 2019, p. 697.

20 For the relationship between interpretation and the dichotomy see KOLB, R. *The International Law of State Responsibility. An Introduction*. Cheltenham: Edward Elgar Publishing, 2017, p. 43.

21 Art. 31–33 VCLT.

responsibility need not be governed by the same set of secondary rules as that of states.[22]

Finally, this paper does not examine all standards of investment protection. Thus, only international obligations stemming from investment treaties, which are suitable for demonstrating the significance of the dichotomy of obligations of conduct and result, have been selected.

3 The Domestic Origins of the Dichotomy

The French scholar *René Demogue* is said to be the spiritual father of the dichotomy.[23] According to Demogue, some civil obligations are breached by a conduct *(obligations de moyen)*, whereas others when a particular result is not attained *(obligations de résultat)*.[24]

For instance, a mere attempt to deliver goods to the buyer would not be the sufficient performance of a sales contract and therefore triggers responsibility of the seller. Whilst if the doctor made his best efforts in having cured his patient, he will not bear the responsibility if the patient is not in good health eventually. Thus, the debtor's commitment with regard to obligation of result is to achieve the result, whereas obligation of conduct entails the commitment to undertake due diligence or best efforts in performing the obligation, but not a result, not being defining features of the latter obligation.

Whilst obligations of result are rather strict, obligations of conduct are more flexible.[25] The latter thus give the debtor more leeway in performing

22 Specific regimes of international law may have own rules of responsibility that are different to those of general international law, as foreseen in the Article 55 of the Draft Articles on State Responsibility for Internationally Wrongful Acts ("DARSIWA"). – See INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. Pp. 140–141 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

23 COULON C. René Demogue et le droit de la responsabilité civile. *Revue interdisciplinaire d'études juridiques* [online]. 2006, Vol. 56, no. 1, pp. 137–158 [cit. 27. 7. 2022]. Available at: https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2006-1-page-137.htm

24 DEMOGUE, R. *Traité des obligations en général. Tome V. Sources des obligations (suite et fin)* [online]. Paris: Libraire Arthur Rousseau, 1925, pp. 538–542 [cit. 27. 7. 2022]. Available at: https://gallica.bnf.fr/ark:/12148/bpt6k6473507n/f552.item.texteImage

25 ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility.* Oxford: Oxford University Press, 2010, p. 375.

its civil obligation. It is easier for the claimant to prove that the result has not been attained, and therefore the obligation has been breached. The only excuse for the debtor would be the circumstance of *force majeure* or another circumstance precluding wrongfulness.[26]

With regard to obligation of conduct, it is necessary for the injured party to prove the fault on the part of the wrongdoer in performing the latter's contractual or statutory obligation. In other words, the injured party will have to prove that the wrongdoer has not used all means to perform its obligation of conduct. As a result, the distinction between obligations of conduct and result has a significant importance for proving a breach of an obligation.

Nonetheless, the dichotomy is not recognised in common law systems.[27]

4 The Dichotomy and the International Responsibility of States

International responsibility of states requires two elements to arise: attribution of conduct to the state and breach of an international obligation.[28]

The breach of international obligation may be defined as the difference between the conduct or result required by international law and the actual conduct of the state or another subject of international law.[29] As a result, it is necessary to ascertain the content of the international obligation binding on the wrongdoer before finding its international responsibility.[30]

Thus, if the state has not attainted the result expected by the international obligation, then the state will bear responsibility for its breach, unless it shows there has been either a circumstance precluding wrongfulness under general

26 ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility*. Oxford: Oxford University Press, 2010, p. 375.

27 Ibid.

28 Art. 2 DARSIWA. In: INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. Pp. 34–36 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

29 DISTEFANO, G. *Fundamental of Public International Law. A Sketch of the international Legal Order*. Leiden, Boston: Brill, Nijhoff, 2019, p. 696.

30 Ibid.

international law or a defence based on the provisions of an investment treaty.[31]

The ascertainment of the obligation's content requires a transparent and well-founded interpretation of the provision containing the obligation and the correct assessment of the facts of the case. This includes that investment tribunals will identify whether the state or the investor should have undertaken their best efforts, or reached a particular result, as international responsibility of the former or the latter hinges on this question.[32]

The classification of international obligations as ones of conduct or result then entails three layers of analysis. First, *Roberto Ago*, the former Special Rapporteur of the International Law Commission, had introduced the dichotomy into the draft of what was to become the DARSIWA. Albeit, *Ago's* proposals have not eventually been adopted (see 4.1 below). Second, the ICJ expressly endorsed the dichotomy in its case law (see 4.2 below). Third, as has been intimated above, a number of qualified publicists, namely those with the civil-law background, have seen the distinction as viable and useful.[33]

Moreover, the dichotomy plays role with regard to the time aspect. The obligation of result is breached as soon as the result has not been ultimately achieved.[34] The obligation of conduct is breached whenever the conduct prescribed by a rule of international law has not been adopted.[35] This may have important legal consequences. Among others, it enables the injured party to adopt a reaction in accordance with international law to the breach of the international obligation in question. Generally speaking, the most

31 For a detailed classification of defences against responsibility in international law see PADDEU, F. *Justification and Excuse in International Law: Concepts and Theory of General Defences*. Cambridge: Cambridge University Press, 2018, pp. 95–128; see also TOMKA, P. Defenses Based on Necessity under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties. In: KINNEAR, M. et al. (eds.). *Building International Investment Law. The First 50 Years of ICSID*. Alphen aan den Rijn: Kluwer Law International, 2016, pp. 472–492.

32 See DUPUY, P. M., KERBRAT, Y. *Droit international public*. Paris: Éditions Dalloz, 2018, p. 539.

33 See the majority of authors in the footnote 7 above.

34 KOLB, R. *The International Law of State Responsibility. An Introduction*. Cheltenham: Edward Elgar Publishing, 2017, p. 41.

35 See INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. P. 54 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

important role assigned to this dichotomy is establishing of the breach of international obligation and its proof.

International obligation may then be defined as a duty agreed to or imposed on subjects of international law by a treaty, custom or another source of international law.[36] The "corollary" of the breach is responsibility of the wrongdoer for it.[37]

However, the dichotomy does not seem to have constituted a part of "general principles of law" as a source of international law for the purposes of Article 38 para. 1 letter c) of the ICJ's Statute due to the lack of the general use of the dichotomy in a representative sample of domestic legal systems (let aside whether a dichotomy may be a "principle" of law).[38]

4.1 The ILC Special Rapporteur Ago's Approach to the Dichotomy

Roberto Ago found the distinction between obligations of conduct of such importance that he wished it to have become part of the codification of international responsibility of states.

Ago thus proposed Articles 20 and 21 as follows:

> *"Article 20. Breach of an international obligation calling for the State to adopt a specific course of conduct.*

36 *Sir Jennings* and *Sir Watts* aptly emphasise that international treaties are *"a source more of rights and obligations than law"*. JENNINGS, R. Y., WATTS, A. (eds.). *Oppenheim's International Law. Volume I. Peace.* London: Longman, 1996, p. 31. However, DARSIWA lack any definition of international obligation, which seems to be the International Law Commission's (ILC) deliberate choice. See CRAWFORD, J. *State Responsibility. The General Part.* Cambridge: Cambridge University Press, 2014, p. 93. For an attempt to define obligation in the settings of multilateral treaties see DOMINICÉ, C. The International Responsibility of States for Breach of Multilateral Obligations. *European Journal of International Law.* 1999, Vol. 10, no. 2, p. 354.

37 *"La responsabilité est le corollaire necessaire du droit."* – Decision of the PCIJ of 1. 5. 1925, *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni)*. In: *United Nations. Reports of International Arbitral Awards* [online]. P. 641 [cit. 27. 7. 2022]. Available at: https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlaw615-742arbitration.pdf

38 That a legal principle must be sufficiently general (concerning the doctrine of "unclean hands") was confirmed in the PCA Case of *Yukos Universal Limited (Isle of Man) and the Russian Federation*: *"General principles of law require a certain level of recognition and consensus."* – Final Award of 18. 7. 2014, *Yukos Universal Limited (Isle of Man) and the Russian Federation*, PCA Case No. AA 227. In: *Italaw* [online]. Para. 1359 [cit. 23. 10. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf

> *A breach by the State of an international obligation specifically calling for it to adopt a particular course of conduct exists simply by virtue of the adoption of a course of conduct different from that specifically requires.*
>
> *Article 21. Breach of an international obligation requiring the State to achieve a particular result*
>
> *1. A breach of an international obligation requiring the State to achieve a particular result in concreto, but leaving it free to choose at the outset the means of achieving that result, exists if, by the conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result.*
>
> *2. In cases where the international obligation permits the State whose initial conduct has led to a situation incompatible with the required result to rectify that situation, either by achieving the originally required result through new conduct or by achieving an equivalent result in place of it, a breach of the obligation exists if, in addition, the State has failed to take this subsequent opportunity and has thus completed the breach begun by its initial conduct."*[39]

Article 20 thus speaks of an obligation requiring specific course of conduct. As a result, international responsibility would arise if the state did not adopt this specific conduct. This formulation is rather strict, leaving no room to the state for choosing the means to fulfil its international obligation.[40]

Article 21 para. 1 of *Ago's* proposal then provided that the state would violate its international obligation requiring the specific result, if it did not choose among the possible means to achieve the result the one that would enable the realisation of the result required by the international obligation. The means to achieve the result were left to the state's free choice.[41] Compared to Article 20, this rule was leaving more leeway to the state to meet its international obligations.

Article 21 para. 2 was based on the idea of a complex breach of international obligation. It may be also termed, for our working purposes,

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39 INTERNATIONAL LAW COMMISSION. Sixth report on State responsibility by Mr. Roberto Ago, Special Rapporteur. *United Nations* [online]. Pp. 8, 20 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_302.pdf

40 See DUPUY, P. M. Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility. *European Journal of International Law*. 1999, Vol. 10, no. 2, p. 376.

41 See COMBACAU, J. Obligation de résultat et obligation de comportement quelques questions et pas de réponse. In: *Mélanges offerts à Paul Reuter. Le droit International: unité et diversité*. Paris: Pedone, 1981, p. 187.

as a "second-chance rule". According to this provision the state, which does not attain the result required by an international obligation, may remedy such situation by the new conduct that would achieve the purpose or ensure the result equivalent to the one originally required by the international obligation. The state is then responsible for the breach of an international obligation, if, and only if, it does not use one of these two alternatives.

This concept of a complex breach of international obligation stems from the substantive requirement of exhaustion of local remedies as a precondition for finding that a state's conduct amounts to breach of an international obligation. This has particular significance when the foreigner as the injured party seeks reparation of the injury against the state breaching, for instance, the minimum standard of treatment.[42]

Ago's proposals of Articles 20 and 21 eventually did not find their way into DARSIWA.[43] On the one hand, the added value of the *Ago's* analytical work is undeniable in that he has demonstrated the complexness of the content of international obligations and thus responsibility for their breach. On the other hand, unfortunately, *Ago* also radically altered the traditional, civil-law, understanding of the divide.[44] This would not be problematic as not all principles of domestic law may be adopted into international law under the heading of general principles of law as per Article 38 para. 1 letter c) of the Statute of the ICJ (see also 4 above).[45]

However, *Ago* possibly reached the opposite meaning of the obligation of conduct and result.[46] Suffice it to have a look into the commentary to the Article 20 that mentions side by side the example the directive as the European Union legal act, which binds as to the result sought, and

42 See KOLB, R. *The International Law of State Responsibility. An Introduction*. Cheltenham: Edward Elgar Publishing, 2017, p. 42.

43 ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility*. Oxford: Oxford University Press, 2010, p. 376.

44 Ibid., p. 375.

45 See, e.g., Award of 31. 10. 2011, *El Paso Energy International Company and The Argentine Republic*, ICSID Case No. ARB/03/15. In: *Italaw* [online]. Para. 622 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf

46 See DUPUY, P. M. Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility. *European Journal of International Law*. 1999, Vol. 10, no. 2, p. 376.

the Article 2 of the International Covenant on Civil and Political Rights providing that *"each party* […] *undertakes to take the necessary steps* […] *adopt such legislative and other measures"*[47]. As a result, the first example, leaving aside the specific character of the EU law, is certainly one of result which is the defining feature of the international obligation, whereas the second example requires a conduct by the state in the sphere of its internal law.

Generally speaking, it seems that the confusion in the proposals is caused by the lack of clarity as to an overlap or difference (?) between positive "steps" and "particular course of conduct" and with regard to a legal significance assigned to the "result" in the particular instance of an international obligation. However, as rightly noted by *Dupuy*, it is the inadequate way the proposal describes the content of international obligations and resulting consequences in the sphere of international responsibility that is fraught with difficulties, not the terminology.[48]

In fact, it was *Dupuy* who returned to the dichotomy its original civil-law meaning.[49] As a result, obligation of conduct requires best efforts, whereas obligation of result demands the specific result. In the former case, if the wrongdoer shows he has made his best efforts, he will not sustain international responsibility. Also, in this case a result is sought, but the difference to an obligation of result is that the result is not the defining feature of the international obligation. Thus, the mere fact that it has not been reached does not trigger responsibility. This approach largely corresponds to what may be found in the ICJ's case law (see 4.2 below).

Eventually, the dichotomy of obligations of conduct and result did not find its way into DARSIWA. Only a commentary to the Article 12 of DARSIWA

47 INTERNATIONAL LAW COMMISSION. Sixth report on State responsibility by Mr. Roberto Ago, Special Rapporteur. *United Nations* [online]. P. 9 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_302.pdf; with reference to International Covenant on Civil and Political Rights.

48 ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility.* Oxford: Oxford University Press, 2010, p. 376.

49 DUPUY, P. M. Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility. *European Journal of International Law*. 1999, Vol. 10, no. 2, p. 378.

mentions the distinction between the two kinds of obligations.[50] The question then arises as to the interpretation of the silence of the DARSIWA's black-letter rules on the dichotomy.[51]

It is submitted that this silence is not a negation of the dichotomy.[52] Given the numerous references to the dichotomy in the existing literature on international law and cases endorsing it, the distinction between obligations of conduct and result has not disappeared from international law.[53] The role of the dichotomy seems to formally rest within the teachings of most qualified publicists under the Article 38 para. 1. letter d) of the Statute of the ICJ.[54] In this connection, it seems useful to have a look at the ICJ's approach to the dichotomy in its case law.

4.2 The Identification of the Dichotomy in the ICJ's Case Law

The ICJ's case law is of particular importance for our present context for two reasons. For first, the ICJ is a World Court in the sense that it is *"the principal judicial organ of the United Nations"*[55]. Given the fact that the United Nations assembles almost 200 states, the ICJ's role in unfolding and declaring international customary rules cannot be overstated.[56]

50 INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. P. 56 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

51 See ECONOMIDES, C. P. Content of the Obligation: Obligations of Means and Obligations of Result. In: CRAWFORD, J., PELLET, A., OLLESON, S. (eds.). *The Law of International Responsibility*. Oxford: Oxford University Press, 2010, p. 376.

52 See an interesting examination of the role and kinds of silence in music by FERRARI, E. *Ascoltare il silenzio. Viaggio nel silenzio in musica.* Milano-Udine: Mimosis Accademia del Silenzio, 2013, pp. 13–29. Nevertheless, two kinds of silences seem to exist in international law. First of them has no legal significance as such. By contrast, the second one constitutes a *"silence circonstancié"*, which combined with particular legal and factual circumstances may speak volumes. This latter kind of silence has been recalled in Dissenting Opinion of Professor Georges Abi-Saab of 28. 10. 2011 to the Decision on Jurisdiction and Admissibility of, ICSID Case No. ARB/07/5. In: *Italaw* [online]. Para. 169–170 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0237.pdf

53 See MALENOVSKÝ, J. *Mezinárodní právo veřejné: obecná část a poměr k jiným právním systémům*. Brno: Masarykova univerzita, 2020, p. 262.

54 The Statute of the International Court of Justice.

55 Art. 92 United Nations Charter.

56 See, *ex multis*, DUMBERRY, P. *The Formation and Identification of Rules of Customary International Law in International Investment Law*. Cambridge: Cambridge University Press, 2016, pp. 46–47.

For second, and connected therewith, the ICJ's cases may be useful in the context of international investment law.[57] For instance, investment tribunals have found a yardstick for measuring whether a host state committed denial of justice in the ICJ's ELSI case.[58]

In Avena, the ICJ found that obligations stemming from the international consular law required the United States to enable a reassessment of the capital punishment imposed on a number of Mexican nationals. The ICJ thus *"observe[d] that this obligation of result is one which must be met within a reasonable period of time. Even serious efforts of the United States, should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the Avena Judgment, would not be regarded as fulfilling this obligation of result."*[59]

It seems that the ICJ's reasoning is connected to purposive interpretation of the international obligation in question. Hence, the purpose of the international obligation in issue requires that the persons condemned to death must have an actual access to justice, viz the possibility to request new examination of their case. There is then a tenuous link between purposive interpretation and efficiency of the treaty terms (see 2 above). Therefore, the obligation in issue in the *Avena* case cannot be considered as one of conduct, but that of result, since otherwise such obligations would be deprived of any content and effects.

In *Application of the Genocide Convention*, the ICJ stated concerning the nature of the obligation to prevent genocide the following: *"It is clear that the obligation*

57 The present author is not overoptimistic about the ICJ's role in the decision-making of investment tribunals though. On the other hand, the ICJ seems to be one of few international courts or tribunals, alongside with the European Court of Human Rights and Iran-United States Claims Tribunal, whose case law may be of importance for investment cases. See the detailed discussion on the role of the ICJ cases in the decision-making of investment tribunals, and *vice versa*, in PELLET, A. The Case Law of the ICJ in Investment Arbitration. *ICSID Review*. 2013, Vol. 28, no. 2, pp. 223–240.

58 See, e.g., Decision on Jurisdiction and Liability of 24. 8. 2015, *Dan Cake (Portugal) S.A. and Hungary*, ICSID Case No. ARB/12/9. In: *Italaw* [online]. Para. 146 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw4457.pdf; with reference to Judgment of the ICJ of 20. 7. 1989, *Elettronica Sicula S.p.A. (ELSI), (United States of America vs. Italy)*. In: *International Court of Justice* [online]. P. 15 [cit. 7. 7. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/76/076-19890720-JUD-01-00-EN.pdf

59 Request for Interpretation of the Judgment of 31. 3. 2004 in the *Case concerning Avena and Other Mexican Nationals (Mexico vs. United States of America)*. In: *International Court of Justice* [online]. Para. 27 [cit. 7. 7. 2022]. Available at: https://www.icj-cij.org/en/case/139

in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide."[60]

Thus, in accordance with the ICJ's dictum, it is not possible to absolutely exclude that genocide would arise, whereas it is perfectly legitimate to request the state to take all steps to prevent it. The ICJ thus views the obligation of prevention through the prism of the dichotomy of obligations of conduct and result.[61] Moreover, the ICJ clearly engages reasonableness in what may be expected of the state in performing the international obligation in question.

In summary, these cases show two things. First, the classification of the obligation as one of conduct or result depends on the criteria of purpose and efficiency of the international obligation in question. Second, the ICJ impliedly reflects the maxim *ultra posse nemo tenetur* (see 2 above). As a result, it is reasonable to interpret the treaty rule in such a way that the performance of the international obligation contained therein is objectively not beyond the powers of the subject bound by the obligation.

5 Standards of Treatment and International Obligations in Investment Treaties

Investment treaties that they contain standards of treatment of investors and investments.[62] Standards are, in a nutshell, international legal rules formulated in a general fashion.[63] As opposed to rules, they provide a general guidance as to how host states must behave towards foreign investors. Only

60 Application de la convention pour la prévention et la répression du crime de génocide *(Bosnie-Herzégovine vs. Serbie-et-Monténégro)*. In: *International Court of Justice* [online]. Para. 430 [cit. 27. 7. 2022]. Available at: https://www.icj-cij.org/fr/affaire/91/arrets

61 See DISTEFANO, G. *Fundamental of Public International Law. A Sketch of the international Legal Order*. Leiden, Boston: Brill, Nijhoff, 2019, p. 697.

62 ORTINO, F. Refining the Content and Role of Investment "Rules": and "Standards": A New Approach to International Investment Treaty Making. *ICSID Review*, 2013, Vol. 28, no. 1, p. 155.

63 As to the difference between standards and rules, including the advantages and disadvantages of the use of one or another see Ibid., pp. 153–154.

recently, the drafters of new investment agreements have included specific kinds of breaches of these standards.[64]

The standards' advantage over rules lies in their flexibility, as not all specific host state's wrongdoings against investors and investments could have been foreseen at the time of the making of the investment treaty. Nonetheless, international obligations stemming from these standards will have to be implied in most cases by interpretation of the investment treaty provisions in accordance with the VCLT's interpretation rules by adjudicators in the investment dispute resolution (see also 5.2 below).

Investment treaties frequently include these standards: fair and equitable treatment; full protection and security; prohibition of arbitrary and discriminatory measures; most-favoured-nation treatment; and national treatment.[65] In addition, investment treaties contain other international obligations of states, namely prohibition of expropriation without compensation; umbrella clauses; and transfer of capital clauses.[66]

Investment standards may be divided into absolute and relative ones.[67] The criterion for such distinction is whether a comparison with other investors and investments is required before a violation of that standard may be found.

A relative standard is thus, for instance, the national treatment, as it requires a comparison between foreign investors and domestic entrepreneurs.[68] Absolute standards then require that investors and investments be treated according to these standards, regardless of the fact whether other foreign or domestic investors are treated differently. The example of an absolute standard is full protection and security (see 5.1 below), which must be guaranteed whether or not the host state offers such protection to its own nationals.[69]

64 See, e.g., Art. 8.10 para. 2 letters a)–f) of the Comprehensive Economic and Trade Agreement (CETA). This provision elaborates on the standard of fair and equitable treatment by including the most frequent instances of violation of this standard.

65 See in general, REINISCH, A., SCHREUER, C. *International Protection of Investments: The Substantive Standards*. Cambridge: Cambridge University Press, 2020, pp. 251–854.

66 Ibid., pp. 1–250 and 855–998.

67 See DE NANTEUIL, A. *Droit international de l'investissement*. Paris: Pedone, 2014, pp. 288, 313.

68 See, *ex multis*, BJÖRKLUND, A. K. The National Treatment Obligation. In: YANNACA-SMALL, K. (ed.). *Arbitration under International Investment Agreements: A Guide to the Key Issues*. Oxford: Oxford University Press, 2018, p. 532.

69 REINISCH, A., SCHREUER, C. *International Protection of Investments: The Substantive Standards*. Cambridge: Cambridge University Press, 2020, p. 540.

Whether the standard of investment protection is absolute or relative, it implies international obligations for the host state. In addition, as will be shown below (5.3), also investors may have international obligations under investment treaties.

5.1 Standard of Full Protection and Security and an Obligation of Diligence

Host states are under an international obligation to guarantee full protection and security to the investors and investments contained in a number of investment treaties.[70] Not only that the investor and investment are protected against interferences therewith by the host state, but also against the acts of private parties.[71]

Some controversies surround this standard though. Firstly, does it entail physical or legal security of investors and investments?[72] Secondly, to what extent, if any, does this standard overlap with other standards, namely fair and equitable treatment?[73] Thirdly, should the subjective conditions of the country, in which the investor situated its investment, play any role in the assessment of as to whether the standard was breach or not?[74] Fourthly, is the full protection and security standard different to the minimum treatment of foreigners under general international law?[75]

However, the most important issue of high practical relevance is this: which standard of state responsibility the full protection and security standard would require? Two possibilities exist here.

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70 See, *ex multis*, Art. 5 Agreement between Japan and the Kingdom of Bahrain for the Reciprocal Promotion and Protection of Investment; Art. 4 para. 2 letter b) Agreement between the Government of Uruguay and the Government of Turkey (in Spanish). However, terminology differs. One may find not only the expression, but also *"full protection and security"* or *"the most constant protection and security"*, for instance. For the former wording see the two bilateral investment treaties in this footnote. The latter formulation is contained in Article 10 para. 1 of the Energy Charter Treaty.

71 ZEITLER, H. E. Full Protection and Security. In: SCHILL, S. W. (ed.). *International Investment Law and Comparative Public Law*. Oxford: Oxford University Press, 2010, pp. 187–190.

72 Ibid., pp. 195–198.

73 REINISCH, A., SCHREUER, C. *International Protection of Investments: The Substantive Standards*. Cambridge: Cambridge University Press, 2020, pp. 550–558.

74 Ibid., pp. 584–585.

75 Ibid., pp. 545–550.

The first option is that a state's fault is irrelevant for finding its international responsibility. For instance, if a guerrilla group destroyed the investor's factory, it would make no difference whether the host state sent its soldiers to defend the factory or remained inactive. In both cases, the state would be responsible.[76]

The second possibility reflects the concept of responsibility for not exerting due diligence in protecting the investor or investment. Thus, if a guerrilla group destroyed the investor's factory, the state would be responsible only if it did not take steps against this destroying of the factory or the state's action was insufficient to prevent it. By the same token, the state may exculpate itself by proving its due diligence.

The concept of obligation of diligence as one of conduct was confirmed in *AAPL Ltd. vs. Sri Lanka*, where the arbitral tribunal put it thus: *"The arbitral tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with full protection and security was construed as absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a 'strict liability' on behalf of the host State."*[77]

As also noted by the tribunal in *L.E.S.I. S.p.A. and Astaldi S.p.A. vs. Algeria*: *"The obligation of security is an obligation of conduct and not an obligation of result guaranteeing to the investor that nothing would ever happen to its investment. The obligation of security implies that the host state must do everything in its power to avoid that a damage is inflicted upon the investment."*[78]

In *AMPAL-American Israel Corp. vs. Arab Republic of Egypt*, the tribunal found that if the host state does not implement measures to protect the investment

76 Of course, the state will not be responsible if one of the circumstances precluding wrongfulness under general international law has arisen. See Article 20–27 of the DARSIWA, which contain a list of these circumstances, in INTERNATIONAL LAW COMMISSION. Draft Articles on State Responsibility for Internationally Wrongful Acts. *United Nations* [online]. Pp. 31–114 [cit. 27. 7. 2022]. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

77 Final Award of 27. 6. 1990, *Asian Agricultural Products Ltd. vs. Republic of Sri Lanka*, ICSID Case No. ARB/87/3. In: *Italaw* [online]. Para. 43 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf

78 Award of 12. 11. 2008, *L.E.S.I. S.p.A. and Astaldi S.p.A. vs. Algeria*, ICSID Case No. ARB/05/3. In: *Italaw* [online]. Para. 153 [cit. 27. 7. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf (translated in English by the present author).

against repeated attacks, it fails to meet its obligations arising out of the full protection and security standard.[79] On the other hand, in *Strabag SE vs. Libya*, the tribunal decided that the standard was not breached as it was not possible for Libya *"to take consistent and effective measures to protect Claimant's investment"*.[80]

As a result, there is a broad consensus that the standard of full protection and security does not obligate the host state to ensure that no damage would arise to the investor or investment in any circumstances. The state does not bear the objective responsibility.[81] Therefore, since it is impossible for the host state to protect the investor and investment absolutely, the full protection and security standard must entail a diligence of the host state in protecting investor and investment. The state must exert due diligence in preventing and punishing the acts that would interfere with them as well.[82] Yet, the state objectively cannot ensure the result that no damages arises to the investor or its investment.

However, *Mantilla Blanco* rightly points out that the mere fact that diligence lies at the heart of the standard might not be sufficient for showing the such obligation is necessarily one of conduct or result.[83] Nevertheless, the criteria of utility and reasonableness indicate that full protection and security requires rather conduct than result. Obligation of diligence is thus no separate obligation, but a specific obligation of conduct (see also 2 above).[84]

79 Decision on Liability and Heads of Loss of 21. 2. 2017, *AMPA-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLLS, and BSS-EMG Investors LLc*, ICSID Case No. ARB/12/11. In: *Italaw* [online]. Para. 287 [cit. 21. 10. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf

80 Award of 29. 6. 2020, *Strabag SE vs. Libya*, ICSID Case No. ARB (AF)/15/1. In: *Italaw* [online]. Para. 236 [cit. 21. 10. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf

81 See, with regard to the standard applied in ICSID arbitration, ALEXANDROV, S. A. The Evolution of the Full Protection and Security Standard. In: KINNEAR, M. et al. (eds.). *Building International Investment Law. The First 50 Years of ICSID*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 320.

82 See ZEITLER, H. E. Full Protection and Security. In: SCHILL, S. W. (ed.). *International Investment Law and Comparative Public Law*. Oxford: Oxford University Press, 2010, p. 189.

83 BLANCO, S. M. *Full Protection and Security in International Investment Law*. Cham: Springer, 2019, p. 338.

84 *Malenovský* views the obligation of vigilance in protecting the rights of foreigners as a specific expression of the obligation of conduct. See MALENOVSKÝ, J. *Mezinárodní právo veřejné: obecná část a poměr k jiným právním systémům*. Brno: Masarykova univerzita, 2020, p. 262.

5.2 International Obligations Contained in Investment Dispute Resolution Clauses

In contrast to the standard of full protection and security dealt with above, dispute resolution clauses include procedural obligations.[85] Dispute resolution clauses refer, for the purposes of our present discussion, to the provisions of investment treaties that provide means of resolution of disputes between investors and host states. By the same token, the present paper does not examine dispute resolution clauses concerning resolution of disputes between the investment treaty parties.[86] Dispute resolution clauses in investment treaties have rarely been analysed from the perspective of the international obligations contained therein.

For instance, the Article 8 of the investment treaty between the Czech Republic and the Russian Federation reads:

> *"Disputes between one Treaty Party and the Investor of the other Treaty Party arising in connection with realisation of investments, including disputes relating to the scope, conditions and means of compensation, shall be resolved, as far as possible, by negotiations.*
>
> *When such disputes cannot be resolved by negotiations in the course of six months from the date of the notice of the investor of one of the Treaty Parties to the other Treaty Party, the investor shall be entitled to submit the dispute either to:*
>
> *a) Competent court or arbitral court of the Treaty Party on whose territory the investments were made;*
>
> *b) International Centre for Settlement of Investment Disputes* […]*;*
>
> *c) Arbitral tribunal established ad hoc under the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL)."*[87]

Dispute resolution provisions include the state parties' offer to arbitrate addressed to the other treaty party's investors as potential claimants.[88] The

85 For the distinction between procedural and substantive obligations see D'ARGENT, P. Les obligations internationales. In: *Recueil des Cours 2021*. Boston, Leiden: Brill, Nijhoff, 2021, Vol. 417, pp. 167–168.

86 See generally HAZARIKA, A. *State-to-state Arbitration based on International Investment Agreements Scope Utility and Potential*. Cham: Springer, 2021, pp. 19–23.

87 Translated by the author from the authenticated Czech version of the treaty – Dohoda mezi vládou Ruské federace a vládou České republiky o podpoře a vzájemné ochraně investic.

88 See*, ex multis*, ŠTURMA, P., BALAŠ, V. *Mezinárodní ekonomické právo.* Praha: C. H. Beck, 2013, p. 411.

dispute resolution clause at hand contains the right of the investor to sue the host state in arbitration and the corresponding obligation of the latter to submit to arbitration. As a consequence, the state is under an international obligation to resolve the dispute with the investor by arbitration as a specific means of dispute resolution.

That the treaty gives the *right* to the investor to choose between arbitration and courts does not alter the fact that the *obligation* of state to submit to arbitration is one of result, provided that the investor opted for arbitration. Thus, depending on the content of the dispute resolution clause in question, the host state cannot require resolution of the dispute with the investor through other means than arbitration, e.g., before its domestic courts.[89] As a result, the obligation to submit to arbitration is that of result.

Moreover, dispute resolution clauses regularly contain an international obligation to engage into negotiations to settle the dispute amicably.[90] If a settlement between the investor and state is not reached within a period of time (the so-called cooling-off period), investor may commence arbitration.[91] The obligation for both state and investor to negotiate is certainly one of conduct.[92] This is so, it is argued, because the parties may be held to do their best to reach a settlement, but cannot guarantee they will reach it.

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89 The same conclusion has been drawn, although following a different path of argumentation based on the absence of the requirement of exhaustion of local remedies in the law of international investment protection, by MOURRE, A. Expropriation by Courts: Is It Expropriation or Denial of Justice? In: ROVINE, A. W. (ed.). *Contemporary Issues in International Arbitration and Mediation: The Fordham papers 2011*. Leiden, Boston: Brill, Martinus Nijhoff Publishers, 2012, p. 60.

90 See, *ex multis*, FEIGERLOVÁ, M. Dopad nesplnění přátelského řešení sporu na rozhodčí řízení. In: ŠTURMA, P., TRÁVNÍČKOVÁ, Z. (eds.). *Pokojné řešení sporů v mezinárodním právu*. Praha: Česká společnost pro mezinárodní právo, 2020, p. 155.

91 Ibid., p. 160.

92 In *Pulp Mills*, the ICJ *"dr[e]w attention to the characteristics of the obligation to negotiate and to the conduct which this imposes on the States concerned"* (with further reference to its previous cases). – See Judgment of the ICJ of 20. 4. 2010, *Pulp Mills on the River Uruguay (Argentina vs. Uruguay)*. In: *International Court of Justice* [online]. P. 14, para. 145 [cit. 27. 7. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf; Despite this being an inter-state case, there is no reason why the logic behind classifying the obligation to negotiate as one of conduct cannot be used in an investor-state dispute.

In addition, a number of dispute resolution provisions in investment treaties encompass an international obligation for both states and investors to comply with the terms of the arbitral award.[93] The German-Lebanese investment treaty, for instance, stipulates that *"the awards of arbitration shall be final and binding on both parties to the dispute. Each Contracting Party shall carry out without delay any such award and such award shall be enforced in accordance with domestic law."*[94]

Above all, the compliance with the award means that the state's executive will pay a monetary compensation to the investor or provide a specific performance, whichever kind of reparation under international law was ordered by the tribunal in its award.[95] The compliance with the award is more an obligation of result, for interpreting this provision, as requiring a mere effort would undermine the spirit and an *effet utile* of the obligation.[96]

Moreover, dispute resolution clauses contain obligations to recognise and enforce the arbitral award. Thus, for instance, Article 10 para. 2 of the investment treaty between the Czech Republic and Germany provides that *"the award shall be recognized and enforced under the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards."*[97]

Pursuant to Article VII of the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), domestic rules on recognition and enforcement apply

93 As far as states are concerned, such obligation may be seen as confirming the customary principle *pacta sunt servanda,* which comprises also the duty to comply with arbitration award as an outcome of the dispute arising out of an international treaty. See SCHREUER, C. H. et al. *The ICSID Convention: A Commentary*. Cambridge: Cambridge University Press, 2009, p. 1099.

94 Agreement between the Lebanese Republic and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments.

95 BRANBANDERE, E. de. *Investment Treaty Arbitration as Public International Law Procedural Aspects and Implications*. Cambridge: Cambridge University Press, 2014, pp. 175–201.

96 Investment awards are rendered by tribunals established on the basis of an international investment treaty. Investment treaties are governed by international customary rules codified in the VCLT, including its Article 26, which requires that *"every treaty in force is binding upon the parties to it and must be performed by them in good faith."* Hardly would it be reconcilable with the obligation to perform the investment treaty in good faith, were the obligation to comply with the award to be a matter of best efforts.

97 Germany and Czech and Slovak Federal Republic Treaty concerning the Encouragement and Reciprocal Protection of Investments (with Protocol and Exchange of Notes dated 10 January and 13 February 1991).

to the extent they are more favourable to recognition and enforcement of arbitral awards than the New York Convention.[98]

Thus, in case that the losing party, namely the host state, does not observe the award, both states, as parties to the investment treaty, are bound to recognise and enforce that award, either under the New York Convention or its domestic law (the part of which may be the said convention).[99]

The international obligation to recognise and enforce arbitral award seems to be one single international obligation under the New York Convention.[100] All awards need to be recognised, should they be enforced. Not all recognised awards have to be enforced though. Recognition and enforcement are thus distinct processes.[101] Whilst recognition is governed by the investment treaty and the New York Convention as sources of international law, enforcement runs under a domestic law.[102]

Moreover, the state may invoke its immunity as a defence against recognition and enforcement, despite the fact that the state immunity is not among the grounds contained in Article V of the New York Convention. Whilst immunity from jurisdiction under international customary law may be invoked in the stage of recognition, the defence of immunity from enforcement may be invoked against enforcement.[103] This also supports the necessity to analyse recognition and enforcement separately.

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98 Art. VII para. 1 New York Convention.

99 New York Convention. As to the legislative incorporation of the New York Convention into domestic laws see BERMANN, G. A. Introduction. In: BERMANN, G. A. (ed.). *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*. Cham: Springer, 2017, pp. 7–9.

100 For instance, *Scherer* mentions only one single obligation – SCHERER, M. Article III. In: WOLFF, R. (ed.). *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Article-by-Article Commentary*. München: C. H. Beck, 2019, pp. 202–203.

101 BLACKABY, N., PARTESIDES, C., REDFERN, A., HUNTER, M. *Redfern and Hunter on International Arbitration: Student Version*. Oxford: Oxford University Press, 2015, pp. 610–611.

102 It has been pointed out that enforcement is carried out by organs of the state of the enforcement and on the basis of domestic rules of the procedure. See PAULSSON, M. R. P. *The 1958 New York Convention in Action*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 124.

103 See SAGAR, S. "Waiver of Sovereign Immunity" Clauses in Contracts: An Examination of their Legal Standing and Practical Value in Enforcement of International Arbitral Awards. *Journal of International Arbitration*. 2014, Vol. 31, no. 5, p. 617.

Hence, for the purposes of our analysis through the prism of the dichotomy of obligations of conduct and result, suppose there were discrete obligations: a) to recognise awards, and b) to enforce awards.

The obligation to recognise awards contained in investment treaties and the New York Convention would be one of result. Thus, *"each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles"*.[104] To conceive this kind obligation as one of conduct would contravene its purpose to prompt the obligated subject to comply with the award and threatening him with enforcement in the case of non-compliance. Also, should such obligation be interpreted as requiring a mere effort to recognise the award, it would cast doubt on its binding effect.[105]

Nevertheless, the obligation to enforce arbitral awards will be more one of conduct than result. This is supported by the fact that grounds for non-enforcement exist in the Article V of the New York Convention.[106] The systemic reading of the Articles III and V of the New York Convention thus excludes the conclusion that the obligation to enforce arbitral awards is that of result.[107]

In addition, there is no international customary rule to the effect that obligations to enforce awards under dispute resolution clauses of investment

104 New York Convention.

105 Some commentaries to the New York Convention indicate a decreased flexibility with regard to the content of this international obligation. This concerns namely the binding, hence preclusive, effect of arbitral awards recognised as such under the New York Convention. See SCHERER, M. Article III. In: WOLFF, R. (ed.). *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Article-by-Article Commentary*. München: C. H. Beck, 2019, p. 203.

106 Article V para. 1 contains the grounds for which the recognition may be refused at the request of the party against whom the award is invoked, whereas Article V para. 2 contains grounds that must be examined by the court or another authority of the state where the enforcement is sought on their own motion. However, given the wording "may refuse", courts or other authorities of the state of enforcement are not obliged to refuse the recognition and enforcement when it finds that the subject-matter was not arbitrable or contrary to public policy. As to the intricacies of the Article V's wording "may" versus "must" in the five languages, in which the New York Convention is authenticated, see PAULSSON, J. May or Must Under the New York Convention: An Exercise in Syntax and Linguistics. *Arbitration International*. 1998, Vol. 14, no. 2, pp. 227–230.

107 This internal systemic approach to the treaty text is required by Article 31 para. 1 in conjunction with Article 31 para. 2 of the VCLT.

treaties or the international obligation under Article III of the New York Convention must be interpreted as removing state immunity from enforcement. As a result, the obligation to enforce awards is one of conduct.

Nonetheless, now we have to re-connect the analyses concerning obligation of recognition and that of enforcement. Is this twofold obligation one of result or conduct? The purpose of this international obligation speaks in favour of the classification as an obligation of result. As elucidated above, the effective enforcement of arbitral awards would require a strict reliance on the performance of the obligation. However, the maxim *ultra posse nemo tenetur* softens this conclusion in favour of the classification as an obligation of conduct. As a result, it is reasonable to perceive the obligation to recognise and enforce arbitral awards contained in dispute resolution clauses of investment treaties as one of conduct.

This conclusion regarding the nature of the obligation applies *mutatis mutandis* to dispute resolution clauses referring to enforcement in accordance with "domestic law", to the extent the domestic law incorporates the New York Convention.[108] Whilst "incorporation" refers, for our working purposes, to "the formalised reception of international law into domestic law".[109] Most Contracting States of the New York Convention have given some domestic legal effects to it.[110] Albeit, not all Contracting States have considered the New York Convention as self-executing.[111]

Moreover, in states whose legal order is based on a dualist relationship between international and domestic law *"no treaties have formal status of law"*.[112] It is thus the domestic statute which incorporates the New York Convention, including all modifications to the treaty text contained therein,

108 The overwhelming majority of states are bound by the New York Convention. See List of the Contracting States. *New York Arbitration Convention* [online]. [cit. 27. 7. 2022]. Available at: https://www.newyorkconvention.org/list+of+contracting+states

109 FATIMA, S. *Using International Law in Domestic Courts*. Oxford: Hart Publishing, 2005, p. 55.

110 BERMANN, G. A. Introduction. In: BERMANN, G. A. (ed.). *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*. Cham: Springer, 2017, pp. 7–9.

111 *Bermann* speaks of almost one third of the Contracting States that deem the New York Convention as self-executing. See ibid., p. 7. The uncertainty surrounding the status of the New York Convention as (non-)self-executing has been occasionally criticised. See BORN, G. B. The New York Convention: A Self-Executing Treaty. *Michigan Journal of International Law*. 2018, Vol. 40, no. 1, p. 115 *et passim*.

112 SLOSS, D. Domestic Application of Treaties. In: HOLLIS, D. B. (ed.). *The Oxford Guide to Treaties*. Oxford: Oxford University Press, 2014, p. 370.

that will inform the wording "domestic law" in the dispute resolution clause of an investment treaty.[113] Consequently, the "domestic law" for the purposes of the dispute resolution clause in an investment treaty will be the one without the New York Convention, unless the latter has been incorporated into it.[114] However, the reference to a domestic law must be taken seriously also in monist legal orders, so that the internal hierarchy between the legislation incorporating the New York Convention and other pieces of domestic legislation is maintained.[115]

Moreover, only a minority of states are not bound by the New York Convention.[116] Such states will be under the obligation of conduct to enforce the award by virtue of the dispute resolution clause in an investment treaty in accordance with its domestic legislation.[117] They would not be obliged to reach the result of enforcing the award, given that in most states grounds for non-enforcement exist.

As a result, the obligation to enforce arbitral awards in accordance with domestic law is that of conduct. This result is substantially the same with the recognition and enforcement under the New York Convention.

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113 *Bermann* speaks of almost one third of the Contracting States that deem the New York Convention as self-executing. BERMANN, G. A. Introduction. In: BERMANN, G. A. (ed.) *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention*. Cham: Springer, 2017, p. 7.

114 It goes beyond the realm of this paper whether investment tribunals would be bound by the domestic law's self-perception as not including the New York Convention in interpreting the dispute resolution clause, despite the fact that the state is bound by the latter as a matter of international law. It seems that Article 27 of the VCLT provides the answer in negative.

115 SLOSS, D. Domestic Application of Treaties. In: HOLLIS, D. B. (ed.). *The Oxford Guide to Treaties*. Oxford: Oxford University Press, 2014, p. 374.

116 For instance, Somalia is not the Contracting Party to the New York Convention. Yet, Somalia concluded three investment treaties. See Somalia Bilateral Investment Treaties. *Investment Policy Hub* [online]. [cit. 27. 7. 2022]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/194/somalia; Note, however, that Somalia is the ICSID Contracting State. See Database of ICSID Member States. *ICSID* [online]. [cit. 27. 7. 2022]. Available at: https://icsid.worldbank.org/about/member-states/database-of-member-states

117 See Art. 10 para. 7 Agreement between the Government of the Republic of Turkey and the Federal Government of the Republic of Somalia concerning the Reciprocal Promotion and Protection of Investments.

However, also the ICSID Convention should be taken into consideration for two reasons.[118] First, it may form part of the domestic law which the dispute resolution clause refers to. Second, even if such reference is lacking, a dispute resolution clause may allow the choice of the ICSID as a forum for a dispute between an investor and state (see the dispute resolution clause above). In such scenario, the ICSID Convention will apply also to the enforcement of the pecuniary awards rendered under the aegis of the Centre. The provision at the heart of our interest is thus Article 54 para. 1 of the ICSID Convention which reads: *"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state…"*[119]

Article 54 para. 1 lays down a strict, positive obligation *(facere)* to enforce "pecuniary obligations", leaving no other choice to the state of their enforcement. As a result, this is an obligation of result. However, the question remains whether this conclusion would remain intact, if we read the said provision in conjunction with Article 55 of the ICSID Convention setting forth that *"nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution"*. It is argued that if this contextual reading is adopted, then the obligation to enforce pecuniary obligations becomes closer to the one of conduct, as it releases the state of the enforcement from the strict obligation to enforce the award.

The result is thus substantially the same as with the New York Convention (see above). A systemic reading of international investment treaties may reveal that an international obligation seemingly one of result is actually one of conduct. However, it should be noted that the reason for "softening" of the obligation of result is compliance with international obligations

118 Convention on the Settlement of Investment Disputes between States and Nationals of other States that expressly maintain the immunity from enforcement, despite the existence of the obligation to recognise and enforce awards.

119 Ibid.

binding on the enforcement state, namely the respect for execution immunity of other states.[120]

5.3 Investors' Obligations to Comply with Human Rights' Obligations

Thus far, the role of the dichotomy for international obligations of states has been discussed. However, recently concluded investment treaties contain not only substantive obligations for states under the heading of investment standards, but also obligations for investors.[121]

For instance, the Article 14 of the investment treaty between Qatar and Ethiopia provides that *"investors and their investments shall comply with the labor and environment laws and regulations of the host contracting party with respect to management and operation of an investment."*[122]

A different formulation may be found in the Article 18 of the investment treaty between Morocco and Nigeria:

> *"Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties."*[123]

These treaty clauses have come into existence as a reaction to (alleged or real) human rights' abuses by investors.[124] Whilst it might be welcomed that an initial asymmetry in international obligations between investors and states in detriment to the latter has now been (perhaps) more balanced, this comes at a price of vagueness of the international obligations imposed on investors.

120 The significance of the execution immunity was emphasised by the ICJ. See Judgment of the ICJ of 3. 2. 2012, *Jurisdictional Immunities of the State (Germany vs. Italy, Greece intervening)*. In: *International Court of Justice* [online]. Pp. 51–52, para. 113 [cit. 27. 7. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-EN.pdf

121 See generally RADI, Y. *Rules and Practices of International Investment Law and Arbitration*. Cambridge: Cambridge University Press, 2020, pp. 218–230.

122 Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Qatar for the Promotion and Reciprocal Protection of Investments.

123 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria.

124 See MUCHLINSKI, P. Can International Investment Law Punish Investor's Human Rights Violations Copper Mesa, Contributory Fault and its Alternatives. *ICSID Review*. 2022, Vol. 37, no. 1–2, p. 371 et passim.

Nonetheless, given the generally accepted principle of treaty interpretation that every treaty provision should be presumed to have some meaning and effect,[125] the arbitral tribunal cannot conclude that it does not understand what was the treaty parties' intention in a nebulous formulation of a human right obligation binding on the investor, and therefore refuse to interpret and apply the provision. This would amount to situation of *non licet*.[126]

Thus, it is submitted that the distinction between obligation of conduct and result may be helpful in establishing the content of human rights and related obligations of investors. It is suggested that human rights' obligation worded as a positive obligation, i.e., active conduct, should be interpreted as obligations of conduct requiring due diligence, not attaining the protection of human rights as a specific result. Whilst obligations formulated as negative, i.e., prohibitions of conduct, ought to be interpreted as those of result.

A justification for this difference lies in the already mentioned rationales of utility and reasonableness. First, it is rather with ease for the investor to refrain from violating human rights. However, positive actions require more effort than abstaining from a conduct. As a result, the obligation to the effect that the investor must promote or observe human rights cannot be but one of conduct.

6 Findings

The answer to the key research question (see 2 above) is that the dichotomy of obligations of conduct and result actually assists in establishing the existence of a breach of an international obligation under investment treaties. The use of the dichotomy is revealing in that it enhances our understanding of the content of international obligations. Since international responsibility presupposes determining of the content of the international obligation, employing the dichotomy is by no means a superfluous operation.

125 DÖRR, O. Article 31. In: DÖRR, O., SCHMALENBACH, K. (eds.). *Vienna Convention on the Law of Treaties: A Commentary*. Berlin: Springer, 2012, p. 539.

126 For the explanation of this legal principle in the context of the related principles of *jura novit curia* and *ne infra petita* see TANZI, A. M. Ne ultra petita. In: BERGAMINI, L. (ed.). *L'arbitrato negli investimenti internazionali*. Napoli: Edizioni Scientifiche Italiane, 2020, p. 695.

The standard of full protection of security, which implies the obligation of due diligence on the part of the host state, may be classified as one of conduct. Host states, therefore, will not normally be responsible for a breach of this standard, provided that they undertake their diligence to protect the investor and investment.

Moreover, the classification of obligations as one of conduct and result may be useful in analysing dispute resolution clauses in investment treaties. This classification enables, it is argued, a valuable insight into the complexity of these provisions, including quite a few international obligations. Hence, the obligation to negotiate requires a conduct, not a result. Secondly, the obligation to submit to arbitration has been one of result. Thirdly, the obligation to comply with arbitral awards was classified as one of result. Fourthly, the obligation to recognise and enforce awards has been found to be that of conduct.

Nonetheless, a caveat has been identified with regard to the obligation to enforce arbitral awards. The systemic reading of the treaty may show that the obligation to enforce awards, which may seem in isolation as one of result, has to be "softened" in favour of an obligation of conduct. However, since the execution of immunity of states was the specific factor for assessing the obligation to enforce as one of conduct, it would require a further research to draw general conclusions thereof.

In addition, the investor obligations to observe human rights contained in the recent investment treaties were examined through the lenses of the dichotomy. Given that these provisions are rather nebulous, it is necessary to find analytical tools that would endow their content with a meaning. Whilst bearing in mind the peril of defining *ignotum per ignotius*, the dichotomy of obligations of conduct and result may be a promising starting point in the analysis of the investor human rights' obligations.

Furthermore, the analysis has shown that the distinction between positively *(facere)* and negatively *(non facere)* formulated investors' obligations to observe human rights ought to be taken into account. It has been submitted that obligations prohibiting breaches of human rights should be classified as obligations of result, whereas the obligations requiring their active protection by the investor are obligations of conduct.

In summary, the analysis might not have removed all doubts surrounding the classification of international obligations on the basis of the dichotomy. It could not (and did not intend to) conceal the fact that the explanatory power of dichotomies is necessarily influenced by their schematic nature leading to generalisations (see 2 above). In any event, there will always be an element of subjectivity in the classification of international obligations.

What has remained to be analysed in a future research is whether and to what extent the dichotomy has an impact upon reparation of damages in international investment law, including causation and quantum. Also, whilst one may imagine what would be the legal consequences of a breach of the standard of full protection and security or investor's breach of human rights, it would be interesting to examine what would be the form of reparation for breaches of procedural obligations contained in dispute resolution clauses.

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Contact – e-mail

zdenek.novy@law.muni.cz

ORCID

0000-0003-0641-7125

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Investment Arbitration Reform: Third-Party Funding in Investment Arbitration

Tereza Ševčíková

Faculty of Law, Masaryk University, Czech Republic

Abstract

This paper analyses the issue of "third-party funding", something widely criticised in investment arbitration. It is an issue addressed both through UNCITRAL Working Group III and in the amendment of the ICSID Procedural Rules (in force since 1 July 2022). The author discusses the issue and why it has been seen as problematic, then focuses on proposals for solutions discussed in debates. Finally, she compares the proposals discussed in UNCITRAL Working Group III with the newly adopted amendment of the ICSID Procedural Rules.

Keywords

Third-Party Funding; UNCITRAL Working Group III; ICSID; Reform; Investment Arbitration.

1 Introduction

Generally speaking, the primary purpose of international investment law is to provide foreign investors with protection for their investments from interference by the host state where the investor operates.[1] While investment law provides for substantive guarantees,[2] international investment arbitration is the procedural mechanism that secures the procedural guarantees.[3]

1 DOLZER, R., SCHREUER, C. *Principles of International Investment Law*. Oxford: Oxford University Press, 2008, pp. 1–3.

2 For example, the specific standards are the national treatment, most favoured nation, fair and equitable treatment ("FET"), etc. – Ibid., pp. 220–222.

3 EUROPEAN COMMISSION. Factsheet on Investor-State Dispute Settlement. *SICE* [online]. 3. 10. 2013, 6 p. [cit. 7. 5. 2022]. Available at: http://www.sice.oas.org/tpd/USA_EU/Studies/tradoc_151791_Investor-State_Dis_e.pdf10

There is debate about the current investment arbitration system because some involved states and other actors are disputing whether it fulfils its desired goals.[4] Investment arbitration is currently, again, being reformed. However, this seems to be a complex, determined debate, while some results have already been presented this time. This paper deals with one of the third-party concerns raised as part of the currently ongoing reform of investment arbitration. To understand why the actors in the debate raised it as a concern, the author believes that the readers need to understand what third-party funding is, and how it was developed – both generally and specifically – in investment arbitration.

Third-party funding is a fast-growing industry involving speculative investors who invest in arbitration proceedings and seek to control and participate in debt collection via such investment.[5] The third-party funders' investments in the proceedings are most likely to provide the funding or resources to finance international arbitration's legal costs and expenses.[6] To summarize the general introductory excurse, some states want to ban third-party funding, while others wish to regulate it. The investors, specifically small and medium-sized enterprises ("SMEs"), want to create a mechanism through which they can access justice without third-party funders disqualifying them from this. In other words, to reform it.

This paper provides a descriptive analysis of the concerns related to the presence of third parties and how they can be mitigated. The author firstly presents how third-party funding works in practice and how it was developed. Then, the criticism of third-party funding in the current system in UNCITRAL Working Group III, the ICSID and SMEs is described. The third chapter very briefly presents the current state of the regulation. That is followed by a description of the current initiation in UNCITRAL Working Group III and ICSID, and the possibilities presented by SMEs. The author concludes with her view on the presented solutions and a comparison of the presented solutions.

4 GIORGETTI, C. Reforming International Investment Arbitration: An Introduction. *The Law and Practice of International Courts and Tribunals*. 2019, Vol. 18, p. 306.

5 STEINITZ, M. Whose Claim Is This Anyway? Third-Party Litigation Funding. *Minnesota Law Review*. 2011, Vol. 95, no. 4, p. 1268.

6 Ibid., pp. 1286–1291.

2 How Third-Party Funding Operates in the Current System

A third-party funder may be a lawyer or just a third person: a company sharing indirect interests in the success of the claim, which is interested in the outcome, and makes financial arrangements or provides material support for the costs of one of the parties in certain proceedings in exchange for remuneration – often a share of the award.[7]

This opportunity for investors who cannot afford arbitration proceedings became available in commercial proceedings around twenty years ago. Third-party funding was illegal under common law as a violation of the doctrines of maintenance and champerty, and virtually unknown in the civil law part of the world.[8] United Kingdom and Australian courts made the first move towards a slow but hastening process of legalization that has spread to Europe, the United States and Asia,[9] raising significant policy concerns.[10]

With the global financial crisis after 2008, demand from speculators for new investment vehicles rose, and third-party funders discovered that the political economy of the investor-state dispute settlement system offered the possibility of very high returns with comparatively little risk. The high costs and potentially significant damages characteristic of investment arbitration proceedings have made it a new and attractive market for third-party funders.[11] For information, according to a survey from 2018, reproduced in the Report of the ICCA – Queen Mary Task Force on Third-Party

7 BOURGEOIS, A. Third-Party Funding. *Jus Mundi* [online]. 23. 2. 2022 [cit. 7. 5. 2022]. Available at: https://jusmundi.com/en/document/wiki/en-third-party-funding

8 STEINITZ, M. Whose Claim Is This Anyway? Third-Party Litigation Funding. *Minnesota Law Review*. 2011, Vol. 95, no. 4, p. 1268.

9 RICKARD, L. Third-party litigation funding in U.S. enters mainstream, leading to calls for reform. *Financier Worldwide* [online]. November 2016 [cit. 7. 5. 2022]. Available at: https://www.financierworldwide.com/third-party-litigation-funding-in-us-enters-mainstream-leading-to-calls-for-reform#.YpN0py0Rqu4

10 BEISNER, J. H., RUBIN, G. A. Stopping the Sale on Lawsuits: A Proposal to Regulate Third Party Investments in Litigation. *U.S. Chamber Institute for Legal Reform* [online]. October 2012, pp. 1–2 [cit. 7. 5. 2022]. Available at: https://instituteforlegalreform.com/wp-content/uploads/2020/10/TPLF_Solutions.pdf

11 GARCIA, F. J. The Case Against Third-Party Funding in Investment Arbitration. *IISD* [online]. 30. 7. 2018 [cit. 7. 5. 2022]. Available at: https://www.iisd.org/itn/en/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia/

Funding in International Arbitration created by the International Council for Commercial Arbitration, third-party funding is used in both commercial, investment and state-state arbitration.[12]

On the other hand, it is rather challenging to approximate the role of third-party funders because, as became apparent in some investment arbitration cases, they generally prefer not to disclose their role to the other parties or the arbitrators – even though, according to the available information from the mentioned cases, their actual or alleged role is significant.[13] Many jurisdictions are beginning to recognize the impact of third-party funding and its unique role in international investment arbitration. It is essential to consider whether third-party funding is consistent with the goals of the investment law regime and the values and interests states must advance and protect.

2.1 The Structure of Third-Party Funding

Suppose an investor is sure of their claim but does not have the funds to pay for investment arbitration proceedings. In such a case, they can turn to an external third-party company that provides claimants with the funds they need to conduct arbitration if they are convinced their case has a chance of success. This company will then recoup its investment in the claimants' dispute from the award. It might be a private company, an investment bank, a special investment fund (hedge funds) or an international law firm. However, such a third party will only provide funds if it likes the case and sees a possibility of winning. Usually, the third party through which the claimant

12 Report of the ICCA – Queen Mary Task Force on Third-Party Funding in International Arbitration. *ICCA* [online]. April 2018, p. 1 [cit. 7. 5. 2022]. Available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf

13 Viz., e.g., Decision on Jurisdiction and Admissibility of 4. 8. 2011 and Dissenting Opinion, Georges Abi-Saad of 28. 10. 2011, *Abaclat and others vs. Argentine Republic Case*, ICSID Case No. ARB/07/5. In: *Cases Database ICSID* [online]. [cit. 7. 5. 2022]. Available at: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/5&tab=DOC; Annulment Proceeding of 28. 4. 2011, *RSM Production Corporation vs. Grenada Case*, ICSID Case No. ARB/05/14. In: *Cases Database ICSID* [online]. [cit. 7. 5. 2022]. Available at: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/05/14; Award of 3. 3. 2010, *Ron Fuchs vs. Georgia Case*, ICSID Case No. ARB/08/2. In: *Cases Database ICSID* [online]. [cit. 7. 5. 2022]. Available at: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/15

secures funding will research the likelihood of winning, what the costs are likely to be, and other similarly important data before it makes its decision.[14]

2.1.1 Pros and Cons

The third-party funding system brings many advantages as well as disadvantages. One advantage is that the system fulfils the need for access to justice for investors who cannot afford costly proceedings. Furthermore, it offers division of risk management and some level of predictability of claim validity, since many third-party funders are only interested in "good claims" – those their research indicates have high potential to succeed. One disadvantage of third-party funding relates to the expenses because the successful claimant pays a massive amount to the third-party funder under the Funding Agreement.

Moreover, the claimant can lose control or influence over their own case, even though this is supposed to be prohibited. The costs of applying for third-party funding can also be relatively high. If the investor does not qualify, they can lose a lot of money and the possibility to access justice, while this is specifically true for SMEs.[15]

3 Criticism of Third-Party Funding in the Current System

Generally speaking, the current investment arbitration system is widely criticised, specifically in terms of its fairness, governance, asymmetry, legitimacy, the rule of law grounds, non-consistency, non-coherency, and non-correctness.[16] These structural insufficiencies of the system do not help promote the third-party funding model, and make investment arbitration a very attractive investment

14 Third-Party Funding: A Source of Capital for Any Company With a Good Legal Claim. *FTI Consulting* [online]. [cit. 7. 5. 2022]. Available at: https://www.fticonsulting.com/emea/insights/articles/third-party-funding-source-capital-any-company-with-good-legal-claim

15 Third-Party Funding in International Arbitration. *Ashurst* [online]. 1. 2. 2022 [cit. 8. 5. 2022]. Available at: https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/

16 GARCIA, F. J. Third-Party Funding as Exploitation of the Investment Treaty System. *Boston College Law Review*. 2018, Vol. 59, no. 8, p. 2913.

market for funders.[17] The involvement of third-party funders may have an impact on the jurisdiction of the arbitral tribunal, the possibility of obtaining security for costs, transparency and conflict of interests, and the determination of recoverable costs.[18] It may also impact other parts of investment arbitration proceedings, as the reader will see in the following chapters.

The current system is highly criticised, while one of the concerns raised relates to third-party funding itself. States criticise the non-regulative character and dangers inherent in third-party funding[19] for investors, specifically SMEs, and the possible lack of access to justice.[20]

There is debate on reform in several platforms. Therefore, this paper looks at several platforms where third-party funding is being discussed. The debate is taking place in UNCITRAL WG III, ICSID, and among investors, specifically SMEs.

3.1 What Has Been Seen as Problematic in UNCITRAL Working Group III?

UNCITRAL mandated its Working Group III in 2017 to identify concerns regarding investor-state dispute settlement and to develop potential reform solutions.[21] In this section, the author first presents the concerns raised at Working Group III sessions, and then analyses those concerns in more detail.

17 GARCIA, F. J. Third-Party Funding as Exploitation of the Investment Treaty System. *Boston College Law Review*. 2018, Vol. 59, no. 8, p. 2914.

18 BOURGEOIS, A. Third-Party Funding. *Jus Mundi* [online]. 23. 2. 2022 [cit. 7. 5. 2022]. Available at: https://jusmundi.com/en/document/wiki/en-third-party-funding

19 KALICKI, J. Third-Party Funding in Arbitration: Innovations and Limits in Self-Regulation (Part 2 of 2). *Kluwer Arbitration Blog* [online]. 14. 3. 2012 [cit. 7. 5. 2022]. Available at: http://arbitrationblog.kluwerarbitration.com/2012/03/14/third-party-funding-in-arbitration-innovations-and-limits-in-self-regulation-part-2-of-2/; GARCIA, F. J. The Case Against Third-Party Funding in Investment Arbitration. *IISD* [online]. 30. 7. 2018 [cit. 7. 5. 2022]. Available at: https://www.iisd.org/itn/en/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia/

20 Possible reform of investor-State dispute settlement (ISDS) – cost and duration, Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session (Vienna, 29 October – 2 November 2018). *UNCITRAL* [online]. 31. 8. 2022, p. 3, para. 9 [cit. 8. 5. 2022]. Available at: https://undocs.org/en/A/CN.9/WG.III/WP.153; MILLER, S., HICKS, G. N. *Investor-State Dispute Settlement: A Reality Check*. Lanham: Rowman & Littlefield, 2015, 31 p.

21 UNCITRAL Working Group III and Reform of Investor-State Dispute Settlement. *IISD* [online]. [cit. 13. 5. 2022]. Available at: https://www.iisd.org/projects/uncitral-working-group-iii-and-reform-investor-state-dispute-settlement

Within the Working Group III debate, third-party funding was raised as a concern that required further consideration at the 34th session.[22] It was observed that third-party funding had become a significant concern, creating a systemic imbalance, and that it has an impact on issues such as transparency, the appointment of arbitrators, the compensation of arbitrators, lack of accountability, conflicts of interest of arbitrators, costs of proceedings, a potential increase in frivolous claims, and outcome legitimacy.[23] At the 35th session, the delegates added other observations, including that domestic legislation generally did not prohibit double-hatting. It was also noted that "triple" or even "quadruple" hatting had been observed in practice, where certain individuals acted as party-appointed experts in certain investment arbitration cases or advisers to third-party funders.[24] According to the report from that session, such practices raise ethical issues and might have a negative impact on proceedings. Furthermore, it pointed to the fact that third-party funders might gain excessive control or influence over the arbitration process, leading to frivolous claims and discouragement of settlements.[25] Moreover, it was indicated that third-party funding was a complex area and that there were different forms or types of funding.[26]

On the other hand, Working Group III does not see only criticism. On the contrary, it mentioned that third-party funding could be a helpful tool to ensure access to justice, particularly for SMEs.[27]

The author adds that in UNCITRAL Working Group III sessions, states have raised concerns about third-party funding linked with outcome transparency and legitimacy, and cost issues. Ten states from thirty Member States have specifically raised concerns. This specific presentation concerned all the

22 Third-party funding [online]. *UNCITRAL* [cit. 13. 5. 2022]. Available at: https://uncitral.un.org/en/thirdpartyfunding

23 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November – 1 December 2017) Part I. *UNCITRAL* [online]. 19. 12. 2017, p. 13, para. 64 [cit. 13. 5. 2022]. Available at: https://undocs.org/en/A/CN.9/930/Rev.1

24 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018). *UNCITRAL* [online]. 14. 5. 2017, p. 12, para. 79 [cit. 13. 5. 2022]. Available at: https://daccess-ods.un.org/tmp/6780042.64831543.html

25 Ibid., para. 89.

26 Ibid., para. 90.

27 Ibid., para. 91.

already mentioned issues related to third-party funding, such as transparency, impartiality of arbitrators and conflicts of interest, systematic imbalance, the probability of more frivolous claims, costs, and award enforcement.[28]

28 A fascinating point was raised by Nigeria, which stated: *"We find that third-party funders are attracted by high-level claims, the perceived finality of awards, and the enforcement regime. But it still raises moral, ethical, and policy issues. Why should a total stranger who has suffered no injury be allowed to benefit from injury caused to others? In our view, the danger of third-party funding is that the funders are not known to BITs."* The Nigerian delegate proposed that transparency be enhanced or that third-party funding be banned. The Polish delegation commented on the relationship between third-party funding and frivolous claims: *"… the third-party funder runs a low risk of indemnifying the whole state for the incurred arbitration costs. Such a situation creates an obvious asymmetry between the investor and the state and can induce investors to bring unrelated claims."* Singapore said that the issue of third-party funding is related to the costs *per se* as well as to the impartiality of the arbitrators. Furthermore, Singapore believes that *"the increasing prevalence of third-party funding* […] *is something that is not being sufficiently addressed in the current ISDS framework, but it needs to be more fully addressed in order to safeguard the integrity and impartiality of ISDS proceedings."* Australia commented on transparency and its relation to third-party funding*: "One of the areas to look at concerning ways of improving transparency is in relation to third-party funding."* Italy stated, concerning the systemic issues, security costs, third-party funding and legitimacy of the system, that: *"Some issues on security for costs, of third-party financing, are also linked to the legitimacy of the system because transparency and conflicts are connected."* With that comment, the author believes that the Italian delegation wanted to point out that all these concerns should be resolved together at some point. The Netherlands specifically commented*: "The issue of transparency is really a crosscutting one and* […] *in view of this delegation needs a systemic holistic approach."* India was concerned about the problem of pro-investor and pro-state arbitrators regarding impartiality and independence, and stated that: *"The mix of third-party funding, multiple hatting and lack of adequate ethical standards has the potential to derail the system."* Canada stated that: *"… the perception is that third-party funding really benefits illegitimate investors, that it is a way of exploiting the system, and that it gives rise to claims that would not otherwise justifiably arise.* […] *There is growing consensus, and a number of recent treaties look at the issue of transparency, security and costs, and the link to third-party funding."* Uruguay commented on transparency, the impartiality of arbitrators, and third-party funding: *"Transparency of the proceedings is vital. We would suggest that there be a proper phase in arbitration whereby a group or committee would analyse the relevance of the documents brought forward as evidence, look at the claim, and then consider the costs. This could also look at the list of arbitrators in order to ascertain their skills, their professional ethics, and their links to the parties or third-party funders in order to avoid conflicts of interest."* And lastly, the USA affirmed the need to better understand different types of third-party funding: *"We* […] *note that third-party funding can encompass a number of different forms* […]. *Others have noted that it plays an important role for access to justice for small and medium enterprises.* […] *It's important to have more information and a better inventory of these types of different forms available to the working group* […] *that we can define it in order to be in a better position to assess what solutions may be appropriate, and what types of third-party funding may raise concerns."*
ROBERTS, A., BOURAOUI, Z. UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third-Party Funding and Counterclaims. *EJIL: Talk* [online]. 6. 6. 2018 [cit. 14. 5. 2022]. Available at: https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/

The author now also expands on the points raised within the debate in more detail. The lack of transparency concerning third-party funding related to the fact that a party can be secretly financed by a third party that has a conflict of interest with the arbitrators not specified during the proceedings. Since the third-party system is not sufficiently transparent, no one will ever know of this. Furthermore, the lack of transparency could mean the tribunal was not impartial or independent because of the conflict of interest, and therefore the whole proceedings are unjust. This issue is also related to the "multiple-hatting" of the arbitrators.

An improperly regulated system also raises the issue of payment, and the allocation and apportionment of the costs of proceedings. As already pointed out in the first chapter of this paper, the third-party funders pay part of the total costs of the proceedings. If the claimant is successful, the third-party funder gets a significant payout. Therefore, when the tribunal is assigning the costs, there is a knowledge gap regarding who should get them. Furthermore, states see the payment of costs and part of the allocated damages to a third, non-involved, party, which was involved just to profit from the proceedings, as problematic.

Furthermore, some states pointed out that third-party funding increases frivolous claims and can incentivise claimants to bring claims – and funders to finance such claims – that lack strong merits. Critics argue that this trend of financing frivolous claims is increasing legal costs for states, while investors/claimants bear little of the risk in bringing such claims.[29]

The concern relating to system imbalance through third-party funding was firstly raised at the 34th session of UNCITRAL Working Group III.[30] According to the debaters, third-party funding creates a systematic imbalance between investors and states.[31]

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29 XIN CHEN, S., HOUGH, K. Researching Third-Party Funding in Investor-State Dispute Settlement. *NYU Law Globalex* [online]. May 2019 [cit. 14. 5. 2022]. Available at: https://www.nyulawglobal.org/globalex/Third-Party_Funding_Investor-State_Dispute_Settlement.html#_6.4._Frivolous_Claims

30 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November – 1 December 2017) Part I. *UNCITRAL* [online]. 19. 12. 2017, p. 10, para. 64 [cit. 13. 5. 2022]. Available at: https://undocs.org/en/A/CN.9/930/Rev.1

31 Ibid.

In conclusion, the reader may see that the lack of transparency of third-party funding is most problematic as it is related to a higher probability of conflicts of interest and costs, specifically the allocation and security of costs. Furthermore, some states raised a systematic concern, with some debaters wanting to ban it, others just to reform it. Moreover, because third-party funding is the only option for some SMEs, Working Group III further developed these concerns into a possible solution, as the reader may see in Chapter 5.

3.2 The Debate Within ICSID Amendment Proceedings

Between October 2016 and January 2022, the ICSID amended its rules of procedure. The amended rules have been in force since 1 July 2022. As a part of the amendment proceedings, third-party funding was raised as one of the concerns.[32] As part of the amendment proceedings, six "Working Papers" were initiated.[33] Additionally, the issue of third-party funding was included in the first Working Paper issued on 2 August 2018, where the authors stated that the increase in third-party funding meant that the related concerns increased as well.

The ICSID received two types of comments, similarly to UNCITRAL. One group of states wanted to prohibit third-party funding entirely because, according to these states, it promotes frivolous claims and is inadaptable to disputes involving states.[34] On the contrary, the other group, including states and other actors, wanted to include a rule for the mandatory disclosure of information concerning third-party funding.[35] Such disclosure would cover concerns like lack of transparency, conflict of interests, and issues related to costs. Hence, the main criticism within this platform stems from the fear of frivolous claims piling up and the fact that it is not sufficiently regulated.

32 About the ICSID Rule Amendments. *ICSID* [online]. [cit. 15. 5. 2022]. Available at: https://icsid.worldbank.org/resources/rules-and-regulations/amendments/about

33 ICSID Rules and Regulations Amendment. *ICSID* [online]. [cit. 15. 5. 2022]. Available at: https://icsid.worldbank.org/resources/rules-amendments

34 ICSID. Proposals for Amendment of the ICSID Rules – Working Paper. *ICSID* [online]. P. 131, para. 241 [cit. 15. 5. 2022]. Available at: https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf

35 Ibid., p. 131, para. 241, 243.

3.3 Other Remarks

So far, the author has presented the views of the states and political actors in two vital platforms – UNCITRAL Working Group III and the ICSID. Nevertheless, there is another point of view – the investors' one. Third-party funding was integrated into investment proceedings during the 2008 financial crisis with the intention of improving access to justice in investment arbitration proceedings for enterprises that could not afford the expensive proceedings. These were and are still most likely SMEs. For them, the current system is also not very favourable. Third-party funding has gradually become popular with these enterprises as it improves access to justice. Yet the third-party funders get the majority of the potential profit, and thus criticise SMEs for often not having the access to justice they should, and therefore want the system to be more accessible.[36]

4 How Is Third-Party Funding Regulated Today?

After the criticism of the current system, the author believes it is also important to understand how it is regulated – both now and in the past. The current regulation is mainly based on international treaties and the procedural rules of the arbitration institutions.

Some states and international organisations have expressed concern about the impact on the investor-State dispute settlement system and expressed a willingness to regulate it. Therefore, they have started to regulate third-party funding within the newly negotiated treaties. Some of the first agreements were the regulation of third-party funding included in the EU-Canada Comprehensive Economic and Trade Agreement[37] and in the EU-Vietnam Free Trade Agreement.[38] On the other hand, some modern bilateral initiatives have expressly banned third-party funding, for example, the Argentina-United Arab Emirates BIT.[39]

36 BUTLER, P., HERBERT, C. Access to Justice vs Access to Justice for Small and Medium-Sized Enterprises: The Case for a Bilateral Arbitration Treaty. *New Zealand Universities Law Review*. 2014, Vol. 26, no. 2, p. 189.
37 Art. 8.26 EU–Canada Comprehensive Economic and Trade Agreement ("CETA").
38 Art. 3.37 EU–Vietnam Free Trade Agreement ("EVFTA").
39 Art. 24 Argentina – United Arab Emirates Bilateral Investment Treaty (2018).

Also, some arbitration institutions have started to include third-party funding provisions in their rules of procedure. For example, in 2021, the ICC included specific provisions on third-party funding in the 2021 ICC Arbitration Rules.[40]

Even though some states are seeking to regulate this issue at a bilateral level and some arbitral institutions are moving forward and trying to incorporate provisions regulating third-party funding, the issue has begun to be addressed at multilateral level only in the last five to six years. These efforts are examined in more detail in the following chapter.

5 Third-Party Funding as Part of Investment Arbitration Reform

Based on the analysis of the concerns and how third-party funding is currently ineffectively regulated, the author provides insights into the proposals and solutions in investment arbitration reform in this chapter. According to the findings, the main issues are the systemic imbalance, transparency, appointment of arbitrators and concerns about the compensation of arbitrators, conflicts of interest, the lack of accountability, frivolous claims, and legitimacy of the outcome. In addition, however, the approach of SMEs themselves, who need help with the financing, seems to be a problem. Therefore, to be an ideal solution, it should cover as many of the problems addressed as possible.

5.1 UNCITRAL Working Group III

The following two models were firstly suggested for further consideration at its 35th session: (i) prohibiting third-party funding entirely in ISDS cases[41]

40 DODGE, K. et al. Can Third-Party Funding Find the Right Place in Investment Arbitration Rules? *Kluwer Arbitration Blog* [online]. 31. 1. 2022 [cit. 16. 5. 2022]. Available at: http://arbitrationblog.kluwerarbitration.com/2022/01/31/can-third-party-funding-find-the-right-place-in-investment-arbitration-rules/

41 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018). *UNCITRAL* [online]. 14. 5. 2017, p. 14, para. 92 [cit. 13. 5. 2022]. Available at: https://daccess-ods.un.org/tmp/6780042.64831543.html; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019). *UNCITRAL* [online]. 9. 4. 2019, pp. 5–6, para. 20 [cit. 16. 5. 2022]. Available at: https://daccess-ods.un.org/tmp/3092404.00791168.html

or (ii) regulating third-party funding.[42] It was also suggested that a clear definition of third-party funding be developed.[43]

After several more sessions, it was presented at the 38th session that third-party funding should be regulated. Furthermore, the general thought was that flexibility should be provided, as third-party funding could open access to justice for those with insufficient resources, particularly SMEs and – to a more limited extent – states. It was also stated that prohibition of third-party funding could lead to the development of other forms of funding that might not be subject to regulation.[44]

UNCITRAL Working Group III initiated an "Initial Draft" concerning the regulation of third-party funding based on the issues raised in the 34th, 35th, and 36th, but mainly the 37th and 38th sessions. The Member States and other involved actors can comment on this Initial Draft until 30 July 2022.[45] The draft provisions have been prepared for inclusion in investment treaties and would need to be adjusted if they were to be part of a different type of instrument.[46] To ensure the structure of the article is clear, the author has divided this section in accordance with the Initial Draft.

5.1.1 Definitions

The Initial Draft firstly provides provisions concerning some key definitions. Specifically, the first provision regulates "proceedings", "third-party funder",

42 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018). *UNCITRAL* [online]. 14. 5. 2017, p. 14, para. 92 [cit. 13. 5. 2022]. Available at: https://daccess-ods.un.org/tmp/6780042.64831543.html; Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019). *UNCITRAL* [online]. 9. 4. 2019, pp. 5–6, para. 20 [cit. 16. 5. 2022]. Available at: https://daccess-ods.un.org/tmp/3092404.00791168.html

43 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019). *UNCITRAL* [online]. 9. 4. 2019, p. 6, para. 21 [cit. 16. 5. 2022]. Available at: https://daccess-ods.un.org/tmp/3092404.00791168.html

44 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019). *UNCITRAL* [online]. 23. 10. 2019, p. 16, para. 81 [cit. 16. 5. 2022]. Available at: https://daccess-ods.un.org/tmp/8651513.45729828.html

45 Possible reform of investor-State dispute settlement (ISDS) – Draft provisions on third-party funding. *UNCITRAL* [online]. 14 p. [cit. 16. 5. 2022]. Available at: https://uncitral.un.org/en/thirdpartyfunding

46 Ibid., p. 2, para. 3.

"funded party", and "third-party funding".[47] The authors stated that their goal was to provide clear definitions. However, commentators may create other key terminology that might need to be added.[48]

The author believes that the definitions are most likely sufficiently clear, except for one critique. The definition of third-party funding includes generally direct or indirect findings. Even though the definition seems to be sufficient, the two key adjectives could be elaborated further. Why? One of the comments raised as a concern about third-party funding was that it might have many forms. Also, if the authors wish to prepare multilateral regulation of third-party funding, it must be crystal-clear.

5.1.2 Regulation Models

After these definitions, the Initial Draft provides two possible regulation models of third-party funding for states in their agreements. One is the "Prohibition Model" and the other is the "Restriction Model". Furthermore, this section includes a provision for legal consequences and possible sanctions for both these models.[49]

The author sees it as quite refreshing that the states, as sovereign actors in the international field, will be able to choose which model suits them better.

As some states desired, the Prohibition Model is supposed to address the prohibition of third-party funding. Such prohibition may address the concerns that third-party funding increases structural imbalance and frivolous claims.[50] The Initial Draft offers four options.[51] One is that third-party funding is generally prohibited.[52] The second is that investors cannot submit their claims if they entered into a funding agreement or received third-party funding.[53] The third possible model is based on the given consent of the

47 Possible reform of investor-State dispute settlement (ISDS) – Draft provisions on third-party funding. *UNCITRAL* [online]. P. 2, provision 1 [cit. 16. 5. 2022]. Available at: https://uncitral.un.org/en/thirdpartyfunding
48 Ibid., p. 3–4, para. 9.
49 Ibid., p. 4, para. 10.
50 Ibid., p. 4, para. 11.
51 Ibid., p. 4, provision 2.
52 Ibid., p. 4, para. 12.
53 Ibid., p. 4, para. 13.

respondent, which means that the respondent will give consent to the investment arbitration only if the claimant has not received any form of third-party funding.[54] The last model concerns the denial of benefits to the claimants that receive third-party funding. According to the UNCITRAL Working Group III's proposal, denying claimant's benefits with third-party funding could prevent the abuse of rights and safeguard the economic development objectives states pursue in investment treaties.[55]

Even though the author believes that it should be up to the states if they want to regulate or prohibit third-party funding, these provisions seem to cover every limitation. As mentioned in the UNCITRAL Working Group III debate, sometimes third-party funding is the only option for some SMEs to gain access to justice. Therefore, according to the author, the states should prohibit third-party funding only in some justifiable cases.

Then there is the Restriction Model or, more precisely, possible forms of it – the access to justice model, the sustainable development model, and the restriction list model. The first mentioned model is developed around the good faith of investors and their declaration that they do not have the means to pursue their claim without third-party funding.[56] The sustainable development model allows third-party funding for claimants only when the investment complies with sustainable development requirements.[57] Such requirements would be pre-defined. Also, this seems to support the current trend with states seeking, during treaty negotiations and renegotiations, to balance the protection of investors with their sustainable development agendas.[58] According to the author, it seems quite possible that this goal can be achieved. On the other hand, Working Group III should develop in more detail the pre-defined requirements because, for now, the terms seem quite devoid of meaning. The last presented model – the restriction list model – brings to the mix the possibility that the contracting states can include a list of prohibited forms of third-party funding in investment treaties.[59]

54 Possible reform of investor-State dispute settlement (ISDS) – Draft provisions on third-party funding. *UNCITRAL* [online]. P. 4, para. 13 [cit. 16. 5. 2022]. Available at: https://uncitral.un.org/en/thirdpartyfunding

55 Ibid., p. 5, para. 14.

56 Ibid., p. 6, para. 19.

57 Ibid., p. 6, para. 22–25.

58 Ibid., p. 6, para. 22.

59 Ibid., p. 7, para. 26.

This seems quite a reasonable option for those states that want to prohibit or at least regulate some forms of third-party funding but also do not want to deny justice to SMEs.

The authors of the Initial Draft added a subsection about the regulation models at the end of the section and together with a subsection about the legal consequences and possible sanctions.[60] This provision is supposed to be a list of possible consequences if the claimants do not comply with the settled model.[61]

5.1.3 Disclosure of Third-Party Funding

One significant provision is about the disclosure of third-party funding. The authors of the Initial Draft presented a rather detailed list of the information to be disclosed in order to prevent conflicts of interest,[62] which is one of the biggest concerns raised about third-party funding. According to the provision, the funded party[63] should disclose information about the name and address of the third-party funder[64] as well as the name and address of the beneficial owner of the third-party funder and any legal or natural person with decision-making authority.[65] Lastly, the author adds that the funded party should disclose the funding agreement.[66] In the comments, the authors encourage the debaters to think whether they would like to establish some exceptions. Due to the detailed nature of the list of mandatory disclosed information, the author welcomes this approach because it may help resolve some of the transparency and conflicts of interest concerns, or at least reduce them. Furthermore, in the second paragraph the authors added a list of other information that the tribunal may require.[67]

Even though the authors see it as positive that the tribunal would have the possibility, if the circumstances so require, to order the disclosure of other

60 Possible reform of investor-State dispute settlement (ISDS) – Draft provisions on third-party funding. *UNCITRAL* [online]. Pp. 7–8, para. 31–35 [cit. 16. 5. 2022]. Available at: https://uncitral.un.org/en/thirdpartyfunding

61 Ibid., p. 7, para. 31.

62 Ibid., p. 9, para. 36–49.

63 Ibid., p. 10, para. 38.

64 Ibid., p. 9, provision 7, para. 1, letter a).

65 Ibid., p. 9, provision 7, para. 1, letter b).

66 Ibid., p. 9, provision 7, para. 1, letter c).

67 Ibid., p. 9, provision 7, para. 2.

information, and that the list should not be overly burdensome, the tribunal should be able to have more flexibility on a case-by-case basis. As regards the time limits for filing, the parties should disclose the information with their statement of claim or afterwards when the funding agreement enters into force.[68] In addition, if any new information comes into light or there is any change to information, the funded party must inform the tribunal immediately.[69] This looks quite reasonable, although the author has one comment: the word "immediately" in paragraph 4 should be discussed in more detail so that one tribunal cannot decide it means "the day after it is found out" but another thinks it means "within a month or so". The provision also reflects the new sanctions provision and includes the failure to comply and possible sanctions.[70]

5.1.4 Other Provisions

Finally, the Initial Draft includes other provisions[71] concerning the scope of covered investor and investment,[72] security for costs,[73] allocation of costs[74] and a code of conduct for third-party funders.[75]

The scope of the covered investor and investment seems very reasonable since it only states, *"for the avoidance of doubt, third-party funding shall not be considered as covered investment under this* [Agreement] *and a third-party funder shall not be considered an investor of a Party."*[76] This will create security for the other party to the proceedings, especially considering that some third-party funders seek control over the proceedings without a legitimate title.

The author also welcomes the provision that allows the tribunal to order the third-party funder to provide security for costs, addressing states' concerns about inability to recover their costs.[77] The authors of the Initial Draft

68 Possible reform of investor-State dispute settlement (ISDS) – Draft provisions on third-party funding. *UNCITRAL* [online]. P. 9, provision 7, para. 3 [cit. 16. 5. 2022]. Available at: https://uncitral.un.org/en/thirdpartyfunding
69 Ibid., p. 9, provision 7, para. 4.
70 Ibid., p. 9, provision 7, para. 5.
71 Ibid., pp. 12–14.
72 Ibid., p. 12, provision 8.
73 Ibid., pp. 12–13, provision 9.
74 Ibid., pp. 13–14, provision 10.
75 Ibid., p. 14.
76 Ibid., p. 12, provision 8.
77 Ibid., p. 12, para. 51.

have left open the question whether the tribunals should have more strict guidelines concerning the amount of the security for costs to be ordered or let the mechanism be flexible.[78] In the author's point of view, the system should remain more flexible. However, recommended guidance would not be a burdensome option either.

As for the allocation of costs provision, the author considers it positive that the Initial Draft regulates that the costs arising or related to third-party funding will not be included in the costs of the proceedings.[79] This answers one concern related to the fact that some third-party funders only enter proceedings because of the high costs and tend to create even higher costs.

5.1.5 Some Reflections by the Author on the Initial Draft

Even though this Initial Draft seems to cover all the raised concerns and provides the debaters with at least one solution for each, it still seems relatively unpolished. The author believes that the possibilities raised are good, though the Initial Draft has only been prepared for implementation into investment treaties. This would require the creation of a multilateral instrument for all the states that want to include the provision in their treaties. Alternatively, all the states who want to include these provisions must renegotiate their old treaties, etc. The logistics behind the implementation are quite complex. Therefore, the author believes that UNCITRAL Working Group III should develop a multilateral solution to avoid all the additional issues. On the other hand, the next Working Group III session concerning third-party funding will show more development.

5.2 ICSID Amendment Proceedings

As discussed above, third-party funding has been addressed as part of the ICSID amendment proceedings, resulting in the newly accepted rules of procedure in force from 1 July 2022. When this article was being written they were not yet in force. Hence the author does not include any practical references.

78 Possible reform of investor-State dispute settlement (ISDS) – Draft provisions on third-party funding. *UNCITRAL* [online]. Pp. 12–13, para. 52 [cit. 16. 5. 2022]. Available at: https://uncitral.un.org/en/thirdpartyfunding

79 Ibid., p. 9, provision 10.

One of the many innovations introduced by the amendment is the obligation to report third-party funding. According to the first working paper, the states' comments were divided into two groups. One party wanted to ban third-party funding entirely, while the other only to regulate it effectively.[80] The ICSID decided to include a provision for notification of third-party funding rather than for a complete repeal, recognizing that some investors would not have the means to have access to justice and have their claims heard without third-party funding.[81]

Rule No. 14 of the ICSID Arbitration Rules governs the details of the notice of third-party funding of proceedings. When giving notice, the parties must disclose the name and address of the third party that will fund the proceedings. If the third party financing the proceedings is a legal person, a list of persons and entities owned and controlled by that third party must also be attached.[82] The funding agreement is not strictly included in the list, unlike with the Initial Draft from UNCITRAL Working Group III.[83] This may be a good thing because at least some part of the arrangement between the funded party and third-party funder can stay confidential between them. On the other hand, some other information may arise from that agreement, and can prevent conflicts of interest. However, how it will work in practice will be apparent after 1 July 2022.

A party must file a notice of third-party funding of their dispute with the secretary-general of the ICSID upon registration of the request for arbitration, or immediately upon the conclusion of the third-party funding agreement after registration. In addition, the tribunal may require the

80 ICSID. Proposals for Amendment of the ICSID Rules – Working Paper. *ICSID* [online]. P. 131, para. 241 [cit. 15. 5. 2022]. Available at: https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf

81 Ibid., p. 131, para. 242.

82 Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings. *ICSID* [online]. P. 33, Rule No. 14, para. 1 [cit. 22. 5. 2022]. Available at: https://icsid.worldbank.org/sites/default/files/publications/rule_amendment_proposals_convention.pdf

83 *Viz.* Investor or state that is not specified in more detail. – Possible reform of investor-State dispute settlement (ISDS) – Draft provisions on third-party funding. *UNCITRAL* [online]. P. 10, para. 38 [cit. 16. 5. 2022]. Available at: https://uncitral.un.org/en/thirdpartyfunding

disclosure of further information regarding the funding agreement or the settlor if it deems necessary.[84]

The inclusion of a mandatory notice of third-party funding in the rules of procedure reflects a trend whereby the issue of third-party funding of disputes is currently widely criticised, and arbitral institutions include a modification in their rules. Depending on how the new provision is adopted, it has the potential to regulate this issue at least partially.

6 Conclusion – ICSID vs UNCITRAL Working Group III

To conclude, the author considers that the states constantly addressed the same concerns in the criticism – systemic imbalance, transparency, conflicts of interest of arbitrators, costs of the proceedings, a potential increase in frivolous claims, and legitimacy of the outcome. On the other hand, the investors, mainly SMEs,[85] may view it as undermining the system since the profit-seeking investors only fund the claims if they see the likelihood of sufficient profit. Both UNCITRAL Working Group III and the ICSID address this concern as part of the reform debate. In the context of the ICSID discussion, new rules with high potential to correct the system's deficiencies have already been accepted. Quite a long debate still lies ahead for UNCITRAL Working Group III. However, it is already possible to compare the implementation of the two proposals at this point. Not from the practice point of view, but only the wording.

The UNCITRAL Initial Draft provides a rather extensive regulation that at first sight offers states choices and flexibility. Problematically, however, the Draft is currently only developed for the possibility of being incorporated into investment treaties. That is an imperfect solution, as states already add a provision to investment treaties if they want to regulate third-party funding. Moreover, the question arises as to how UNCITRAL Working Group III would envision implementing the Initial Draft provisions in existing treaties. In the author's view, the development of the Initial Draft

84 Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings. *ICSID* [online]. P. 34, Rule No. 14, para. 4 [cit. 22. 5. 2022]. Available at: https://icsid.worldbank.org/sites/default/files/publications/rule_amendment_proposals_convention.pdf

85 For which it is sometimes the only option to get funding for their proceedings.

is still in its early stages and will need some time to evolve before it is ready to be tested in practice. The author appreciates that the Initial Draft has so far included funding agreements in the disclosure of information. The question is whether there will be the political will to keep it that way.

As for the new ICSID Amendment Rules, it must be noted that they have indeed turned out quite well overall. In a relatively short amount of time,[86] they have managed to address and, therefore, possibly fix the problematic points in terms of the procedural aspects. How this will work in practice remains to be seen. Nevertheless, the wording is very promising.[87] As for the rule on notice of third-party funding itself, all the concerns are covered with a single rule, with the rules of procedure further elaborating on the points raised (such as dealing with frivolous claims – Rule 41 – Manifest Lack of Legal Merit,[88] or Rule 53 – Security of Costs).[89] The author likes the grasp of the whole issue and especially the omission of the possibility of prohibiting third-party funding, as it helps recreate structural balance.

As a final note, the author would like to add that in the context of investment arbitration, it is indispensable to take into account how the changes will work in practice, and this will first be seen with the ICSID rules from 1 July 2022 and with the UNCITRAL Working Group Draft hopefully as soon as possible.

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86 More or less the same time that UNCITRAL Working Group III has been in operation.

87 With a few minor exceptions. There is more about this in the author's forthcoming article: KUDRNA, J., ŠEVČÍKOVÁ, T. *Změny ICSID procesních pravidel – jak budou vypadat řízení u ICSID od července 2022.*

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89 Ibid., pp. 53–54, Rule No. 53.

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Contact – e-mail

468258@mail.muni.cz

ORCID

0000-0003-4243-7799

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Between Protection and Access to Justice: On the Regulation of Returns in Third-Party Litigation Funding

Patrik Provazník

Faculty of Law, Masaryk University, Czech Republic

Abstract

The present paper deals with the issue of third-party litigation funding from the perspective of current regulatory considerations. These, under the guise of protecting the weaker party from exploitation by the funder, are directed towards setting limits on the funders' returns for their services. This measure is intended not only to ensure that the supported litigants do not lose a substantial part of the amount awarded, but also to limit other negative externalities associated with this funding mechanism. However, this paper seeks to show that the consequences of such a measure may be diametrically opposed and miss the mark.

Keywords

Access to Justice; Caps on Returns; Regulatory Considerations; Third-Party Litigation Funding; (Un)Intended Consequences.

1 Introduction

Access to justice represents one of the fundamental principles of the rule of law, which is not only a goal in itself, but also a process to achieve it.[1] However, in the pursuit of its implementation, certain obstacles may be encountered time and again, which are regularly accompanied by extensive discussions on how to counter them. One such a pressing issue in the current

1 Handbook on European law relating to access to justice. *European Court of Human Rights* [online]. 22. 6. 2016, p. 16 [cit. 15. 5. 2022]. Available at: https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf

litigation environment, both nationally and internationally, is the economic accessibility of justice. Indeed, across the spectrum of global jurisdictions, it may be observed that an increasing amount of financial resources is required to enforce or defend one's rights before the courts. For many parties, however, these costs may present insurmountable obstacles that result in them either resigning to pursue their rights or losing the litigation brought against them. Thus, the lack of access to legal services and justice may be not only a result but also a cause of disadvantage and poverty.[2] In these circumstances, the scales are tipped in favor of the economically stronger litigant, as justice is largely relegated to the ability to bear the economic burden of the legal process. For many people, access to justice thus becomes more of a dreamlike ideal without realistic contours.

However, the outcome of a legal dispute should reflect the strength of the party's claim, not the size of its bank account.[3] Therefore, the litigation environment and the market have responded to these negative externalities with a variety of tools to counter them. In addition to generally accepted tools, such as legal aid or legal expenses insurance, a new market for alternative funding, which is referred to in this paper as third-party litigation funding ("TPLF")[4], has begun to emerge and develop. Although many jurisdictions have more than 20 years of experience with this phenomenon in its modern form, it is a largely unregulated or only partially regulated funding mechanism. And while the absence of formal regulation, which would be substituted by means of self-regulation among the entities operating in the market, may not cause difficulties for an industry in its infancy,[5] the litigation investment

2 Equal Access to Justice. *OECD* [online]. 7. 10. 2015, p. 3 [cit. 15. 5. 2022]. Available at: https://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf

3 BEDI, S., MARRA, W. C. The Shadows of Litigation Finance. *Vanderbilt Law Review*. 2021, Vol. 74, no. 3, p. 566.

4 This term also implies that the focus of this paper is on the use and regulation of this mechanism in state court proceedings, although a number of aspects typically associated with arbitration, such as the volume of claims, the speed of proceedings, or the expertise of arbitrators, make arbitration even more appealing to funders.

5 HODGES, C., PEYSNER, J., NURSE, A. Litigation funding: status and issues. *University of Oxford. Faculty of Law* [online]. January 2012, p. 144 [cit. 15. 5. 2022]. Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf

market is currently a rapidly expanding market whose global value for 2021 was estimated at approximately $ 13 billion.[6]

This type of funding, whereby a third party provides one party to a dispute with funds in exchange for a financial reward, has attracted considerable attention and has been the subject of extensive scholarly and legislative debate over the last few years. This is due to the fact that there are several problematic aspects associated with TPLF, the most pressing of which is the question of the relationship between enabling access to justice and the price that litigants must pay for this opportunity. Indeed, critics of this mechanism often point to the paradox that the rising costs of access to justice are combated by an instrument that, while improving access to justice, often imposes disproportionately high costs. This is, of course, a source of controversy, and raises questions about the need for regulation.

When considering the regulation of TPLF, most current discussions focus on measures to set limits on funders' returns. This approach is believed to tame predatory lenders, and counter the negative externalities of TPLF in all of its aspects. This paper's objective is thus to consider whether the proposed regulation of the contractual side of TPLF leads to the intended objectives or whether, instead, an unintended consequence is lurking behind the good intention.

To answer this question, the paper is divided into four parts. The first part briefly outlines how TPLF works, identifies its functions, and provides a classification of its problematic aspects. The second part of the paper outlines the developments in the debates and legislative measures adopted in selected jurisdictions with the focus on funders' returns limitation. The third part focuses specifically on the criticized consequences of TPLF, and the implications of the proposed regulations of funder returns on these aspects. Part four then concludes with a reflection on the question raised.

6 The Decade of Dispute & the impact of litigation funding. *FTI Consulting* [online]. 22. 7. 2021 [cit. 15. 5. 2022]. Available at: https://fticommunications.com/wp-content/uploads/2021/07/FTI-Consulting-The-Decade-of-Disputes-The-Impact-of-Litigation-Funding.pdf

2 Setting the Stage: TPLF

2.1 Grasping the Notion

TPLF falls under the broader category of so-called alternative litigation funding, an umbrella term for a range of instruments where a third party who is not a party to the proceedings contributes in a certain way to the costs of the litigation.

The TPLF mechanism may be characterized by the following defining features:[7]

> *"1. a cash advance;*
> *2. made by a non-party;*
> *3. to a party to the proceedings (mostly plaintiff);*
> *4. in exchange for an assigned share of the litigation proceeds, if any;*
> *5. arising out of settlement or judgment; and*
> *6. payable at the time of recovery"*

Based on these features, TPLF may be broadly[8] defined as the practice whereby a third party provides a litigant, under a litigation funding agreement, with funds to enable it to pursue (or defend)[9] a claim in court, in exchange for a financial reward.[10]

It is apparent from this definition that the commitment of the supported party to provide the funder with a financial reward constitutes the

7 MCLAUGHLIN, J. H. Litigation Funding: Charting a Legal and Ethical Course. *Vermont Law Review*. 2007, Vol. 31, no. 3, p. 618. – Point 3 slightly modified as the source speaks of plaintiff only.

8 TPLF is not a uniform concept, but its structure is determined and adapted to the environment in which it is applied, both in terms of societal considerations, and the need to comply with existing legal regulations and principles governing judicial proceedings. – HODGES, C., PEYSNER, J., NURSE, A. Litigation funding: status and issues. *University of Oxford. Faculty of Law* [online]. January 2012, pp. 2, 84 [cit. 15. 5. 2022]. Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf – A broad definition is, therefore, preferable here, as it allows to build on it in the latter parts of this paper, and to modify it when differentiating between the approaches adopted in different jurisdictions.

9 Although TPLF may be used to support both sides of the dispute, typically the funds are provided to plaintiffs, which corresponds to one of the traditional ways of calculating funder's return.

10 HODGES, C., PEYSNER, J., NURSE, A. Litigation funding: status and issues. *University of Oxford. Faculty of Law* [online]. January 2012, p. 10 [cit. 15. 5. 2022]. Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/litigation_funding_here_1_0.pdf

cornerstone of this type of funding. The way the funder's return is calculated varies depending on the different approaches to the mechanism itself, for example, as a multiple of the amount originally granted or as an obligation to repay the amount granted with agreed interests. In most cases, however, the funder's return is calculated as a percentage of the amount awarded or agreed in settlement.[11] Nevertheless, the structure of TPLF contracts is not boilerplate, but reflects the specific circumstances of each case.[12] Accordingly, the provision is often complex and includes multiple calculation methods, with the understanding that the method that yields the highest return to the funder will apply.

The second characteristic feature of TPLF is its non-recourse nature, i.e., the conditionality of the funder's remuneration on the success of the litigant it supports. Thus, if the plaintiff is supported, they will only pay the funder's remuneration if they are successful in pursuing their claim. If, on the other hand, the plaintiff loses the case, they will owe the funder nothing.[13] This is an appealing feature to litigants that distinguishes TPLF from other traditional third-party litigation funding methods.

2.2 Functions

From this brief outline, two elementary functions of TPLF – financial and risk transfer – may be clearly inferred.[14]

11 ELIAS, R. Mythbusting: Why the Critics of Litigation Finance Are Wrong. *Florida A&M University Law Review*. 2017, Vol. 13, no. 1, p. 111; LEWIS, J. Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice. *Georgetown Journal of Legal Ethics*. 2020, Vol. 33, no. 3, p. 687; GLENN, R. The Efficacy of Choice-of-Law and Forum Selection Provisions in Third-Party Litigation Funding Contracts. *Cardozo Law Review*. 2020, Vol. 41, no. 5, p. 2248.

12 GLENN, R. The Efficacy of Choice-of-Law and Forum Selection Provisions in Third-Party Litigation Funding Contracts. *Cardozo Law Review*. 2020, Vol. 41, no. 5, p. 2248.

13 LEWIS, J. Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice. *Georgetown Journal of Legal Ethics*. 2020, Vol. 33, no. 3, p. 687; ELIAS, R. Mythbusting: Why the Critics of Litigation Finance Are Wrong. *Florida A&M University Law Review*. 2017, Vol. 13, no. 1, p. 113; VELJANOVSKI, C. Third Party Litigation Funding in Europe. *Journal of Law, Economics & Policy*. 2012, Vol. 8, no. 3, p. 405.

14 HEATON, J. B. Litigation Funding: An Economic Analysis. *American Journal of Trial Advocacy*. 2019, Vol. 42, no. 2, p. 309.

The financial function reflects the fact that TPLF is a form of funding for one of the litigants. Thus, the funder provides the supported party with funds which, depending on the contractual arrangement, are used either to cover the costs of litigation or to finance everyday life. Both cases are indeed viable, as in the majority of cases, funding is provided to parties who do not have the means to litigate and are unable to obtain them from other sources. TPLF thus becomes their last resort to proceed with the claim.

On the other hand, it should be noted that this does not exhaust the range of persons who can use the services of funders. Funding may also be provided to parties who have sufficient funds to finance litigation, but do not want to spend them because of the risk associated with litigation.[15] This is typical of commercial entities that prefer to invest the funds in their business and its development. Third-party funding thus allows them to turn their legal claims into investments.[16] Another category may be those who perceive their claims as negative expected values cases and would therefore refrain from litigation themselves. However, in terms of economic analysis, when using TPLF, the risk-averse claimant may become risk-neutral thanks to the funding.[17] In this respect, it is rather the second elementary function of TPLF that is the decisive factor for them.

This function consists of transferring the risk to the funder. It reflects the non-recourse nature of funding, where, if the litigation is lost, all the risk falls on the funder who loses its original investment, gains nothing, and typically will still be liable to pay the counterparty's legal expenses. In such cases, it becomes advantageous for the funded party to trade this risk of losing the case for a portion of the amount awarded or otherwise obtained in the event of successful litigation.

15 APOSTOLIDIS, M. Third-Party Funding in Dispute Resolution: Financial Aspects and Litigation Funding Agreements. *Academia.edu* [online]. P. 6 [cit. 15. 5. 2022]. Available at: https://www.academia.edu/34709414/Third-Party_Funding_in_Dispute_Resolution_Financial_Aspects_and_Litigation_Funding_Agreements_by_Miltiadis_G._Apostolidis_International_Hellenic_University_SCHOOL_OF_ECONOMICS_BUSINESS_ADMINISTRATION_and_LEGAL_STUDIES

16 LEWIS, J. Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice. *Georgetown Journal of Legal Ethics*. 2020, Vol. 33, no. 3, p. 700.

17 HEATON, J. B. Litigation Funding: An Economic Analysis. *American Journal of Trial Advocacy*. 2019, Vol. 42, no. 2, pp. 311–312.

2.3 Commercial vs. Consumer

One more important point should be made, which already follows in part from the above, and which should be born in mind when considering the regulation of TPLF. This is the distinction to be made between funding commercial and consumer litigation.

It is generally considered that the former category does not pose such a risk of exploitation by the funder, since there are sophisticated entities on both sides, who are presumed to be aware of the associated risks. This conviction may stem from the assumption that commercial litigation funding will most often not be used because of the lack of resources, but rather to convert the claim into an investment, with the contractual terms striking a balance that is beneficial to both the funder and the litigant.[18]

Against this conclusion, it could be argued that the position of a small and medium-sized enterprise *vis-à-vis* a billion-dollar company does not, in fact, show significant differences from that of a consumer. One can certainly agree with this in relation to the ability to compete economically in spending money on litigation. However, from an informational and legal point of view, that is to say, in terms of the ability to perceive and properly understand all the implications that entering into a TPLF contract entails, their position is nevertheless different from that of consumers. The two categories of financing are very different, raise different concerns in relation to different aspects of TPLF, and regulatory considerations reflect this accordingly.

It is central to the following parts of this paper to note that many of the existing and prospective regulations considering capping funders' returns, as well as the discussions outlined *infra*, predominantly relate to the consumer litigation funding market.[19]

2.4 Dissecting Complexity: To the Core of This Paper

There is no doubt that TPLF yields several positive effects. Among the most significant of these are, of course, the improved access to justice and levelling

18 ELIAS, R. Mythbusting: Why the Critics of Litigation Finance Are Wrong. *Florida A&M University Law Review*. 2017, Vol. 13, no. 1, p. 116.

19 BEDI, S., MARRA, W. C. The Shadows of Litigation Finance. *Vanderbilt Law Review*. 2021, Vol. 74, no. 3, p. 576.

the playing field between the litigants or, as has been aptly noted, assisting David in his battle with Goliath.[20] Hand in hand with these also comes the deterrence effect, which leads to greater compliance with the law, since one can no longer rely on not being sued in many cases because the victims of their actions cannot afford to pursue their claim due to the lack of funds.[21]

On the other hand, however, the fulfilment of these functions also raises several concerns that fall under three sets of issues. These issues can be broadly classified as:[22]

1. Procedural – focusing on the impact of the financial support provided on the conduct of the supported litigants during court proceedings.
2. Ethical – touching on issues of potential conflict of interest, issues of disruption of the lawyer-client relationship, and the funder's influence on their procedural actions.
3. Contractual – relating to the conduct of the parties in negotiating the terms and the structure of the TPLF contract.

This paper is specifically focused, within the contractual level, on the issue of limiting the freedom of funders in determining their remuneration, which is a cornerstone of any TPLF contract and at, the same time, is probably one of the most controversial aspects of all the above-mentioned.

Its essence, and concurrently the bone of contention, lies in the provision that the funder, in the event of a winning decision, receives a portion of the damages awarded at the expense of the supported party. The amount of the funder's return is typically in the range of 20–40% of the amount raised, but due to the individual nature of each contract this range can vary in either direction. Although the commercial considerations determining the amount of the fee charged may vary,[23] the traditional model is based on a direct proportionality

20 BEDI, S., MARRA, W. C. The Shadows of Litigation Finance. *Vanderbilt Law Review*. 2021, Vol. 74, no. 3, p. 580.

21 PURI, P. Financing of Litigation by Third-Party Investors: A Share of Justice. *Osgoode Hall Law Journal*. 1998, Vol. 36, no. 3, p. 556; DE MORPURGO, M. A Comparative Legal and Economic Approach to Third-Party Litigation Funding. *Cardozo Journal of International and Comparative Law*. 2011, Vol. 19, no. 2, pp. 382–383.

22 SHANNON, V. A. Harmonizing Third-Party Litigation Funding Regulation. *Cardozo Law Review*. 2015, Vol. 36, no. 3, p. 881.

23 VELJANOVSKI, C. Third Party Litigation Funding in Europe. *Journal of Law, Economics & Policy*. 2012, Vol. 8, no. 3, pp. 423–424.

whereby the greater the risk taken by the funder, the greater the fee charged in the event of success. Overall, funders' returns significantly exceed the limits of returns that a funder could expect for other types of investment.

It is sometimes argued that the objectives and interests of both parties should be aligned.[24] In practice, however, it should be noted that funders do not act as guardian angels for their customers but operate for the purpose of generating profit. They do this precisely by charging fees for their services. In this respect, although the funder and its customer share the same objective, they differ in their reasons for achieving that objective.[25] Despite this realization, charging excessive fees is viewed as a secondary (additional)[26] victimization of the victim.[27] Therefore, there are tendencies to fight this state of affairs.

One of the proposed ways of countering these high returns is to positively influence new entrants and rely on market forces where competition not only across alternative funding methods but also within TPLF funders will lead to lower rates charged.[28] However, the massive development and overall size of the TPLF market no longer allows for reliance on these forms of (self-)regulation and, on the contrary, gives rise to a belief in the need for legislative intervention.[29] This fact triggers a regulatory tendency

24 APOSTOLIDIS, M. Third-Party Funding in Dispute Resolution: Financial Aspects and Litigation Funding Agreements. *Academia.edu* [online]. P. 16 [cit. 15. 5. 2022]. Available at: https://www.academia.edu/34709414/Third-Party_Funding_in_Dispute_Resolution_Financial_Aspects_and_Litigation_Funding_Agreements_by_Miltiadis_G._Apostolidis_International_Hellenic_University_SCHOOL_OF_ECONOMICS_BUSINESS_ADMINISTRATION_and_LEGAL_STUDIES

25 ELIAS, R. Mythbusting: Why the Critics of Litigation Finance Are Wrong. *Florida A&M University Law Review*. 2017, Vol. 13, no. 1, p. 115.

26 RODAK, M. It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement. *University of Pennsylvania Law Review*. 2006, Vol. 155, no. 2, p. 518.

27 BEYDLER, N. Risky Business: Examining Approaches to Regulating Consumer Litigation Funding. *UMKC Law Review*. 2012, Vol. 80, no. 4, p. 1160.

28 MOLOT, J. T. Litigation Finance: A Market Solution to a Procedural Problem. *Georgetown Law Journal*. 2010, Vol. 99, no. 1, p. 108; MARTIN, S. L. The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed. *Fordham Journal of Corporate & Financial Law*. 2004, Vol. 10, no. 1, p. 57.

29 BARKSDALE, C. R. All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance. *Review of Litigation*. 2007, Vol. 26, no. 3, p. 736; ESTEVAO, M. J. The Litigation Financing Industry: Regulation to Protect and Inform Consumers. *University of Colorado Law Review*. 2013, Vol. 84, no. 2, p. 483.

to limit these revenues by setting limits on what a funder could demand. The fundamental idea behind this approach is primarily to protect the recipient of the financial support from the funder and to ensure that they receive a greater return on the amount paid out, so that they do not fall victim to secondary victimization, this time by the funder. In this context, however, the question arises as to whether this objective will be achieved by setting a limit on the returns of funders.

3 Overview of Regulatory Considerations in Selected Jurisdictions

Before proceeding to assess the impact of capping on the perceived negative externalities of TPLF, the author considers it appropriate to present the developments on this issue across selected jurisdictions. In each jurisdiction, funders respond to the particularities of the local litigation environment and any existing regulations and developments in relation to this mechanism. This is no different when considering the question of the regulation of funder returns. The aim of this section is to demonstrate the differences and similarities in approaches and opinions, as well as the way these are reflected in current regulatory considerations.

For the purposes of this paper, due to the limited scope, three jurisdictions have been selected to present the ways in which this issue is or is considered to be regulated. The implications of the proposed regulatory instruments will be addressed in more detail in the next section of the paper.

3.1 United States of America

The present regulatory considerations and approaches to funder returns are determined by historical approaches that rested on an absolute rejection of third-party involvement in litigation between the parties, relying on the common-law doctrines of maintenance and champerty. Although these doctrines are most strongly associated with the milieu and influence of English feudal lords,[30] in some US states adherence to these doctrines persists to this day.[31]

30 GLENN, R. The Efficacy of Choice-of-Law and Forum Selection Provisions in Third-Party Litigation Funding Contracts. *Cardozo Law Review*. 2020, Vol. 41, no. 5, p. 2251.

31 Such as Minnesota, Delaware, or Kentucky.

At the opposite end of the scale of openness to TPLF stand jurisdictions that consider the doctrines of champerty and maintenance as outdated and inapt for the needs of the current litigation environment. This shift in policy is often presented on the case of Ohio, where the courts first found TPLF inadmissible because of its conflict with these doctrines, only to be followed by the legislature's response, which struck down these limitations, effectively legalizing TPLF.[32] Nevertheless, the doctrine of champerty has left its mark in these jurisdictions as well, as many funders under its influence insist on deriving their returns not from the amount recovered, but from the amount originally advanced, which is returned with agreed interests. This, in turn, leads to the fact that the solution to the issue of funder returns relies on an approach to the classification of TPLF contracts. These can be divided into two streams.

On the one hand, there are jurisdictions that classify TPLF contracts as investments. For this approach, most of the jurisdictions so represented do not regulate in any way the question of funders' returns. Thus, these jurisdictions have moved from a regime of absolute prohibition to a regime of funder freedom.

On the other hand, there are jurisdictions that perceive the risks associated with the absolute freedom of funders and seek to tame this discretion. They achieve this through a different classification, whereby a TPLF contract is not seen as an investment but as a loan subject to usury laws.[33] Typically, the following characteristics must be present for the concept of usury to be met within the meaning of these laws:[34]

1. *"an agreement to lend money;*

32 MOLOT, J. T. Litigation Finance: A Market Solution to a Procedural Problem. *Georgetown Law Journal*. 2010, Vol. 99, no. 1, p. 95.

33 *E.g.*, Decision of the Supreme Court of Colorado, United States of America, of 16 November 2015, Case No. 13SC497 [online]. *FindLaw* [cit. 15. 5. 2022]. Available at: https://caselaw.findlaw.com/co-supreme-court/1718513.html

34 MARTIN, S. L. The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed. *Fordham Journal of Corporate & Financial Law*, 2004, Vol. 10, no. 1, p. 58; XIAO, J. Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table. *Vanderbilt Law Review*. 2015, Vol. 68, no. 1, p. 272. The fourth defining feature of intent to obtain more than the statutory maximum is (ir)relevant depending on the jurisdiction. – RICHMOND, D. R. Other People's Money: The Ethics of Litigation Funding. *Mercer Law Review*. 2005, Vol. 56, no. 2, p. 665.

2. *the borrower's absolute obligation to repay with repayment not contingent on any other event or circumstance;*
3. *a greater compensation for making the loan than is allowed under a usury statute or the State Constitution; and*
4. *an intention to take more for the loan of the money than the law allows."*

As can be seen, this approach gets in the way of funders who, striving to avoid regulation by these statutes, word their contracts to make the return of the funds provided and their return contingent on the outcome of the proceedings. Thus, when using TPLF, the supported party is not under an absolute obligation to return the funds provided, which is a mandatory element for the fulfilment of the concept of usury as defined above. Nevertheless, there have been some court decisions which have found, in relation to this element, that, in the circumstances of the case, the risk taken by the funder was so low as to amount in practice to an absolute obligation on the litigant to repay the funds provided together with the agreed return to the funder. This has been held, for example, in cases where the defendant's liability was determined based on strict liability for the damage caused.[35]

3.2 Australia

Australia is considered the cradle of modern TPLF. The origins of this method of litigation funding date back to 1995, when it was enshrined in a statutory exemption for insolvency practitioners.[36] However, in other areas, uncertainty persisted as to the legality of this method of funding, considering the existing doctrines of champerty and maintenance. Consequently, funder activity in these other areas was limited and the

35 E.g., Decision of the Nassau County Supreme Court, the State of New York, of 2. 3. 2005, Case *Echeverria vs. Estate of Lindner*, 2005 NY Slip Op 50675(U). In: *JUSTIA US Law* [online]. [cit. 15. 5. 2022]. Available at: https://law.justia.com/cases/new-york/other-courts/2005/2005-50675.html. However, regarding the classification of funded cases into commercial and consumer, it should be noted that the classification of TPLF as loans and their subsumption under the restrictions of usury laws applies to consumer cases, but does not apply to commercial cases, which are thereby left largely unregulated. – XIAO, J. Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table. *Vanderbilt Law Review*. 2015, Vol. 68, no. 1, p. 272.

36 LEGG, M. et al. The Rise and Regulation of Litigation Funding in Australia. *Northern Kentucky Law Review*. 2011, Vol. 38, no. 4, p. 628.

development rather slow. These doubts were finally removed in 2006 when the High Court of Australia handed down its first decision in the *Fostif* case.[37] Since then, the issue of TPLF regulation has been the subject of a plethora of scholarly articles, as well as studies and debates at the legislative level.

At an early stage in the development of these debates, a report by the Productivity Commission came out quite clearly in favor of freedom of funders in relation to their returns and, conversely, concluded that there was no need to limit funders' returns.[38]

A similar approach to legislative intervention can be seen in the Consultation Paper and follow-up Report produced by the Victorian Law Reform Commission ("VLRC") in 2017 and 2018, respectively. This Consultation Paper was based on the recognized power of the courts to assess the reasonableness and fairness of returns to funders in class actions. However, an issue identified within the terms of reference was whether criteria for setting a cap or sliding scale should be introduced at a statutory level or within court guidelines to ensure that returns to funders are not disproportionate in relation to the risk undertaken.[39] However, it was already noted within the follow-up Report that there was a divergence of views on the statutory regulation and therefore a recommendation was made that the Supreme Court should address this issue through developing its expertise rather than being guided by artificial legislative guidance.[40]

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37 Order of the High Court of Australia of 30. 8. 2006, Case *Campbells Cash and Carry Pty Limited vs. Fostif Pty Ltd.*, [2006] HCA 41. In: *Jade* [online]. [cit. 15. 5. 2022]. Available at: https://jade.io/article/1499

38 PRODUCTIVITY COMMISSION. Access to Justice Arrangements. Inquiry Report. *Australian Government Productivity Commission* [online]. September 2014, p. 635 [cit. 15. 5. 2022]. Available at: https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf

39 VICTORIAN LAW REFORM COMMISSION. Access to Justice – Litigation Funding and Group Proceedings. Consultation Paper. *Victorian Law Reform Commission* [online]. July 2017, p. 100 [cit. 15. 5. 2022]. Available at: https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRC_Litigation_Funding_and_Group_Proceedings_Consultation_Paper_for_web.pdf

40 VICTORIAN LAW REFORM COMMISSION. Access to Justice – Litigation Funding and Group Proceedings. Report. *Victorian Law Reform Commission* [online]. March 2018, p. 127 [cit. 15. 5. 2022]. Available at: https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRC_Litigation_Funding_and_Group_Proceedings_Report_for-web.pdf

Two months after the publication of the Report prepared by the VLRC, another discussion was initiated by the Australian Law Reform Commission. Having identified the arguments put forward for or against capping funder returns, which were consistent with the previous discussions and findings, two issues were again raised for discussion, namely whether statutory limits on returns should be introduced in the form of a sliding scale on the amount settled or adjudicated, or whether a provision should be introduced providing for a rebuttable presumption that would ensure that members of a class action would recover at least 50.1% of the proceeds, unless the court decides otherwise in the particular circumstances of the case.[41] A total of 78 submissions were made to this discussion. Following these submissions, a final report entitled "Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" was published in December 2018.[42] Based on the submissions and after evaluating the arguments presented, it was recommended that statutory caps limiting funders' returns be introduced only if other proposals, including enshrining the power of courts to modify, set or reject percentage arrangements in TPLF agreements, were not adopted.[43]

The next stage of finding an approach to TPLF regulation took place in 2020 in the Parliamentary Joint Committee on Corporations and Financial Services ("PJC"). It issued a report in December 2020 where the PJC recommended consultation by the Australian Government on how best to provide a minimum return on litigation proceeds for class members, as well as whether a minimum return of 70% is the most appropriate limit

41 AUSTRALIAN LAW REFORM COMMISSION. Inquiry into Class Action Proceedings and Third-Party Litigation Funders. Discussion Paper. *Australian Government Australian Law Reform Commission* [online]. June 2018, p. 94 [cit. 15. 5. 2022]. Available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/dp85_1_june_2018_.pdf

42 AUSTRALIAN LAW REFORM COMMISSION. Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders. *Australian Government Australian Law Reform Commission* [online]. December 2018 [cit. 15. 5. 2022]. Available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess_2.pdf

43 Ibid., p. 216.

or whether a graduated approach would be more appropriate.[44] Following this recommendation, a consultation process was launched in June 2021. A total of 23 submissions were made, including one confidential, out of which only four submissions were in favor of setting limits, but even these did not adopt clear-cut positions.

Despite the overwhelmingly negative view from TPLF companies, a bill was introduced in 2021 providing for a rebuttable presumption in favor of a 30% cap on funder returns, along with other conditions.[45] The first reading of this bill took place on 27 October 2021, but its fate is uncertain and will depend on the upcoming federal elections. At the time of writing this paper, neither the results of the elections nor the fate of the proposal were known.

3.3 European Union

The stance towards TPLF and its possible regulation at EU level has long been outside the attention of the EU legislator and thus left to the discretion of Member States.[46] A moderate shift in this passive stance occurred in 2013, when the European Commission adopted a recommendation following the ongoing discussions on collective redress mechanisms. This recommendation also addressed the issue of funding, where the principles identified were to ensure that TPLF would not lead to abuse of the system or cause conflicts of interest.[47] Therefore, it was recommended to prohibit the funder from charging unreasonable interest on the funds provided.[48]

44 PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES. Litigation funding and the regulation of the class action industry. *Parliament of Australia* [online]. 21. 12. 2020, p. 206 [cit. 15. 5. 2022]. Available at: https://www.aph.gov.au/-/media/Committees/corporations_ctte/Litigation_Funding/Litigation_funding_and_the_regulation_of_the_class_action_industry_report.pdf?la=en&hash=688F6CEDD016BE31B03A75101A6C6AA3BAE29AB7

45 Australia. Corporations Amendment (Improving Outcome for Litigation Funding Participants) Bill 2021.

46 MASSARO, A. P. The New Directive on an EU-Wide Representative Action and Third-Party Litigation Funding: An Opportunity for European Consumers? *Scindeks-clanci.ceon.rs* [online]. P. 97 [cit. 15. 5. 2022]. Available at: https://scindeks-clanci.ceon.rs/data/pdf/2683-443X/2021/2683-443X2101095P.pdf

47 Point 19 Preamble of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

48 Ibid., point 16 letter c).

A principle was also identified that the funder's remuneration should be prohibited from being derived from the amount reached in a settlement or from the damages awarded in a judgment, unless such arrangements were regulated by a public authority to safeguard the interests of the parties.[49] However, the only Member State that introduced national legislation in line with this recommendation was Slovenia in its Collective Actions Act.[50]

A further development on this issue came in 2018, when the first draft Directive on representative actions[51] was adopted under the "New Deal for Consumers" initiative. This draft addressed the issue of funding of representative actions in Article 7, however, unlike the prohibitions identified in point 16 of the 2013 Recommendation, there is no prohibition on funders charging excessive interest on the funds provided. Thus, only the procedural and ethical aspects were addressed, i.e., the duty of disclosure and the prohibition of abuse of process to the detriment of the funder's competitors. Similar holds true for Article 10 of the adopted text of the Directive which also emphasizes that TPLF is a matter for individual Member States to decide whether or not to allow it.[52]

However, this has not stopped developments at EU level. In March 2021, a European Added Value Assessment entitled "Responsible private funding of litigation" was published, which focused specifically on TPLF and responded to the fragmentation of regulatory approaches to representative actions across Member States, and in turn highlighted the need to provide equivalent protection across the EU.[53] In this context, two regulatory models with different levels of regulation – medium and strong – were presented.

49 Point 32 Preamble of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

50 Slovenia. Art. 60 Act No 55/2017, zakon o kolektivnih tožbah (ZKolT).

51 Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM/2018/0184 final).

52 Art. 10 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

53 SAULNIER, J., MÜLLER, K., KORONTHALYOVA, I. Responsible private funding on litigation. European added value assessment. *European Parliament* [online]. March 2021, p. 1 [cit. 15. 5. 2022]. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf

In relation to the regulation of funder returns, their common feature is the introduction of a cap on such returns, but only the strong regulatory model explicitly includes a cap of 30%.[54] However, it is stressed that the added value is similar in both cases, which creates an obstacle to reaching a clear conclusion on which model to opt for.[55] It is thus already apparent at this point that the issue is not entirely clear-cut and deserves due examination and consideration.

The last proposal to be mentioned is the Draft Report of 17 June 2021 with recommendations to the Commission on Responsible private funding of litigation, which is referred to as the Voss Report. This is a draft directive which expresses the belief that, when third-party funding is used, the litigants should not be left with less than 60% of the proceeds, unless the specific circumstances of the case justify a contrary approach.[56]

4 Partial Conclusion and Transition to the (Un) Intended Consequences of Capping

While no satisfactory answers emerge from the brief overview of the developments outlined, two partial conclusions can be drawn. On the one hand, there is a consensus on the need to regulate TPLF market players. On the other hand, it is the fact that in all jurisdictions, limiting funders' returns is generally considered to be the most effective and straightforward tool to address the various issues of TPLF. It is intended not only to protect the parties supported, but also to remedy other negative externalities that are linked to its procedural and ethical aspects.

However, despite these tendencies, it should also be clear how controversial the issue is, and that it is not easy to reach a consensus on the setting of limits or their potential level. Why is this so? And is something else being overlooked? To answer these questions, in the following paragraphs the

54 Ibid., pp. 18–19.

55 Ibid., p. 28.

56 EUROPAN PARLIAMENT. COMMITTEE ON LEGAL AFFAIRS. Draft Report with recommendations to the Commission on Responsible private funding of litigation. *European Parliament* [online]. 17. 6. 2021, p. 6, point 9 and Art. 13 para. 4 [cit. 15. 5. 2022]. Available at: https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf

focus will be on the most frequently cited arguments in favor of capping funder returns, and the author will try to present conclusions as to why it may be rather undesirable or why it misses the pursued primary objective of protecting litigants.

4.1 Overall Increase in Caseload

One of the fundamental purposes of TPLF is to mitigate the economic barriers of access to justice and, in turn, to strengthen this principle. Therefore, a logical consequence of the availability of TPLF is an overall increase in the number of cases brought before the courts. While this increase may reflect both of the functions of TPLF identified above, the author believes that the majority of this increase will fall into the category of cases that would not otherwise see the day in court due to lack of resources. The author thus does not consider this to be a negative consequence of TPLF itself, as on the contrary it achieves its core positive effect of providing access to justice and equality of arms of the parties to the dispute.[57] The outcome of litigation is thus no longer dependent on the amount of available funds, but on the legal strength of a particular claim.

The negative side of this consequence is sometimes associated with the fact that too much litigation may discourage riskier activities, the implementation and development of which could subsequently be beneficial for the market concerned or for the society as a whole.[58] In this respect, however, it should be noted that the regulation of liability for risky activities is a matter of substantive law, which by its approach itself regulates the question of whether and to what extent a particular claim can be successfully asserted. The availability of litigation funding in this case has no bearing on the merits of the case and the number of meritorious cases.

57 DE MORPURGO, M. A Comparative Legal and Economic Approach to Third-Party Litigation Funding. *Cardozo Journal of International and Comparative Law*. 2011, Vol. 19, no. 2, p. 385; LYON, J. Revolution in Progress: Third-Party Funding of American Litigation. *UCLA Law Review*. 2010, Vol. 58, no. 2, p. 591.

58 RODAK, M. It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement. *University of Pennsylvania Law Review*. 2006, Vol. 155, no. 2, p. 519.

4.2 Increase in Frivolous Cases

However, the basic argument of TPLF critics and proponents of capping funder returns is the fear of an overall increase in frivolous litigation. This view is based on the belief that funders will seek out high-volume cases where, although the likelihood of success is low, the likelihood of large profits is high. It is asserted that specialist funders will be able to resort to this practice when they can spread the risk across their portfolio of funded cases.[59]

Although such situations cannot be ruled out in rare cases, the author does not consider this argument to be valid either. This conclusion is based on the premise of defining a frivolous case as *"*[a case] *that lacks merit and is commenced for the purpose of harassing, intimidating or irritating the defendant"*[60]. Thus, if one disregards cases of judicial excess, the successful outcome of litigation cannot be described as frivolous because such litigation has a meritorious basis. If it were frivolous and had no basis, the action would have to be dismissed.

Nevertheless, similar conclusion holds true even if a case is considered frivolous when there is a low probability of success. Certainly, one can accept the proposition that the supported litigant, who risks no loss if the litigation is lost, may have an incentive in pursuing any claim when using TPLF. In this case, however, it is important to remember the objective and interests of the funders as they are far from providing their resources to fund any litigation. Very detailed due diligence is carried out before the decision to fund a particular dispute is made, which includes an assessment of the risk-return ratio and an assessment of the evidence supporting the merits of the dispute.[61] For example, based on interviews with established funders,

59 XIAO, J. Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table. *Vanderbilt Law Review*. 2015, Vol. 68, no. 1, p. 269.

60 PURI, P. Financing of Litigation by Third-Party Investors: A Share of Justice. *Osgoode Hall Law Journal*. 1998, Vol. 36, no. 3, p. 558.

61 APOSTOLIDIS, M. Third-Party Funding in Dispute Resolution: Financial Aspects and Litigation Funding Agreements. *Academia.edu* [online]. P. 28 [cit. 15. 5. 2022]. Available at: https://www.academia.edu/34709414/Third-Party_Funding_in_Dispute_Resolution_Financial_Aspects_and_Litigation_Funding_Agreements_by_Miltiadis_G._Apostolidis_International_Hellenic_University_SCHOOL_OF_ECONOMICS_BUSINESS_ADMINISTRATION_and_LEGAL_STUDIES

it has been reported that one of the companies requires a probability of success of up to 95%, while another requires a probability of success of at least 50%.[62] If this assessment does not achieve the required ratio, such litigation will not be funded unless there is some error of judgment in the assessment process itself.[63] To the contrary, such a process may serve as a sieve, filtering out frivolous disputes and showing the funding applicant that such a dispute is not worth pursuing in court proceedings.[64] This stems from the fact that funders are repeat players in the market and thus have experience in estimating the likelihood of winning a dispute.[65]

Moreover, reliable and established funders with a reputation will not risk funding such cases because they would lose their reputation and money. Many funding companies are publicly traded and have obligations to their shareholders, so they cannot afford to throw money away on frivolous litigation. The only exception might perhaps be in cases of market competitors. In these cases, the funder's motivation is certainly not to obtain a return on its investment, but these cases should be addressed by providing for a prohibition on this type of competition. Limiting funder returns will thus have zero effect on these cases.

It is thus more likely that with the availability of TPLF the ratio of meritorious to frivolous cases will increasingly shift in favor of the meritorious ones, which is also a desirable and general objective of this method of litigation funding.

4.3 Decreased Incentives for Settlement

Another issue that is being discussed when considering the regulation of funder returns is the impact on settlements. Indeed, there is a perception

62 ABRAMS, D. S., CHEN, D. L. A Market for Justice: A First Empirical Look at Third Party Litigation Funding. *University of Pennsylvania Journal of Business Law*. 2013, Vol. 15, no. 4, p. 1088.

63 MOLOT, J. T. Litigation Finance: A Market Solution to a Procedural Problem. *Georgetown Law Journal*. 2010, Vol. 99, no. 1, p. 107.

64 PURI, P. Financing of Litigation by Third-Party Investors: A Share of Justice. *Osgoode Hall Law Journal*. 1998, Vol. 36, no. 3, p. 558; BEDI, S., MARRA, W. C. The Shadows of Litigation Finance. *Vanderbilt Law Review*. 2021, Vol. 74, no. 3, p. 607.

65 ROBERTSON, C. B. The Impact of Third-Party Financing on Transnational Litigation. *Case Western Reserve Journal of International Law*. 2011, Vol. 44, no. 1, p. 170.

among critics of TPLF that the availability of funding will reduce the incentive of the funded party to accept a settlement and, in turn, lead to prolonged litigation in an attempt to extract the most favorable judgment. This view may arguably stem from the risk-transfer function of TPLF, which transfers the risk of losing from the litigant to the funder. Therefore, the litigant does not have to fear loss and its actions might be assessed as riskier. In taking this view, however, it must be noted that settlements must first and foremost be fair and just. Nevertheless, this has often not been the case in situations where settlements have been proposed in the knowledge that the party concerned cannot, for financial reasons, afford to take the dispute to court.[66]

Moreover, some sources assert that this statement is not accurate, and on the contrary, TPLF tends to encourage settlement.[67] Indeed, funders are also interested in a fair settlement, as they can obtain an interesting return for themselves at a relatively small cost. Such a solution is relatively swift, and the proportion of the return may be more favorable to them, given the small costs.

On the other hand, one cannot ignore cases where TPLF will be used opportunistically in an attempt to force the defendant to settle a case that would otherwise have little likelihood of success.[68] Here again, this is due to the desire to avoid the potential increased costs of litigation. However, it should be noted that such motives are more likely to be ruled out in the case of established funders with a good reputation. The argument is thus directed more towards those predatory funders who cast a long shadow on the whole practice of TPLF.

4.4 Limiting Funder Returns or Access to Justice?

The primary purpose for setting caps on funder returns should be to ensure that funders' customers are not deprived of a disproportionately large portion

66 RICHMOND, D. R. Other People's Money: The Ethics of Litigation Funding. *Mercer Law Review*. 2005, Vol. 56, no. 2, p. 661.

67 LYON, J. Revolution in Progress: Third-Party Funding of American Litigation. *UCLA Law Review*. 2010, Vol. 58, no. 2, p. 597.

68 ABRAMOWICZ, M. Litigation Finance and the Problem of Frivolous Litigation. *DePaul Law Review*. 2014, Vol. 63, no. 2, p. 197.

of the proceeds for the benefit of the funder. However, this paper proposes that the capping of funder returns under the guise of protecting supported parties will likely lead to negating TPLF's core purpose of providing greater access to justice.

One must recall time and again that funders operate in the market for profit. Therefore, it is beyond doubt that this method of litigation funding is not available for every conceivable claim, but only to claims that evince a sufficient degree of profitability. This profitability is determined in particular by the costs that have to be incurred in order to conduct the proceedings (including the potential obligation to reimburse the opposing party for the costs of the proceedings in the event of losing the case), together with the assurance of a sufficient level of return in the event of winning the case. However, if the returns to funders are capped, then funding will likely not be provided to low value claims, as they will not be economically viable for funders.[69]

With the capping of funder returns, the return on low value claims will be significantly reduced, to the extent that the risk on the funder's side cannot be covered and the claim will therefore not be funded at all. As a consequence, while funders will be prevented from profiting from the proceeds of litigation, it will be to the extent that such litigation will not reach the courts at all.

It should also be noted that low-profitability disputes give little room for funders to make a mistake in their estimation. Thus, setting caps on their returns might make it even worse to the extent that they will rather give

69 SLATER AND GORDON LAWYERS. Submission to the Treasury Consultation: Guaranteeing a minimum return of class action proceeds to class members. *Australian Government. The Treasury* [online]. June 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-slater_and_gordon.pdf; PIPER ALDERMAN. Public Submission – Consultation on Recommendation 20 of the Parliamentary Joint Committee report on litigation funding and class actions. *Australian Government. The Treasury* [online]. 28. 6. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-piper_alderman.pdf; CASHMAN, P. Guaranteeing a minimum return of class action proceeds to class members. Submission to the Treasury in respect of Recommendation 20 of the Parliamentary Joint Committee report on litigation funding and class actions. *Australian Government. The Treasury* [online]. 28. 6. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-dr_peter_cashman.pdf

up altogether.[70] Although the U.S. Chamber Institute for Legal Reform (ILR) points out that a potential loss on the funder's part is part and parcel of their business risk that they must take into account,[71] it is important to recognize that funders will not take that risk and will pass it on to their clients, either through an increase in the price of their services or the more radical way of not funding the litigation at all. As funders are commercial companies that operate in the funding market to generate profit, their primary purpose is not to be the guardian angel of vulnerable litigants, and to provide them with greater access to justice. While this can be a very positive side effect, the primary motivation is to value the funds provided and make a profit.[72]

Another consequence of introducing caps will likely be that the TPLF market will be closed to potential funders who simply will not enter such a market environment. Thus, competition will not be increased, and prices will not be lowered through competition. On the contrary, such a "closed" market will create privileged funders who will be few in number and will thus be able to charge higher prices. With this, the cap on the return to funders could very easily become a baseline for their return.[73]

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70 KIDD, J. Modeling the Likely Effects of Litigation Financing. *Loyola University Chicago Law Journal*. 2016, Vol. 47, no. 4, p. 1288; SHINE LAWYERS. Submission to Treasury and Attorney-General's Department. Guaranteeing a minimum return of class action proceeds to class members. *Australian Government. The Treasury* [online]. 5. 7. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-shine.pdf

71 U.S. CHAMBER INSTITUTE FOR LEGAL REFORM. Guaranteeing a minimum return of class action proceeds to class members. Submission of the US Chamber of Commerce – Institute for Legal Reform. *Australian Government. The Treasury* [online]. 28. 6. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-us_chamber_and_professor_stuart_clark.pdf

72 SHEPHERD, J. M. Ideal Versus Reality in Third-Party Litigation Financing. *Journal of Law, Economics & Policy*. 2012, Vol. 8, no. 3, pp. 595, 600.

73 ALLENS. "Guaranteeing a Minimum Return of Class Action Proceeds to Class Members". Submission to Treasury and Attorney-General's Department Joint Consultation. *Australian Government. The Treasury* [online]. 28. 6. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-allens.pdf; PHI FINNEY MCDONALD. Guaranteeing a minimum return of class action proceeds to members. *Australian Government. The Treasury* [online]. 5. 7. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-phi_finney_mcdonald.pdf; LAW COUNCIL OF AUSTRALIA. Guaranteeing a minimum return of class action proceeds to class members. *Australian Government. The Treasury* [online]. 6. 7. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-law_council_of_australia.pdf

It could perhaps be argued that this would not be an impermeable cap, as the proposed caps are mostly designed as rebuttable presumptions, whereby exceeding them will be possible if the exceptional circumstances of the case warrant it. It would thus be up to the court to assess the circumstances in question. However, this is an additional risk for funders, which would either deter them from funding such litigation altogether or would be reflected time and again in the cost of the services they provide. Moreover, from the position of the court, the author argues that there will be little incentive to rebut the presumption, as the purpose of these limits is to provide protection to the weaker party who might otherwise be secondarily victimized.

Thus, the introduction of limits on funder returns will ultimately miss the intended objective, where instead of increasing the returns to the litigants, they will end up with nothing at all because they will not have the means to resolve their dispute.[74] Such a solution, where the interest in protecting their guaranteed return outweighs their interest in access to justice is a wholly inappropriate solution. As has been aptly noted, the comparison is not whether the litigant receives 85% or 51% of the amount awarded, but whether they receive at least 51% of the amount awarded or 100% of nothing.[75]

5 Conclusion

Based on the above, it is clear that TPLF is not a linear problem, but that there are different aspects and a number of externalities that need to be addressed. The regulation of only one of these aspects is not able to achieve the desired effects in the other aspects. On the other hand, however, such regulation cannot be seen in isolation, as the different issues

74 WOODSFORD LITIGATION FUNDING. Public Submission to the Treasury and Attorney General in respect of the Joint Consultation Paper entitled Guaranteeing a minimum return of class action proceeds to class members (the "Consultation Paper"). *Australian Government. The Treasury* [online]. 25. 6. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-woodsford_litigation_funding.pdf

75 LITIGATION CAPITAL MANAGEMENT LIMITED. The Treasury and Attorney-General's Department Consultation Paper "Guaranteeing a Minimum Return of Class Action Proceeds to Class Members". Submission of Litigation Capital Management Limited. *Australian Government. The Treasury* [online]. 5. 7. 2021 [cit. 15. 5. 2022]. Available at: https://treasury.gov.au/sites/default/files/2021-10/c2021-176658-litigation_capital_management.pdf

are interrelated. Therefore, the need to regulate all aspects of TPLF in their interconnectedness is emphasized.[76] Only then will it be possible to present a comprehensive regulation that is balanced, responds to externalities of TPLF, and does not lead to undesirable consequences.

While it might seem that the author himself has departed from this exhortation by addressing only the issue of funder returns and its capping, this is precisely because it seems to be seen in many jurisdictions as a way to deal not only with the contractual dimension of TPLF, but also with other aspects and externalities. However, as the last chapter shows, capping funder returns is not an all-encompassing tool to combat these other consequences. The author is of the opinion that the impact of capping is rather negligible in these cases, as the determinants of these issues lie outside the contractual aspect of TPLF.

Furthermore, too strict and ill-considered limitation of funder returns may lead to negation of the very primary purpose of protecting vulnerable customers of funders. Indeed, the interest in protecting them will at some point override the interest in ensuring access to justice, which certainly misses the intended purpose of the legislator. Regulation of funder returns is therefore a double-edged sword that, if handled carelessly, can do more harm than good.

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Contact – e-mail
445932@mail.muni.cz

ORCID
0000-0002-7839-3188

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Contract Adjustment in Arbitration – Should the Approach Be Adjusted?[1]

Bára Bečvářová

Faculty of Law, Charles University, Czech Republic

Abstract

For decades, the general attitude has been moving towards accepting contract adjustment in arbitration. More and more, the question is when and how a contract may be adjusted and not whether the arbitrators may have such a power. The article will firstly discuss hardship as a basis for contract adjustment and provide general discussion on arbitrators' position in cases of hardship. Once the scene is set the paper will focus on how the issue is approached in the area of long-term gas sale and purchase agreements and especially the price review clauses. Based on their example, it is concluded that arbitral tribunals should evaluate not only conditions of hardship but also the will of the parties to continue the contract and, in absence of any other guidance, request proposals for adjustment from the parties.

Keywords

Contract Adjustment; Hardship Clause; Price-Review Clause; Gas Sale and Purchase Agreements.

1 Introduction

Contract adjustment[2] is a process best described in opposition to contract interpretation. When interpreting a contract, the decision-maker follows the original will of the parties with focus on clarification of dispute points or even gap-filling regarding the "missed" spots in the contract. Although

1 The article was supported by Charles University, project GA UK No. 342 222.

2 Synonymous term "contract adaptation" is also used in the literature but, for the sake of consistency, this article will only use "contact adjustment".

the interpretation process may be complicated by conflicting views as to whether the parties' intentions should be found within the contract or beyond and cases which require employment of objective standards (e.g., reasonable person's perspective)[3], interpretation does not aim to actively change what was agreed.

To the contrary, in case of contract adjustment, the aim is to change the initial agreement and replace it with a new, adjusted set of rights and obligations. While parties may at any point decide to renegotiate and ultimately change agreed terms, whether any third party, be it a judge or arbitrator, has a power to impose such change upon them naturally sparks a controversy. To summarize, the general concern is that the intervention disrupts parties' right to contract at will as well as their confidence in the sanctity of the contract, *pacta sunt servanda*.[4] Furthermore, any entity other than the parties is necessarily worse positioned and less equipped to make the business decision on the new contractual terms which may negatively affect the result and, most importantly, the practical viability of the adjusted terms.[5]

Regardless of these concerns, the issue gradually became less controversial as more and more national laws[6] incorporated contract adjustment as an option in changing circumstances, building on the doctrine of good faith and the overriding goal to protect economic balance in the contract more than the original wording. The general argument is that in specific circumstances contract adjustment will keep the deal alive when alternatives would be non-performance. While the debate is still ongoing, it is now less focused on whether contract

3 ROSENGREN, J. Contract Interpretation in International Arbitration. *Journal of International Arbitration*. 2013, Vol. 30, no. 1, p. 2.

4 HILLMAN, R. A. Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law. *Duke Law Journal*. 1987, Vol. 36, no. 1, p. 2.

5 HORN, N. Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law. In: HORN, N. (ed.). *Adaptation and Renegotiation of Contracts in International Trade and Finance*. Alphen aan den Rijn: Wolters Kluwer Law International, 1985, pp. 23–24.

6 To name a few, German law (Article 313 of German Civil Code), Dutch law (Article 6:258 of Dutch Civil Code) or Swiss law (Article 119 of Swiss Civil Code) allow for adjustment of contract by a third party (court) under certain conditions. For detailed analysis see FONTAINE, M. Chapter 1: The Evolution of the Rules on Hardship. In: BORTOLOTTI, F., UFOT, D. (eds.). *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*. Den Haag: Kluwer Law International, 2019, pp. 11–40.

adjustment is possible and more on when and how it should be applied. The purpose of this article is to add to this latter debate.

To set the scene, it is necessary to first define hardship[7] as a base on which we may then build any further argument on contract adjustment. Subsequently, the article will comment on a few aspects in position of arbitral tribunals where contract adjustment is requested in arbitration. After the general topics are set, the article will focus on forms of contract adjustment in a specific context of long-term gas sale and purchase agreements ("GSPA") with a goal to identify some aspects of the adjustment process in that field which may be advisable on more general level.

2 Contract Adjustment as a Resolution of Hardship Situations

When negotiating a contract, parties naturally depend not only on their knowledge of the present situation but also their expectations of future events including the gains from the contract itself. The final agreement should then reflect the balance among these aspects acceptable and beneficent for both parties. In UNIDROIT[8] Principles, this state of balance is referred to as "contractual equilibrium"[9] and hardship represents its disruption significant enough to justify, assuming that all conditions are met, contract adjustment.[10] In some national laws the description is even more direct, and hardship occurs whenever performance of the contract becomes excessively/exceedingly onerous[11] without reference to the original "contract equilibrium". In any case, the change has to be beyond mere fluctuation of the market.

7 In order to narrow the topic, situations of hardship will be considered in relation to (international) trade and in the context of arbitration.

8 The International Institute for the Unification of Private Law.

9 For details, see DAWWAS, A. Alteration of the Contractual Equilibrium Under the UNIDROIT Principles. *Pace International Law Review Online Companion*. 2010, Vol. 2, no. 5, pp. 1–28.

10 BRUNNER, C. *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2009, p. 391.

11 For example, hardship rule adopted into French law in 2016 (Article 1195 of the French Civil Code) makes no reference to contract equilibrium. It only requires that the change of circumstances renders performance "excessively onerous".

Simultaneously to the change in costs, there also have to be justifiable reasons why the burden should not be just silently shouldered by the affected party. Under Article 6.2.2 of the UNIDROIT Principles, the cost increase becomes hardship if the source thereof can be found outside of the contract, in events that the affected party (i) became aware of it after conclusion of a contract, (ii) could not reasonably expect it, and (iii) did not control or assume it.[12] To differentiate hardship and *force majeure* situations, it should be noted that hardship does not require impossibility of performance.[13] In cases of hardship, the affected party may perform the contract at its will but the performance is no longer advantageous because of the increased costs.

When hardship occurs, the affected party (or, even better, both parties) may approach the issue from several perspectives:

- (non-)performance – the affected party either performs the contract or breaches it, in any case bearing the negative consequences in the form of increased costs or damages; in some jurisdictions hardship may be claimed as a simple excuse from performance and thus defence against damages claims;[14]
- renegotiation – both parties agree to adjust contractual terms more or less in line with the changing circumstances;
- termination – because the hardship renders the contract economically non-viable, the affected party may have an option to unilaterally terminate the contract (or the parties agree on termination); or
- adjustment – a crossbreed between the above, where a contract is not terminated but the performance is granted under new conditions which are not a result of renegotiation but of an arbitral award.

12 Full text reads: *"There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party."*

13 BRUNNER, C. *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2009, p. 76.

14 Such an approach is most notably seen in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods, which does not support contract adjustment but works only as an exemption from negative consequences in case of non-performance.

Both the contract itself and the underlying contractual law may include or exclude some of these solutions. Although some authors argue that contract adjustment as a potential remedy available in arbitration is neither necessary nor desirable under the current standards and practice,[15] as will be discussed further below, I am of the opinion that contract adjustment may be beneficial but only if additional requirements are met.

2.1 Challenges of Contract Adjustment

While the contracting parties are automatically considered both capable and empowered to renegotiate their contract, in case of a third-party decision, any such assumption becomes moot and gives rise to several challenges. In the context of arbitration these may be divided between issues regarding (i) procedural authority of the arbitration tribunal and (ii) substantive legitimacy of the adjustment.[16]

2.1.1 Power of an Arbitral Tribunal to Decide on Contract Adjustment

What a tribunal can or cannot decide is in essence determined by the arbitral agreement of the parties and the applicable procedural law, *lex arbitri*. When providing scope of arbitrators' powers, arbitration agreements do not go into much detail and refer simply to the power to decide on a "dispute".[17] In some jurisdictions, *lex arbitri* is traditionally interpreted narrowly in this context, meaning that the term dispute is understood as a "legal dispute", which may be understood narrowly as a dispute over legal aspects only.[18] In such a case, assuming that the factual circumstances constitute a hardship situation, two conflicts over the potential adjustment may arise. Either

15 SCHWENZER, I., MUÑOZ E. Duty to renegotiate and contract adaptation in case of hardship. *Uniform Law Review*. 2019, Vol. 24, no. 1, p. 149.

16 BERGER, K. P., Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems. *Journal of International Arbitration*. 2020, Vol. 37, no. 5, p. 590.

17 Template arbitration clauses of major arbitration institution such as ICC, London Court of International Arbitration or Vienna International Arbitral Centre use "all disputes" or "any disputes".

18 BEISTEINER, L. Chapter I: The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective. In: KLAUSEGGER, C. et al. (eds.). *Austrian Yearbook on International Arbitration 2014*. Wien: C. H. Beck, 2014, p. 84.

the affected party requests adjustment of a contract which the counterparty disputes altogether or each party has its own idea as to how the contract should be adjusted. In the first scenario, the tribunal would have to address whether the situation amounts to hardship[19] which may be qualified as a "legal dispute" but ultimately, as is the case with the second scenario, the core of the decision actually lies in deciding on the adjustment itself. This is arguably more of a question of expertise or business than law, which are both questions outside of the context of "legal dispute".[20]

The challenge posed by traditional limitation of arbitrators to solving "legal disputes" only is challenged by the same sources that have introduced it – arbitration agreement and applicable law. Firstly, while parties have agreed that arbitrators shall decide their dispute, the same agreement may also allow adjustment of a contract. While such reference may be found in the arbitration clause, relevant language may also be found elsewhere. In its latest update to template hardship clause, ICC has provided language for adjustment of a contract by arbitrators or court as a part of its hardship clause.[21] This approach seems to be wise, after all, adjustment of a contract should be reserved for hardship situations and if the parties decide to confer that power upon the tribunal, it is advisable to do so without raising any doubt as to when it should be used.

If a parties' agreement on the issue is not available, it is still possible to argue in favour of the arbitrators' power to adapt the contract, this time relying on the principle of synchronized competences.[22] Under this principle, if a matter is arbitrable, and parties choose arbitration in lieu of state courts,

19 LORFING, P. A. Chapter 2: Adaptation of Contracts by Arbitrators. In: BORTOLOTTI, F., UFOT, D. (eds.). *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*. Den Haag: Kluwer Law International, 2019, p. 54.

20 Along these lines, the Austrian Supreme Court held in a decision of 1985 that *"the adaptation of a long-term contract to changed circumstances"* on the basis of a respective contractual clause would not be arbitration (i.e., *Schiedsrichtertätigkeit)*, but rather expert determination (i.e., *Schiedsgutachten)*. – See Judgment of the Supreme Court of Austria (Oberster Gerichts- und Kassationshof), Austria, of 27. 2. 1985, Case 1 Ob 504/85.

21 See ICC template hardship clause at ICC Force Majeure and Hardship Clauses. *ICC* [online]. [cit. 12. 6. 2022]. Available at: https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf

22 BERGER, K. P. Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense. *Arbitration International*. 2001, Vol. 17, no. 1, p. 10.

powers of the arbitrators to resolve the dispute should be, in their scope, aligned with the power of the courts. Otherwise, arbitration would fail as an alternative to court litigation. Hence, the principle of synchronized competences provides the next step towards a solution – it is now a matter of looking whether state courts, in the seat of arbitration, would have the power to adjust the contract.

Similarly to placing the language within contractual hardship clause, in case of court's power, it is usually a matter of substantive and not procedural law. In particular, it has to be determined whether the law governing the contract recognizes hardship as a concept and what solutions it offers in cases it occurs. In cases of conflict between the chosen substantive law of the contract and *lex arbitri*, typically the substantive law allows for hardship and adjustment of contracts while the arbitration is seated in a different state that does not recognize either, it should still be argued in favour of adjustment. That is because even in that scenario, state judges would have to apply the relevant substantive law including the concept of hardship. To argue that they could not do so because of "gaps" in their procedure would deny parties their choice of law, and while adjustment of contracts may be seen as controversial and debatable topic, it hardly seems an appropriate fit for the public policy exception.

To conclude, powers of the tribunal to decide on adjustment of a contract may be found with the most ease if the parties include relevant procedural language in the hardship clause. In its absence, the matter requires an analysis of the applicable substantive law which may allow for adjustment by the court judges and thus, under the principle of synchronized competence, also by the arbitrators. There are thus three potential and often combined sources of arbitrators' power to adjust the contract: arbitration agreement, *lex arbitri* and applicable substantive law. And although this trio may provide for some clashes of its own, the result should support adjustment process as an option in arbitration.[23]

23 BERGER, K. P. Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense. *Arbitration International*. 2001, Vol. 17, no. 1, p. 7–8.

2.1.2 Substantive Issues Regarding Contract Adjustment

First of all, it was noted that also when declaring hardship, the arbitrators should proceed with caution and adopt a restrictive approach – hardship should be reserved for extreme and exceptional circumstances.[24] As noted by an English court, hardship is not something that *"happens in a flash or is here today and gone tomorrow"* but rather circumstances resulting in serious and grave distortion of parties' expectations.[25]

If hardship indeed occurs and arbitrators are deciding on how to adjust the contract, their biggest challenge is that, as any third party actor, they suffer from lack of relevant knowledge, including know-how in the field itself (demands, other sources of goods, price models, etc.) or knowledge related to the parties only (business projections, related contracts, etc.). The arbitrators also lack any real responsibility for the decision, meaning that the burden of a wrong decision will be borne by the parties and not by the decision-makers themselves. Furthermore, there is also lack of certainty regarding the future performance – if the "new" contract is breached, should that trigger a new dispute or enforcement procedure? These are all concerns that should put the tribunal on notice to carefully weight and consider any adjustment measure, and especially to involve both parties as much as possible to alleviate their own shortcomings.

The hardship clauses may provide only very general guidance, stating that arbitrators should adjust the contract in order to find an *"equitable solution"*[26]. If the hardship provision, whether based on the contract or the applicable law, lacks any kind of guidance for the arbitrators, the decision will be based on general principles of good faith and fairness.[27] In addition, some guidance

24 BERGER, K. P. Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems. *Journal of International Arbitration*. 2020, Vol. 37, no. 5, p. 595.

25 Judgment of the Court of Appeal (Civil Division), England, of 28. 7. 1981, *Superior Overseas Development Corporation and Phillips Petroleum (U.K.) Co. Ltd vs. British Gas Corporation*, Case 81/0316 1981 P No. 938 1981 B No. 1271.

26 LORFING, P. A. Chapter 2: Adaptation of Contracts by Arbitrators. In: BORTOLOTTI, F., UFOT, D. (eds.). *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*. Den Haag: Kluwer Law International, 2019, p. 51.

27 BERGER, K. P. Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems. *Journal of International Arbitration*. 2020, Vol. 37, no. 5, p. 596.

may still be sought within the dispute itself. Commentators have noted that even though hardship clauses (or even more generally arbitration clauses) usually require parties to firstly try to negotiate in good faith, even once the claim is filed, arbitrators still may invite the parties to negotiate, invite experts or employ any other methodology to narrow down intentions of the parties[28] and come up with a suitable decision[29].

3 Dealing With a Change of Circumstances in the Context of the GSPAs

In order to examine contract adjustment as a practical solution in case of changing circumstances, this paper will now focus more closely on a specific contractual field of GSPAs. As apparent from the title, under a GSPA the seller undertakes to continuously sell and deliver certain quantities of natural gas for a certain price to the buyer.[30] GSPAs are usually entered into for an extensive period of time, which may extent to several decades, typically between 20 to 30 years, although shorter contracts (10 to 15 years) are becoming more common.[31] Any contract which extends over such a substantial period of time is naturally more susceptible to risk of unforeseeable change in circumstances.[32] As a way of allocation of this risk, the GSPAs have developed several typical features, such as:

- Allocation of volume risk by a "take-or-pay" provision – supply of gas requires considerable investment from the seller who needs to build, maintain and operate required infrastructure, GSPAs thus need to include sufficient assurances that the infrastructure will not be in vain. Traditionally, the volume risk is assumed by the buyers

28 LORFING, P. A. Chapter 2: Adaptation of Contracts by Arbitrators. In: BORTOLOTTI, F., UFOT, D. (eds.). *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*. Den Haag: Kluwer Law International, 2019, p. 65.

29 Ibid., p. 62.

30 IYNEDJIAN, M. Gas Sale and Purchase Agreements under Swiss Law. *ASA Bulletin*. 2012, Vol. 30, no. 4, p. 746.

31 COHEN, G. Long-Term Gas Contracting: Terms, definitions, pricing – Theory and practice. *Institute of Energy for SE Europe (IENE)* [online]. 2019 [cit. 12. 6. 2022]. Available at: https://www.iene.eu/articlefiles/Long-Term%20Gas.pdf

32 ROZEHNALOVÁ, N. Vyšší moc, hardship aneb smluvní doložky v mezinárodní praxi. *Časopis pro právní vědu a praxi*. 2015, Vol. 23, no. 1, p. 57.

in a form of a "take-or-pay" clause which requires the buyer to either take minimum amount of gas (annually), or pay for it; the relevant percentage may be rather high (from 75 to 95% of the full quantity)[33];

- Allocation of price risk – GSPAs determine price for gas by a complex price formulas that may (i) use indexation to other competing energy sources (such as oil, coal or electricity)[34] or (ii) refer to alternative price of gas that may be obtained by the buyer elsewhere; both measures are meant to keep the price on a competitive level.[35]

Both the allocation of volume and price risks are meant as automatic adjustments of the parties' obligations under the GSPAs over time. However, at times the original mechanisms may not work well enough to maintain balance between the parties. Given the initial investment, need for stable supply of gas to third parties, and limited alternative options in terms of other potential contractors, adjustment of a GSPA beyond the original terms seems to be worth due consideration. The GSPAs deal with the issue primarily by including price review clauses, with general hardship clauses acting in support thereof. Both will be examined in the following sub-chapters.

3.1 Contract Adjustment Under the Price Review Clauses in GSPAs

Focusing first on the issues of price, it was noted that the automatic "adjustment" by way of changes of variables in the calculation formula may not be enough to support the economic balance of a particular GSPA. Therefore, in addition to the indexation itself, the GSPAs often include also provisions which allow for revision of the calculation mechanism itself, so called "price review clauses" or "price re-opener clauses".[36]

33 POLKINGHORNE, M. A. Take-or-Pay Conditions in Gas Supply Agreements. *White & Case LLP* [online]. 2016 [cit. 12. 6. 2022]. Available at: https://www.whitecase.com/sites/whitecase/files/files/download/publications/paris-energy-series-no7_2016.pdf

34 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 73.

35 IYNEDJIAN, M. Gas Sale and Purchase Agreements under Swiss Law. *ASA Bulletin*. 2012, Vol. 30, no. 4, p. 747.

36 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 74.

The price review clauses typically feature specification of a triggering event, which may be either a simple passage of time (i.e., allowing for periodical review every few years) or more specific change in the market.[37] If the triggering event occurs, parties are due to renegotiate the price formula, and in case of a conflict enter into a dispute resolution procedure, typically arbitration.

The obvious difference from a general hardship clause is that by targeting a specific provision of the GSPA (i.e., the price clause), the price review clauses enable parties to provide clear set of directions and limitations for themselves as well as the arbitrators.[38] These may include general references to good faith and fairness, maximum number of reviews or other time limitations,[39] requirement to include experts to deal with the technical side of the calculation,[40] requirement to consideration of prices of other energy commodities[41] and others. The wording may also generally specify the final effect of the adjustment, for example demanding that the adjusted price clause must allow the buyer to be able to economically market the gas, or that the adjustment should result in the seller gaining profit or parties share the loss.[42] These are in line with the general idea that the contract should remain balanced.[43]

The price review clauses differ from hardship not only by its limited scope but because they do not necessarily require the triggering event

37 KHANNA, K. Gas Price Review Disputes: Key Insights for a Successful Resolution. *Global Arbitration Review* [online]. 10. 11. 2020 [cit. 12. 6. 2022]. Available at: https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/gas-price-review-disputes-key-insights-successful-resolution

38 LOREFICE, M. Gas Price Review Arbitrations. *Global Arbitration Review* [online]. 10. 11. 2020 [cit. 12. 6. 2022]. Available at: https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/gas-price-review-arbitrations

39 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 81.

40 SARZANA, S. The rise of price revision arbitrations. *ICLG* [online]. 31. 10. 2012 [cit. 12. 6. 2022]. Available at: https://iclg.com/cdr/arbitration-and-adr/european-energy-disputes:-the-rise-of-price-revision-arbitrations

41 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 81.

42 Ibid., p. 81.

43 BERGER, K. P. Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems. *Journal of International Arbitration*. 2020, Vol. 37, no. 5, p. 598.

to be unforeseeable for the affected party. To the contrary, by including a price review clause, parties are planning a procedure for when the triggering event occurs, thus foreseeing it without assuming the risk thereof.[44] From this point of view, price review clauses are not only "better targeted hardship clauses" but also more easily accessible provisions for the affected party.

Of course, the requirement of foreseeability may be added and some authors list it as a general rule,[45] nevertheless such an approach conflicts with the idea of providing specified conditions for the adjustment under the price review clause. Simply speaking, if the review may be triggered only by events unforeseeable to the parties, they may hardly prepare specific and effective guidelines as to how the situations should be solved and parties may as well only include a hardship clause to have a general escape for unforeseeable events. I would thus argue for leaving the foreseeability requirement out of the price review clause.

Apart from hardship, which may also be answered by termination of the contract (see above), if the price review clause is successfully invoked and the negotiations fail, the conflict should be automatically resolved by contract adjustment, otherwise the inclusion of the price review clause in the GSPA loses any effect beyond an invitation to negotiate.

That being said, negotiations still may play a major role in the dispute resolution. In ICC Case no. 10351,[46] the tribunal was deciding on adjustment of a price review clause in a GSPA concerning liquified natural gas following the parties' disagreement in the initial negotiations. The tribunal responded by issuing a partial award, ordering the parties to negotiate again for a set period of time. The arbitration was then to be resolved either in accordance with a newly reached agreement of the parties or by the tribunal itself based upon suggestions provided by the parties.

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44 LOREFICE, M. Gas Price Review Arbitrations. *Global Arbitration Review* [online]. 10. 11. 2020 [cit. 12. 6. 2022]. Available at: https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/gas-price-review-arbitrations

45 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 80.

46 For excerpt in English see Partial 10351. *ICC Dispute Resolution Bulletin*. 2009, Vol. 20, no. 2, pp. 76–86.

3.2 Contract Adjustment Under Hardship Clauses in GSPAs

Hardship clauses may be found in GSPAs,[47] although they are less common,[48] and if the GSPA includes a separate price review clause, hardship provision is more or less a supplementary basis for contract adjustment covering the contract as a whole.[49] In this sense, hardship is a practical third alternative to subject-specific price review clauses and high-standard *force majeure* clauses.

In contrast to more specific price review clauses, hardship clauses in GSPAs, as in other contractual fields, often lack any such criteria and require only "fair and equitable" or "reasonable" result. Nevertheless, in case law related to GSPAs, there are several interesting examples of how a hardship clause may provide more specificity.

In ICC Case no. 15610, the arbitrators evaluated a hardship clause applicable in case of reasonably unforeseen circumstances resulting into a "severe and unforeseeable" hardship which had to last for at least six months. Furthermore, the affected party had to provide a written notice of the situation specifying *"(i) the date and nature of the event or events which caused the change alleged by it; (ii) an evaluation of the hardship that has been suffered; and (iii) the proposal made by that Party to remedy that hardship."*[50]

By these simple requirements, the parties provided some initial materials for themselves as well as the tribunal in a manner comparable with the price-review process.

4 Conclusion

As the list of jurisdictions with substantive rules on hardship and contract adjustment grows, arbitration should follow this trend. Contract adjustment

47 FERRARIO, P. *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Alphen aan den Rijn: Kluwer Law International, 2017, p. 74.

48 ZIADÉ, R., PLUMP, A. Changed Circumstances and Oil and Gas Contracts. *BCDR International Arbitration Review*. 2020, Vol. 7, no. 1, pp. 195, 218.

49 KAUFMAN, E. E., SVINKOVSKAYA, S. Chapter 5: Gas and Liquefied Natural Gas Disputes in Latin America: Issues of Force Majeure, Hardship, and Price Reopeners. In: ALVAREZ, G. M., PICHÉ, M. R., SPERANDIO, F. V. (eds.). *International Arbitration in Latin America: Energy and Natural Resources Disputes*. Alphen aan den Rijn: Wolters Kluwer Law International, 2021, p. 130.

50 See Final Award in Case 15610. *ICC Bulletin e-Chapter, Extracts from ICC Arbitration in Oil and Gas Disputes.* 2014, Vol. 25, no. 1.

should then be provided in the spirit of good faith and fair "meeting halfway" at times when full "meeting of minds" is out of the question even though parties may not wish to terminate the relationship altogether. In cases where the party affected by hardship wishes to renegotiate the contract and the not-affected party wishes to carry on without changes, contract adjustment may resolve the issue in a true manner of a compromise. Given the fact that in hardship neither is to blame for the dispute itself, it seems fair that neither party will be fully successful nor fully burdened by the changed circumstances. For this reason, contract adjustment should be available.

Nevertheless, contract adjustment is still a remedy to a dispute and as such has no chance at successfully resolving the conflict (and not immediately trigger another), if the parties no longer share at least the most basic will to continue the contractual relationship. Hence, expression of such will should be required. While it would be unreasonable to expect an explicit declaration of intent after the arbitration commences, the will of the parties may be derived from their conduct in the proceedings and even during the (failed) negotiations leading up to it. This may cover cases where the parties continue to perform the contract partially or where the dispute is more concerned about the scope and content of the adjustment and not the idea thereof, as is the case with price review clauses in GSPAs. Also, if the claimant includes termination of the contract due to hardship as an alternative prayer for relief (next to the argument for its adjustment) and the claim is refused by the counterparty, that may serve as a guidance for what is actually desired by the parties. Respect to the will of the parties also means that contract adjustment should not be considered unless proposed by at least one of the parties.

Following the GSPAs practice, especially with respect to price review clauses, the arbitral tribunals should consider not only whether hardship occurred but also observe additional requirements in order to support arbitral award leading to contract adjustment.

If there is no guidance in the contract or applicable law, arbitral tribunal should actively seek it. Most importantly, because contract adjustment is meant to re-set the business relationship, the decision-making should incorporate aspects of negotiations in a sense that both parties should be given an opportunity to present their idea about how the contract should

look like after the arbitration is concluded.[51] In practice, the parties should be given a timely notice that the tribunal has decided to adjust the contract and, following such a notice, an opportunity to submit proposals for the adjustment. This notice may be even formalized as a partial arbitral award on the matter.

By providing a chance to participate in the formulation of the adjustment, the tribunal supports procedural equality of the parties and makes success of their future relations more probable. After all, contract adjustment has the unfortunate attribute of creating a renewed platform on which the parties may one day arbitrate anew. The tribunal should not only make every effort to examine its procedural powers and issue an enforceable award but also to consider its practicability for the parties bound by the adjusted rights and obligations.

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[51] The same is suggested also in the explanatory note to the 2020 template of ICC hardship clause. See ICC template hardship clause at ICC Force Majeure and Hardship Clauses. *ICC* [online]. [cit. 12. 6. 2022]. Available at: https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf

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Contact – e-mail

becvarob@prf.cuni.cz

ORCID

0000-0002-0133-231X

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Current Challenges of Enforcing Annulled Arbitral Awards

Lenka Psárska

Faculty of Law, Masaryk University, Czech Republic

Abstract

The controversy regarding the French approach to the enforcement of annulled arbitral awards may have died out, yet new issues continue to arise. This paper analyses the current practice in respect to the discretion given to the enforcing courts by the New York Convention. Special attention is paid to the development of case law and approaches of leading jurisdictions concerning the relationship of an award with the legal order under which it was rendered. The purpose of this paper is assessment of the discretion granted to the national courts by Article V of the New York Convention to enforce an award notwithstanding its annulment at the seat.

Keywords

Annulment Proceedings; Discretionary Power; International Arbitration; New York Convention; Public Policy.

1 Introduction

The purpose and a defining characteristic of arbitration proceedings is, among other things, that it results in a final and binding award. In general, the award cannot be appealed to a higher-level court after it is rendered.[1] However, this does not guarantee the finality of arbitration proceedings as the non-prevailing party might try to challenge the award at the seat of arbitration where it might be set aside or annulled.[2] Generally, the grounds for setting aside are constituted narrowly within respective legal orders.

1 MOSES, M. L. *The Principles and Practice of International Commercial Arbitration*. Cambridge: Cambridge University Press, 2008, pp. 2–3.

2 Ibid.; see also Art. V para. 1 letter e) New York Convention.

Common reasons for setting aside include conflict of the award with the public policy, incapability of the subject-matter of the dispute to be settled by arbitration, incapacity of a party to the arbitration, issues regarding composition of arbitral tribunal, or misbehaviour of arbitrators manifested through impartiality, fraud, corruption, or failure to hear evidence.[3]

This form of judicial intervention by the courts of the primary jurisdictions is well established.[4] It demonstrates how the states continue to administer justice even after parties to a dispute have deliberately decided to avoid litigation.[5] However, success of the non-prevailing party in the annulment proceedings does not mean that each and every jurisdiction will consider an annulled award as having been stripped of any legal effect. It is true that the annulment might nudge the prevailing party to try to resolve the dispute by negotiation, commence new proceedings or even accept its loss and decide not to waste any more resources on the dispute, but at the same time, it does not mean that the dispute has reached a dead end as an enforcement of such an award remains a possibility.

Enforcement of annulled arbitral awards has sparked interest within the legal community numerous times in the past decades.[6] Some jurisdictions have developed clear and distinct rules stemming not only from their national law, but also from long-standing case law. Meanwhile, there are jurisdictions that have only recently been given an opportunity to form their approaches on paper and to adapt them to current needs and international standards. The following chapters of this paper will concern the implications of the current practice. With the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("New

3 See, for example, United States. § 10 of the United States Arbitration Act (FAA), Pub. L. No. 68-401 Stat. 883 (1925); Czech Republic. § 31 Act No 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards, as amended; Art. 34 UNCITRAL Model Law on International Commercial Arbitration.

4 RAU, A. S. Understanding (and Misunderstanding) 'Primary Jurisdiction'. *American Review of International Arbitration* [online]. 2010, no. 06-10, pp. 1–118 [cit. 30. 5. 2022]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633555

5 KERAMEUS, K. D. Waiver of Setting-Aside Procedures in International Arbitration. *The American Journal of Comparative Law*. 1993, Vol. 41, no. 1, pp. 73–74.

6 The interest was commonly sparked by the case law from France and the United States. See PETROCHILOS, G. C. Enforcing Awards Annulled in Their State of Origin Under the New York Convention. *International & Comparative Law Quarterly*. 1999, Vol. 48, no. 4, pp. 856–888.

York Convention" or "Convention") residing at the core of this issue, the paper will demonstrate how the Convention allowed respective jurisdictions to choose their own approach towards the enforcement of annulled arbitral awards. After establishing two approaches that lie on the opposite sides of the spectrum, the paper will focus on other views not falling within prior categories. The main focus will be on the interplay between the award rendered by arbitrators and the judicial ruling of a foreign court, and public policy as a tool to maximize legal certainty and uniformity.

2 A Failure or a Triumph of the New York Convention?

The New York Convention, considered to be one of the most successful international treaties, has greatly contributed to rapid and effective enforceability of international arbitral awards.[7] Enforceability constitutes an essential advantage of arbitration, mainly in comparison to international litigation.[8] The main objective of the Convention is to ensure that awards are enforceable worldwide,[9] which is also consistent with the central obligation of the Convention to recognize arbitral awards as binding and enforce them as stipulated under Article III of the Convention.

At the same time, the epicentre of the presented legal challenges lies in the New York Convention itself. The Convention's wording of provision concerning the refusal of recognition and enforcement, mainly in regards to previous set-aside or annulment of an award, remains as the source of uncertainty. Even though these provisions were created in order to secure the fulfilment of the goal of the Convention to extend the number of enforced awards, this goal came at the expense of certainty, leaving one to wonder whether the Convention established unsustainable pro-enforcement bias.[10] Whether

7 BORN, G. B. The New York Convention: A Self-Executing Treaty. *Michigan Journal of International Law*. 2018, Vol. 40, no. 1, p. 115.

8 BIRD, R. C. Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention. *North Carolina Journal of International Law & Commercial Regulation*. 2011, Vol. 37, no. 4, p. 1024.

9 SILBERMAN, L. The New York Convention After Fifty Years: Some Reflections on the Role of National Law. *Georgia Journal of International & Comparative Law*. 2009, Vol. 38, no. 1, p. 39.

10 JUNITA, F. 'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview. *Indonesian Law Review*. 2015, Vol. 5, no. 2, p. 141.

this can be considered as a failure of the Convention or not, the following chapter will focus on respective perspectives that originated from these provisions and were formed by their diverse interpretation.

2.1 Guidance Provided by the New York Convention

The New York Convention contains two provisions that pave a path both to questions and answers regarding the enforcement of annulled arbitral awards. Article V in conjunction with Article VII of the Convention is a source of the perspectives presented further in the paper. Article V seemingly allows the enforcing courts to make a decision regarding refusal of enforcement, while Article VII had opened a door for the contracting states to adopt national legislation or to conclude international treaties that would grant additional or more favourable rights to the interested parties.

Linguistic interpretation of Article V para. 1 letter e) of the Convention alone might be persuasive enough for a reader to admit that national courts do indeed have a discretion in their decision to enforce an award notwithstanding previous set-aside. Owing to usage of a permissive term "may" instead of "shall", it is generally accepted that Article V is of a permissive nature.[11] More specifically, Article V of the New York Convention stipulates:

> *"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> […]
>
> *(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."*

The sole interpretation of the language of the Convention supports the view that a mere designation of setting aside the award at the seat of arbitration as a reason for refusal of recognition and enforcement does not oblige courts to deny enforcement. At the same time, non-mandatory refusal fits within

11 See ibid., pp. 140–164; BIRD, R. C. Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention. *North Carolina Journal of International Law & Commercial Regulation.* 2011, Vol. 37, no. 4, p. 1029.

the notion that the Convention has a clear pro-enforcement bias.[12] On the other hand, it opens questions about the status of the set-aside decision as such. More specifically, does the provision allow discretion in respect to specific circumstances of each individual case, and if it does, how can these circumstances be assessed, or does the Convention allow disregarding the set-aside decision as such?

The only other provision providing further guidance is Article VII para. 1 of the New York Convention which stipulates that:

> *"The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."*

This provision encourages greater enforcement and ensures that interested parties would not be deprived of additional national rights.[13] French legislation and practice are adequate examples of this interpretation.[14] Article 1525 of the French Code of Civil Procedure stipulates that recognition or enforcement may be denied only on the grounds listed in Article 1520.[15] Article 1520 contains narrow grounds for setting aside arbitral awards[16] and a previous set-aside decision had not become a reason for refusal of recognition and enforcement. Therefore, French law contains more favourable rights for interested parties, while the Convention had created a way which grants the parties a mean to avail themselves these rights.

12 JUNITA, F. 'Pro Enforcement Bias' under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview. *Indonesian Law Review*. 2015, Vol. 5, no. 2, p. 141.

13 BIRD, R. C. Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention. *North Carolina Journal of International Law & Commercial Regulation*. 2011, Vol. 37, no. 4, p. 1029.

14 DUNNA, G. T. To Enforce or Not to Enforce: Laying a Standard of Enforcement of Annulled Awards in India. *Indian Review of International Arbitration*. 2021, Vol. 1, no. 1, p. 119.

15 France. Art. 1525 Code of Civil Procedure (Decree No. 2011-48 from 13 January 2011, reforming arbitration).

16 BIRD, R. C. Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention. *North Carolina Journal of International Law & Commercial Regulation*. 2011, Vol. 37, no. 4, p. 1036. See France. Art. 1520 Code of Civil Procedure (Decree No. 2011-48 from 13 January 2011, reforming arbitration).

However, while a lack of such provision in national law does not necessarily preclude an enforcement of an annulled arbitral award, in practice, it can be seen as an obstruction.

2.2 Partial Conclusion

In practice, the presented interpretation is not often as straightforward or universal. Moreover, even without Article VII and additional rights, one can wonder about residual discretion granted solely by Article V. Further analysis will show that guidance provided by the Convention is not sufficient to have the potential to create a uniform practice across the particular contracting states. The following chapters will address how selected jurisdictions have handled their discretion and substantiated their own approach.

3 Two Sides of the Same Coin

The decision whether to enforce an award despite prior annulment belongs to the courts with a secondary jurisdiction.[17] The object of their assessment is largely identical, yet their conclusions might principally differ. Even though the enforcing courts would be primarily guided by their national law, this step will be omitted for the purposes of this paper. For that reason, the first step of the analysis is a question whether an award is attached to the legal order under which it was rendered. An affirmative answer can lead the court to quite a simple conclusion that the award has lost its legal effect and cannot be enforced as it stopped existing.[18] On the other hand, a negative answer that denies the attachment will lead to further questions. Subsequent solution will depend on various factors and can easily end in disregarding the set-aside decision as such. Generally, the outcome will likely arise out of adopted legal theories and national law, possibly coming down

17 RAU, A. S. Understanding (and Misunderstanding) 'Primary Jurisdiction'. *American Review of International Arbitration* [online]. 2010, no. 06-10, p. 6 [cit. 30. 5. 2022]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633555

18 BERG, A. J. van den. Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Court of Appeal of Amsterdam, April 28, 2009. *Journal of International Arbitration*. 2010, Vol. 27, no. 2, pp. 179, 187, 198.

to theoretical foundations of international arbitration.[19] There is a spectrum of possible perspectives and this chapter will outline two of them that are on the opposite ends.

3.1 Territorial Approach

The former of the two presented perspectives responds to the existence of a set-aside decision by refusing the recognition and enforcement of an arbitral award. Aside from being labelled as territorial, this approach is often described by the term *ex nihilo nihil it* – out of nothing, comes nothing.[20] This approach *"gives predominant and almost exclusive relevance to the seat"*[21] and assumes that *"the powers of arbitral tribunals are confined to the limits imposed by the law of the country of the seat."*[22] Therefore, an award is attached to the legal order of the primary jurisdiction. As a result of the annulment, it loses any legal effect under the *lex arbitri*.[23] The award no longer exists and cannot be brought back to life during the enforcement procedure.[24] There are several civil law countries, such as Germany, Italy,[25] Chile,

19 CORREIA FILHO, A. C. N. The Theories of International Arbitration and Related Practical Issues: The Brazilian Approach (Particularly the Recent Leading Case on Recognition of Annulled Awards) vis-à-vis the Delocalization Trend. *Revista Brasileira de Arbitragem*. 2016, Vol. 13, no. 52, p. 28.

20 SILBERMAN, L., HESS, R. U. Enforcement of Arbitral Awards Set Aside or Annulled at the Seat of Arbitration. *Cambridge Compedium of International Commercial and Investment Arbitration* [online]. 2022, p. 3 [cit. 30. 5. 2022]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4029102

21 CORREIA FILHO, A. C. N. The Theories of International Arbitration and Related Practical Issues: The Brazilian Approach (Particularly the Recent Leading Case on Recognition of Annulled Awards) vis-à-vis the Delocalization Trend. *Revista Brasileira de Arbitragem*. 2016, Vol. 13, no. 52, p. 28.

22 Ibid.

23 MOURA VICENTE, D. Requirements for the Enforceability of Arbitral Awards: A Comparative Overview. *APA – Associação Portuguesa de Arbitragem* [online]. 2019, p. 17 [cit. 30. 5. 2022]. Available at: https://www.arbitragem.pt/xms/files/Estudos_da_APA/requirements-enforceability-arbitral-awards-dario-moura-vicente.pdf

24 BERG, A. J. van den. Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Court of Appeal of Amsterdam, April 28, 2009. *Journal of International Arbitration*. 2010, Vol. 27, no. 2, pp. 179, 187, 198.

25 TWEEDDALE, K., TWEEDDALE, A. Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*. 2015, Vol. 81, no. 2, p. 138.

Brazil,[26] or Russia[27] that adopted this approach and would not enforce an award that had been set-aside.

For example, German courts can reverse the previous enforcement decision if the award had been annulled at the seat after it was already enforced,[28] and would deny the enforcement if the annulment of the arbitral award had yet to take legal force.[29] Moreover, when it comes to review of the annulment of an arbitral award, German courts would not find it necessary to examine whether the decision was correct in terms of the ground for annulment if reciprocity between Germany and the state of a primary jurisdiction is established.[30]

Similarly, Singaporean Court of Appeal adopted this approach when it pondered about the purpose and the effect of the set-aside decision in *Astro*:

> *"While the wording of Art V(1)(e) of the New York Convention and Art 36(1)(a)(v) of the Model Law arguably contemplates the possibility that an award which has been set aside may still be enforced, in the sense that the refusal to enforce remains subject to the discretion of the enforcing court, the contemplated erga omnes effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce. What else could it mean to set aside an award? If this avenue of recourse would only ever be of efficacy in relation to enforcement proceedings in the seat court, then it seems to have been devised for little, if any, discernible purpose. As such, we do not think that in principle, even the wider notion of 'double-control' can encompass the same approach as has been adopted by the French courts. The refusal to enforce*

26 CORREIA FILHO, A. C. N. The Theories of International Arbitration and Related Practical Issues: The Brazilian Approach (Particularly the Recent Leading Case on Recognition of Annulled Awards) vis-à-vis the Delocalization Trend. *Revista Brasileira de Arbitragem*. 2016, Vol. 13, no. 52, p. 39.

27 SILBERMAN, L., HESS, R. U. Enforcement of Arbitral Awards Set Aside or Annulled at the Seat of Arbitration. *Cambridge Compedium of International Commercial and Investment Arbitration* [online]. 2022, p. 4 [cit. 30. 5. 2022]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4029102

28 HORVATH, G. J. What Weight Should be Given to the Annulment of an Award under the Lex Arbitri? The Austrian and German Perspectives. *Journal of International Arbitration*. 2009, Vol. 26, no. 2, p. 260. See also Germany. § 1061 para. 3 Code of Civil Procedure (5 December 2005).

29 DOBIÁŠ, P. The Recognition and Enforcement of Arbitral Awards Set Aside in the Country of Origin. In: BĚLOHLÁVEK, A. J., ROZEHNALOVÁ, N. (eds.). *Czech (& Central European) Yearbook of Arbitration. Vol. 9*. The Hague: Lex Lata, 2019, p. 15.

30 Ibid., p. 17.

> *awards which have not been set aside at the seat court may therefore constitute one of the outer-limits of 'double-control'."* [31]

3.2 Delocalized Approach

Often described as delocalization of international commercial arbitration,[32] this approach allows the set-aside decision to be disregarded. The reasoning is based on the delocalization theory. Some authors subscribe to a view that international arbitration is an autonomous legal order that is not rooted in any specific national system, therefore arbitral awards are not attached to any state.[33] For example, *Emmanuel Gaillard* explains:

> *"Arbitrators do not derive their powers from the state in which they have their seat but rather from the sum of all the legal orders that recognize, under certain conditions, the validity of the arbitration agreement and the award. This is why it is often said that arbitrators have no forum."* [34]

France is a typical example of a jurisdiction with this approach. The elimination of Article V letter e) as a ground for non-recognition has been confirmed by the French case law. National law must authorize a court to refuse enforcement of an award as it is the only subject with capacity to decide whether an award itself is entitled to recognition under the French law.[35] In this light, an award is considered to be independent of a legal regime under which it was rendered.[36]

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31 Decision of the Singaporean Court of Appeal, SGCA 57, of 31 October 2013, Civil Appeals Nos 150 and 151 of 2012, *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) vs. Astro Nusantara International BV and others and another appeal*. In: *UNCITRAL* [online]. Para. 77 [cit. 27. 5. 2022]. Available at: https://www.uncitral.org/docs/clout/SGP/SGP_311013_FT_1.pdf

32 DUNNA, G. T. To Enforce or Not to Enforce: Laying a Standard of Enforcement of Annulled Awards in India. *Indian Review of International Arbitration*. 2021, Vol. 1, no. 1, p. 121.

33 CORREIA FILHO, A. C. N. The Theories of International Arbitration and Related Practical Issues: The Brazilian Approach (Particularly the Recent Leading Case on Recognition of Annulled Awards) vis-à-vis the Delocalization Trend. *Revista Brasileira de Arbitragem*. 2016, Vol. 13, no. 52, p. 29.

34 DUNNA, G. T. To Enforce or Not to Enforce: Laying a Standard of Enforcement of Annulled Awards in India. *Indian Review of International Arbitration*. 2021, Vol. 1, no. 1, pp. 114–141.

35 SILBERMAN, L., HESS, R. U. Enforcement of Arbitral Awards Set Aside or Annulled at the Seat of Arbitration. *Cambridge Compedium of International Commercial and Investment Arbitration* [online]. 2022, p. 8 [cit. 30. 5. 2022]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4029102

36 Ibid., p. 12.

Looking back as far as to the 1980s, the Court of Appeal of Paris stated in *Götaverken*[37] that *"the place of the arbitral proceedings, chosen only in order to assure their neutrality, is not significant; it may not be considered an implicit expression of the parties' intent to subject themselves, even subsidiarily, to the loi procédurale française"*[38]. In addition to that, French courts stipulated in cases *Hilmarton,*[39] *Chromalloy*[40] and *Putrabali*[41] that incorporation of an annulled arbitral award into French legal system does not constitute a violation of the French international public policy.[42]

3.3 Partial Conclusion

In spite of certain trends towards delocalisation of international commercial arbitration,[43] it has been affirmed that territorial approach prevails among the contracting states of the New York Convention.[44] In general, the jurisdictions that will give effect to annulled arbitral awards – perhaps apart from France – are not that liberal in their approach, as they would enforce the award only under exceptional circumstances.[45] Yet, these trends and perspectives are not solely a question of legal theory. Their state and clarification can greatly

37 Judgment of the Court of Appeal of Paris (Cour d'appel de Paris), France, of 21 February 1980, Case F 9224. In: TWEEDDALE, K., TWEEDDALE, A. Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*. 2015, Vol. 81, no. 2, p. 138.

38 Ibid.

39 Judgment of the Court of Appeal of Paris (Cour d'appel de Paris), France, of 19 December 1991, Case No. 90-16778. In: DUNNA, G. T. To Enforce or Not to Enforce: Laying a Standard of Enforcement of Annulled Awards in India. *Indian Review of International Arbitration*. 2021, Vol. 1, no. 1, p. 120.

40 Judgment of the Court of Appeal of Paris (Cour d'appel de Paris), France, of 14 January 1997, Case No. 95/23025. In: DUNNA, G. T. To Enforce or Not to Enforce: Laying a Standard of Enforcement of Annulled Awards in India. *Indian Review of International Arbitration*. 2021, Vol. 1, no. 1, p. 120.

41 Judgment of the French Court of Cassation (Cour de cassation), France, of 29 June 2007, Case No. 05-18.053. In: DUNNA, G. T. To Enforce or Not to Enforce: Laying a Standard of Enforcement of Annulled Awards in India. *Indian Review of International Arbitration*. 2021, Vol. 1, no. 1, p. 120.

42 Ibid.

43 CORREIA FILHO, A. C. N. The Theories of International Arbitration and Related Practical Issues: The Brazilian Approach (Particularly the Recent Leading Case on Recognition of Annulled Awards) vis-à-vis the Delocalization Trend. *Revista Brasileira de Arbitragem*. 2016, Vol. 13, no. 52, p. 31.

44 Ibid.

45 Ibid., p. 33.

influence the preservation of credibility of international arbitration as well as legal certainty. For that reason, avoiding arbitrariness is of great importance and should be an objective even of the small number of jurisdictions that do not adhere to neither of the previously presented approaches.

4 Discretionary Powers – Legal Theories versus Reality

The chasm between the territorial and delocalized approach is filled with a variety of theories and scholars have suggested different methods for solving the discrepancies of the present issue. For example, *Jan Paulsson* has suggested differentiation of two sets of standards for annulments – local and international – under which the annulment on the basis of the local standards would only have a local effect. This solution was rightfully criticized as not being suitable for the New York Convention.[46] Other suggestion, proposed by *Gary Born*, was a creation of criteria that would *"justify disregarding an annulment decision at the arbitral seat"*[47]. However, this could greatly undermine the parties' choice of a specific seat and its legal order.[48] Another solution might stem from a multi-local theory which is based on enforcement as the ultimate goal of the arbitration.[49] *"This theory embraces the idea that the whole arbitration is legitimated a posteriori, when the arbitral award meets the requirements to be recognized where its enforcement is sought. According to this theoretical model, the legal orders of the places of enforcement are the origins of the legal force of the arbitration."*[50] However, this theory greatly undermines the role of the seat and the legal certainty of parties to a dispute. On the other hand, the practice has defined the current challenges that need to be addressed. Their existence is reflected in respective cases, and the conclusions

46 SILBERMAN, L., HESS, R. U. Enforcement of Arbitral Awards Set Aside or Annulled at the Seat of Arbitration. *Cambridge Compedium of International Commercial and Investment Arbitration* [online]. 2022, p. 13 [cit. 30. 5. 2022]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4029102

47 Ibid., p. 14.

48 Ibid.

49 CORREIA FILHO, A. C. N. The Theories of International Arbitration and Related Practical Issues: The Brazilian Approach (Particularly the Recent Leading Case on Recognition of Annulled Awards) vis-à-vis the Delocalization Trend. *Revista Brasileira de Arbitragem*. 2016, Vol. 13, no. 52, p. 28.

50 Ibid.

drawn from them might eventually have implications for the subsequent practice worldwide. This chapter focuses on a particular challenge – setting a standard for review of the set-aside decisions obtained as a result of bias or corruption.

4.1 The Yukos Saga

Courts in multiple jurisdictions had an opportunity to address a question whether there is a possibility to enforce an award despite a prior set-aside thanks to a dispute between *Yukos Capital SARL ("Yukos")* and *Yuganskneftegaz*.[51] The dispute concerned four loan agreements. The parties had chosen Russia as a seat of arbitration and subsequently, four awards were made in favour of *Yukos*.[52] After *Yuganskneftegaz* merged with *Open Joint Stock Company Rosneft Oil Co ("Rosneft")*, *Yukos* requested *Rosneft* to comply with the award. Instead, *Rosneft* initiated annulment proceedings and the Arbitrazh Court of Moscow set aside the award.[53] The grounds for the annulment included denial of a right to present the case, a submission of new claims that were not in compliance with the rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ("ICAC"), and an arbitral tribunal not having been formed in accordance with the agreement of the parties.[54] Generally, doubts as to the impartiality of the set-aside proceedings might not be accepted easily. However, *Rosneft* is an entity that was entirely and later by a majority

51 Award of 19 September 2006, International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, *Yukos vs. OJSC Yuganskneftegaz*. In: *Jus Mundi* [online]. [cit. 27. 5. 2022]. Available at: https://jusmundi.com/en/document/decision/en-yukos-capital-s-a-r-l-v-ojsc-yuganskneftegaz-award-1-tuesday-19th-september-2006#decision_18241

52 Ibid.; see also TWEEDDALE, K., TWEEDDALE, A. Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*. 2015, Vol. 81, no. 2, pp. 141–142.

53 Decision of the England and Wales High Court, UK, of 3 July 2014, *Yukos Capital Sarl vs. OJSC Oil Co Rosneft*. In: *Practical Law* [online]. Para. 2 [cit. 27. 5. 2022]. Available at: https://uk.practicallaw.thomsonreuters.com/D-026-6158?transitionType=Default&contextData=(sc.Default)&firstPage=true; see also NACIMIENTO, P., BARNASHOV, A. Recognition and Enforcement of Arbitral Awards in Russia. *Journal of International Arbitration*. 2010, Vol. 27, no. 3, p. 304.

54 NACIMIENTO, P., BARNASHOV, A. Recognition and Enforcement of Arbitral Awards in Russia. *Journal of International Arbitration*. 2010, Vol. 27, no. 3, pp. 304–305.

owned and controlled by the Russian government.[55] The interest that the Russian government could have had in the outcome of the proceedings raises a suspicion, yet one might ask whether a single suspicion can justify a disregard of a foreign national judgment.

4.1.1 Proceedings in the Netherlands

Yukos had initiated the enforcement proceedings in the Netherlands. Even though the application was initially denied by the District Court in Amsterdam[56] on the ground of Article V para. 1 letter e) of the New York Convention, it was reversed by the Court of Appeal in Amsterdam. In its decision,[57] the Court of Appeal had denied the existence of an obligation to enforce an award while it stated that:

> *"Since it is very likely that the judgments by the Russian civil judge setting aside the arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent, said judgment cannot be recognized in the Netherlands. This means that in considering the application by Yukos Capital for enforcement of the arbitration decisions, the setting aside of the decision by the Russian court must be disregarded."* [58]

This decision was subjected to criticism as the accusations it held against the annulling courts in all three instances were extremely serious and were

55 Decision of the England and Wales High Court, UK, of 14 June 2011, *Yukos Capital Sarl vs. OJSC Rosneft Oil Co.* In: *Practical Law* [online]. Para. 6 [cit. 27. 5. 2022]. Available at: https://uk.practicallaw.thomsonreuters.com/D-014-9934?transitionType=Default&contextData=(sc.Default)

56 Judgment of the District Court of Amsterdam (Uitspraak van het Rechtbank Amsterdam), the Netherlands, of 28 February 2008, *Yukos Capital SARL vs. OAO Rosneft*. In: BERG, A. J. van den. Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Court of Appeal of Amsterdam, April 28, 2009. *Journal of International Arbitration*. 2010, Vol. 27, no. 2, p. 180.

57 Judgment of the Court of Appeal of Amsterdam (Uitspraak van het Gerechtshof Amsterdam), the Netherlands, of 28 April 2009, *Yukos Capital SARL vs. OAO Rosneft*. See DUNNA, G. T. To Enforce or Not to Enforce: Laying a Standard of Enforcement of Annulled Awards in India. *Indian Review of International Arbitration*. 2021, Vol. 1, no. 1, p. 126.

58 TWEEDDALE, K., TWEEDDALE, A. Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*. 2015, Vol. 81, no. 2, pp. 141–142.

not supported by sufficient evidence.[59] The court acknowledged the lack of direct evidence and based its decision on a mere deduction of bias formed on the basis of press publications and general reports.[60] The reasoning focused on a systematic lack of impartiality, while it suggested that there was not a judge in the Russian judiciary that could reach an impartial decision when considering the present case.[61] While one would expect a court to be concerned with establishing requirements as to the threshold for the burden of proof, this ruling instead serves as an example of an unrestrained usage of discretion.

4.1.2 Proceedings in the United Kingdom

Despite the successful enforcement proceedings in the Netherlands, *Yukos* had to seek enforcement in the United Kingdom. However, as *Rosneft* eventually paid the principal sum, the proceedings subsequently concerned only the entitlement to interest.[62] This allowed the England and Wales High Court to assess the possibility to enforce the annulled award. Applying principles of comity,[63] the court ruled that:

> *"The answer to the question is not provided by a theory of legal philosophy but by a test: whether the Court in considering whether to give effect to an award can (in particular and identifiable circumstances) treat it as having legal effect notwithstanding a later order of a court annulling the award. In applying this test it would be both unsatisfactory and contrary to principle if the Court were bound to recognize a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy."*[64]

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59 BERG, A. J. van den. Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Court of Appeal of Amsterdam, April 28, 2009. *Journal of International Arbitration*. 2010, Vol. 27, no. 2, p. 180.

60 Ibid.

61 Ibid., p. 181.

62 TWEEDDALE, K., TWEEDDALE, A. Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*. 2015, Vol. 81, no. 2, p. 142.

63 Ibid.

64 Decision of the England and Wales High Court, UK, of 3 July 2014, *Yukos Capital Sarl vs. OJSC Oil Co Rosneft*. In: *Practical Law* [online]. Para. 20 [cit. 27. 5. 2022]. Available at: https://uk.practicallaw.thomsonreuters.com/D-026-6158?transitionType=Default&contextData=(sc.Default)&firstPage=true

The court explicitly denied both the existence of the *ex nihilo nihil fit* principle in English law[65] and any duty to disregard of the set-aside decision.[66] This approach seems to be consistent within the English case law. For example, in *IPCO*[67] the court conveyed a favour towards enforcement as an underlying purpose of the New York Convention.[68] Previous case law also denied an automatic refusal, as it was held that *"the English courts still retain a discretion to enforce the award, though that jurisdiction will be exercised sparingly"*[69]. A year after the decision in *Yukos*, the High Court assessed whether a set-aside decision in *Malicorp* meets the tests for recognition.[70] When the claimant argued that *"the judges responsible for the 2012 Cairo Court of Appeal decision were guilty of progovernment bias"*[71] the court stated this can only be accepted with *"positive and cogent evidence"*[72] while criticising that the presented evidence did not go beyond generalised and anecdotal material.[73]

65 Decision of the England and Wales High Court, UK, of 3 July 2014, *Yukos Capital Sarl vs. OJSC Oil Co Rosneft*. In: *Practical Law* [online]. Para. 81 [cit. 27. 5. 2022]. Available at: https://uk.practicallaw.thomsonreuters.com/D-026-6158?transitionType=Default&contextData=(sc.Default)&firstPage=true

66 TWEEDDALE, K., TWEEDDALE, A. Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*. 2015, Vol. 81, no. 2, p. 143.

67 Decision of the England and Wales High Court, UK, of 14 March 2014, *IPCO (Nigeria) Ltd vs. Nigerian National Petroleum Corp*. In: *Practical Law* [online]. [cit. 27. 5. 2022]. Available at: https://uk.practicallaw.thomsonreuters.com/D-024-8161?transitionType=Default&contextData=%28sc.Default%29

68 TWEEDDALE, K., TWEEDDALE, A. Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*. 2015, Vol. 81, no. 2, p. 140.

69 Decision of the England and Wales High Court, UK, of 27 July 2011, *Dowans Holding SA vs. Tanzania Electric Supply Co Ltd*. In: TWEEDDALE, K., TWEEDDALE, A. Cutting the Gordian Knot: Enforcing Awards where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*. 2015, Vol. 81, no. 2, p. 140.

70 Judgment of the England and Wales High Court, UK, of 19 February 2015, *Malicorp Limited vs. Government of the Arab Republic of Egypt and Others*. In: *Italaw* [online]. Para. 28 [cit. 27. 5. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw7672.pdf

71 Ibid., para. 26.

72 Ibid.

73 Ibid.

4.2 Maximov – A Follow up to Yukos?

Similarly to *Yukos*, the award in the dispute between *Nikolay Viktorovich Maximov ("Maximov")* and *Open Joint Stock Company 'Novolipetsky Metallurgichesky Kombinat' ("NLMK")* was issued by arbitrators under ICAC. The dispute concerned the calculation of the purchase price of shares in Open Joint Stock Company Maxi-Group pursuant to a share purchase agreement.[74] The Arbitrazh Court of Moscow had set aside the award on three grounds – failure of arbitrators to disclose links the claimant's expert witnesses, failure to follow the price formula in the agreement resulting in violation of Russian public policy and the non-arbitrability ground, as the dispute was of corporate nature that is not arbitrable under the Russian law.[75] The decision was upheld on appeal[76] and later refused by the Supreme Arbitrazh Court of the Russian Federation.[77] After that, the claimant sought to enforce the award in France, where it was successful, and in the Netherlands and the United Kingdom.[78]

4.2.1 Proceedings in the Netherlands

In spite of similarities between the present case and *Yukos*, the Amsterdam Court of Appeal had adopted a fundamentally different approach.[79]

74 DEVENISH, P. Enforcement in England and Wales of Arbitral Awards Set Aside in Their Country of Origin. *Oxford University Commonwealth Law Journal*. 2018, Vol. 18, no. 2, p. 144.

75 Ibid., p. 145.

76 Decision of the Federal Arbitration Court of the Moscow District (Постановление Федерального арбитражного суда Московского округа), Russian Federation, of 26 September 2011, *Maximov vs. Novolipetsky (NLMK)*. In: *Jus Mundi* [online]. [cit. 27. 5. 2022]. Available at: https://jusmundi.com/en/document/decision/ru-nikolay-viktorovich-maximov-v-ojsc-novolipetsky-metallurgichesky-kombinat-postanovlenie-federalnyi-arbitrazhnyi-sud-moskovskogo-okruga-monday-26th-september-2011#decision_18314

77 Decision of the Supreme Court of Arbitration of the Russian Federation (Определение Высшего Арбитражного Суда Российской Федерации), Russian Federation, of 30 January 2022, *Maximov vs. Novolipetsky (NLMK)*. In: *Jus Mundi* [online]. [cit. 27. 5. 2022]. Available at: https://jusmundi.com/en/document/decision/ru-nikolay-viktorovich-maximov-v-ojsc-novolipetsky-metallurgichesky-kombinat-opredelenie-vysshego-arbitrazhnogo-suda-rossiiskoi-federatsii-no-vas-15384-11-monday-30th-january-2012#decision_18312

78 Ibid.

79 Judgment of the District Court of Amsterdam (Uitspraak van het Rechtbank Amsterdam), the Netherlands, of 17 November 2011, *Maximov vs. Novolipetsky (NLMK)*. In: *Jus Mundi* [online]. [cit. 27. 5. 2022]. Available at: https://jusmundi.com/en/document/decision/nl-nikolay-viktorovich-maximov-v-ojsc-novolipetsky-metallurgichesky-kombinat-beschikking-von-rechtbank-amsterdam-thursday-17th-november-2011#decision_18275

Maximov argued that the Russian judiciary has been overwhelmingly corrupt and biased for many years, particularly in proceedings involving the Russian state. He also made arguments that *NLMK* should be deemed as being equivalent to the Russian state, and if not, that there are close links between them. Yet, the court addressed the burden of proof, as it demanded that an accusation of bias and impartiality must be based on verifiable and independent sources. Moreover, it was not found that Russia had interests in the present case. *Maximov* did not provide evidence nor proved that the principles of judicial procedure were unacceptably disregarded. In contrast with *Yukos*, the court stated that even if it accepted that Russian judiciary was generally corrupt, it could not be stated about the judges that dealt with the present case.[80] This decision was later upheld on the appeal,[81] implying that the attitude adopted in *Yukos* would not be followed.

4.2.2 The proceedings in the United Kingdom

This case was also assessed by the England and Wales High Court.[82] The court was *"asked to infer bias from the perverse nature of the Russian court's conclusions (and in certain respects the manner in which they were arrived at)"*[83] despite lack of evidence in the case of actual bias, and to *"test is whether the Russian courts' decisions were so extreme and incorrect as not to be open to a Russian court acting in good faith"*[84]. Therefore, the object of the review were conclusions

80 BERG, A. J. van den. Netherlands No. 41, Nikolai Viktorovich Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat, Provisions Judge of the District Court of Amsterdam, 491569/KG RK 11-1722, 17 November 2011. In: *Yearbook Commercial Arbitration Vol. XXXVIII*. Alphen aan den Rijn: Wolters Kluwer, 2013, pp. 274–276.

81 Judgment of the Court of Appeal of Amsterdam (Uitspraak van het Gerechtshof Amsterdam), the Netherlands, of 18 September 2012, *Maximov vs. Novolipetsky (NLMK)*. In: *Jus Mundi* [online]. [cit. 27. 5. 2022]. Available at: https://jusmundi.com/en/document/decision/nl-nikolay-viktorovich-maximov-v-ojsc-novolipetsky-metallurgichesky-kombinat-beschikking-von-gerechtshof-te-amsterdam-tuesday-18th-september-2012#decision_18276

82 Judgment of the England and Wales High Court, UK, of 27 June 2017 *Nikolay Viktorovich Maximov vs. Open Joint Stock Company 'Novolipetsky Metallurgichesky Kombinat*, Case CL-2014-337; CL-2014-658. In: *New York Convention Guide* [online]. [cit. 27. 5. 2022]. Available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=4624&opac_view=2

83 Judgment of the High Court of Justice of England and Wales, UK, of 27 July 2017, *Maximov vs. Novolipetsky (NLMK)*. In: *Jus Mundi* [online]. Para. 2 [cit. 27. 5. 2022]. Available at: https://jusmundi.com/fr/document/decision/en-nikolay-viktorovich-maximov-v-ojsc-novolipetsky-metallurgichesky-kombinat-judgment-of-the-hight-court-of-justice-of-england-and-wales-2017-ewhc-1911-thursday-27th-july-2017

84 Ibid.

in the judgment. The evidence of bias was not meant to be found in errors related to due process, but in the substance. The Court concluded that *"the Claimant bears a heavy burden to establish not only that a foreign courts decisions were wrong or manifestly wrong but that they are so perverse as for it to be concluded that they could not have been arrived at in good faith or otherwise than by bias."*[85] An incorrect substantive decision is not enough. *"The decision of the foreign curt must be deliberately wrong, not simply wrong by incompetence."*[86] In spite of mistakes, the Court was not persuaded that these decisions are so extreme and perverse that they can only be ascribed to bias against the Claimant.[87]

4.3 Judicial Adoption of the Conflict-of-Laws Approach

The scope of review of the presented cases appears to be limited to procedural issues. The courts of the secondary jurisdictions have to assess whether the procedure manifestly offended fundamental principles of natural justice and public policy. Even though the England and Wales High Court was asked to review the conclusions of a decision, it seemed to have established an even higher threshold than it would have required had it reviewed procedural matters. This author evaluates the reasoning of this court positively. Even though the courts of the secondary jurisdictions should strictly limit themselves to the review of procedural matters, exceptional cases, where an impartiality within a judiciary might cleverly conceal itself under seemingly correctly working procedure, may occur.

Generally, it can be concluded that the presented cases have adopted a conflict-of-laws approach. It is based on treating annulment decisions as any other foreign judgments. The annulment will be generally respected save for situations when there is a reason to suspect that the annulment *"lacked procedural integrity or offends public policy of the enforcing State"*[88]. This author is of the opinion that this approach might be considered as the most suitable in comparison with other proposed views or approaches, as it does not undermine the primary jurisdiction, and at the same time, it creates a reasonable point of view for the discretion granted by the New York Convention.

85 Ibid., para. 53.
86 Ibid., para. 15.
87 Ibid., para. 53–64.
88 DUNNA, G. T. To Enforce or Not to Enforce: Laying a Standard of Enforcement of Annulled Awards in India. *Indian Review of International Arbitration*. 2021, Vol. 1, no. 1, p. 124.

5 Conclusion

Reflections of the questions that have been arising in front of national courts in regard to the enforcement of annulled arbitral awards can be seen in the recent legal debates and theories. Courts of certain jurisdictions had been put in a position where they seemingly could have accepted the set-aside decision as having stripped an international arbitral award of its legal effect. Yet, they accepted the challenge to justify an enforcement notwithstanding prior annulment. This paper indicated one major reason to do so – the necessity to address a suspicion of a bias or corruption conducted by the judiciary of a primary jurisdiction. In this light, one can find it easier to navigate within the possibilities that the discretion granted by the Article V para. 1 letter e) of the New York Convention offers.

The search for justification to enforce an annulled arbitral award can be successful and in harmony with the New York Convention. The Convention provides little guidance as to usage of discretion, mainly if one cannot rely on the more-favourable right provision. Moreover, some might even dispute the possibility to apply the residual discretionary power to Article V para. 1 letter e) of the Convention.[89] In spite of that, several jurisdictions have managed to identify an acceptable approach that does not disregard the set-aside decision, nor accepts the *ex nihilo nihil fit* principle. The focus of the previous chapter on cases in which the most fundamental principles of law were at stake demonstrated that it is possible to use the discretion in a reserved manner. Remaining respectful towards the courts of the primary jurisdiction is possible even when handling a suspicion that a judicial ruling was obtained by wrongful and unfair means. More specifically, there is not a tendency to review the substance of an award or to criticize courts of primary jurisdiction for honest or minor errors that can occur in any legal order.

Yet, the trend to review the set-aside decisions indicates that the interplay between the award and the set-asides might be shifting. Despite their function as a tool to control the awards, these decisions can be treated as any other

89 See BERG, A. J. van den. Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Court of Appeal of Amsterdam, April 28, 2009. *Journal of International Arbitration*. 2010, Vol. 27, no. 2, pp. 188, 190.

foreign judgment. Therefore, as a court of a secondary jurisdiction can deny recognition and enforcement of an award on the basis of Article V para. 2 letter b) of the New York Convention if it contradicts its public policy, this court might not recognize the set-aside decision on the same grounds, thus giving an effect to an annulled arbitral award.

This author is of the opinion that adoption of the conflict-of-laws approach is suitable even for jurisdictions that have not yet had an opportunity to analyse the possible usage of residual discretion granted by the New York Convention. It creates a conditional acceptance of recognition and enforcement of annulled arbitral awards where it remains up to the respective courts to rule under which conditions it is possible to grant enforcement.[90] Applying this approach restrictively in exceptional circumstances, the confidence in the usage of the discretion might rise. More specifically, any negative impact on legal certainty would be limited as the exceptional circumstances would cover the situations where the set-aside decision is contrary to the public policy of secondary jurisdictions, which is generally narrow and already well-defined in relation to other enforcements that do not concern previous arbitral proceedings. On the other hand, it is crucial to properly establish the threshold for the burden of proof.

In conclusion, it is probable that the future developments might manifest in the presented manner. If there is any need in practice to adopt new rules in relation to enforcement of arbitral awards in general, the need stems from the necessity to react to biased or unfair judiciary. Even though the New York Convention did not provide much guidance as to the usage of this discretion, utilizing it in order to avoid giving effect to a ruling that resulted from a blatant disregard of due process and fundamental notions of justice can be considered as an adequate usage.

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Contact – e-mail

480136@mail.muni.cz

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Condifentiality of Arbitral Awards on National, International and Institutional Level

Jan Hodermarsky, Vlastislav Stavinoha

Faculty of Law, Masaryk University, Czech Republic; Faculty of Law, Saint Petersburg State University, Russian Federation

Abstract

Confidentiality of arbitration is told to be one of the reasons why parties actually choose to arbitrate. The question of whether the arbitral award should remain confidential is however not unified across different jurisdictions. The regulation of this matter varies even when it comes to rules of various arbitration tribunals. Some jurisdictions consider the confidentiality of arbitral award to be an implied obligation derived from the very nature of arbitral process. This article analyses the legal regulation of confidentiality of arbitral awards on various levels while the importance of the publication is presented in the context of the lack of decisional coherence in international arbitration. Further, the resolution of potential conflict of the regulations is analysed. There are good reasons for making awards publicly available. Considering the information society of the 21st century, the fact that the publication of awards is regulated differently in different jurisdictions is a hindrance of parties' legal certainty.

Keywords

Confidentiality in Arbitration; Arbitral Award Confidentiality; Decisional Coherency; Confidentiality in National and International Law; Confidentiality in Institutional Rules; Interest for Publication of Arbitration Awards.

1 Introduction

Publication of arbitral awards is a fundamental prerequisite for decisional consistency and coherency. Problematic point is that publication of awards

contradicts the maxim of arbitrations – confidentiality, which is often said to be an intrinsic attribute of arbitration.[1] Some claim that it is the confidentiality of arbitration that actually attracts parties the most to choose to arbitrate.[2] Others tend to be more conservative and list confidentiality as one of the advantages and assets of arbitration in comparison to state courts.[3] Popularity of arbitration is growing and it would not be much of a surprise that privacy and confidentiality play a crucial role in it. We live in the information society, in which information represents one of the most important assets. Although many say that arbitration is *eo ipso* confidential, it is not *prima facie* evident what confidentiality in this sense is supposed to mean and what is its scope. In different national laws is this matter regulated in a different manner.[4] In other words, there is no common understanding of the confidentiality principle and it is not clear whether the confidentiality principle encompasses also the prohibition of publication of awards.

A great part of the article is of a descriptive nature and its aim is to see whether and to what extent the issue of confidentiality, in particular in regard to arbitral award, is regulated. Based on the analysis of the sources of regulation on international, national, and institutional level, the hypothesis whether the *status quo* of legal regulation is sufficient to ensure a sufficient level of legal certainty to parties who decide to arbitrate shall be verified.

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1 KÖNIG, V. *Präzedenzwirkung internationaler Schiedssprüche*. Berlin: De Gruyter, 2013, p. 56; ЕРОФЕЕВА, Н. М. Подходы к обеспечению конфиденциальности в международном коммерческом арбитраже. *Гуманитарные, социально-экономические и общественныенауки,* 2015, Vol. 11, no. 1, p. 272.

2 LALIVE, P. A. Problèmes relatifs à l'arbitrage international commercial. In: *Recueil des Cours 1967*. Leyde: A. W. Sijthoff, 1969, Vol. 120, p. 573 – *"Il est superflu d'insister sur l'intérêt qu'il y a, pour les parties à des relations commerciales internationales, à maintenir leurs secrets d'affaires, et à ne pas alerter la concurrence* […] *ou le fisc!"*; YVES FORTIER, L. The Occasionally Unwarranted Assumption of Confidentiality. *Arbitration International*. 1999, Vol. 15, no. 2, p. 131; TRAKMAN, L. E. Confidentiality in International Commercial Arbitration. *Arbitration International*. 2002, Vol. 18, no. 1, p. 1; BLACKABY, N., PARTASIDES, C., REDFERN, A., HUNTER, M. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 2015, p. 30.

3 HAAS, U. Vertraulichkeit im Zusammenhang mit Schiedsverfahren. In: GEIMER, R., SCHÜTZE, R. A. (eds.). *Recht ohne Grenzen: Festschrift für Athanassios Kaissis zum 65. Geburtstag*. München: Otto Schmidt Verlagskontor, 2012, p. 315; CROFT, C., KEE, C., WAINCYMER, J. *A Guide to the UNCITRAL Arbitration Rules*. Cambridge: Cambridge University Press, 2013, p. 467.

4 See also CROFT, C., KEE, C., WAINCYMER, J. *A Guide to the UNCITRAL Arbitration Rules*. Cambridge: Cambridge University Press, 2013, p. 467.

In order to evaluate the level of legal certainty, it is immanent to discuss the potential conflict of the mentioned sources of regulation as for the confidentiality (and publication) of arbitral awards.

2 Confidentiality as an Inherent Principle in Arbitration

It is more of a truism than a truth, as *Fortier* mentions, that arbitrations are private and confidential.[5] The true nature and scope of the confidentiality principle, as well as its formulation as a rule of arbitral procedure are highly contentious.[6] The principle as such, although still being rather fundamental to international arbitration, can no longer be taken for granted.[7] There have been discussions about its place in international arbitration for decades already but we have not managed to move far from what *Fortier* labelled as *"definite lack of consensus"*.[8] In 2016, the United Nations Commission on International Trade Law ("UNCITRAL") stated that there is no uniform approach nor in domestic laws, nor in arbitration rules as for the extent to which the parties in arbitration are obliged to maintain the confidentiality of information regarding the arbitral proceedings.[9] Truth is that in many national and international sources of law of international arbitration there are often no clear rules for confidentiality in detail.[10] From one side there are claims that this shows that it needed no explanations nor discussions as it has been taken for granted (and has not been challenged until

5 YVES FORTIER, L. The Occasionally Unwarranted Assumption of Confidentiality. *Arbitration International*. 1999, Vol. 15, no. 2, p. 131; cf. also Art. 30.1 LCIA Rules, which states that confidentiality is a "general principle", but still the obligation of every subject engaged in the arbitration process is duly described in the Rules.

6 Ibid.

7 BLACKABY, N., PARTASIDES, C., REDFERN, A., HUNTER, M. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 2015, p. 124.

8 YVES FORTIER, L. The Occasionally Unwarranted Assumption of Confidentiality. *Arbitration International*. 1999, Vol. 15, no. 2, p. 132.

9 UNCITRAL Notes on Organizing Arbitral Proceedings. In: *UNCITRAL* [online]. 2016, p. 17 [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf. In this sense also TRAKMAN, L. E. Confidentiality in International Commercial Arbitration. *Arbitration International*. 2002, Vol. 18, no. 1, p. 1.

10 KÖNIG, V. *Präzedenzwirkung internationaler Schiedssprüche*. Berlin: De Gruyter, 2013, p. 56.

recently).[11] Inherent confidentiality is generally regarded as an implied duty which is to be assumed and preserved as an essential corollary of the privacy of arbitral proceedings and prohibition to disclose the award.[12] On the other hand it could also be concluded that the lack of explicit norms implies the inexistence of obligation to confidentiality. The lack of the default settings in favour of confidentiality poses a risk that one of the parties could disclose the award or other documents to third parties or to the media.[13]

In either case, the lack of international consensus on the exact place of confidentiality in arbitration is basically an obstacle to the foreseeability of protection of confidentiality on the global level and may also cause a decline in popularity of international arbitration as such.[14] Parties that have not agreed expressly on confidentiality or have not agreed to apply arbitration rules which expressly address the issue of confidentiality cannot assume confidentiality which would be recognised as an implied commitment to confidentiality. *Trakman* stated already twenty years ago that international organisations and domestic legislatures were developing laws to govern arbitral confidentiality.[15] The fact that even now many national systems do not provide for (in)existence of confidentiality in arbitration is rather pitiful. If it was explicitly stated in national laws that there is no confidentiality by default, the parties would be much more likely aware of the fact and would more probably act accordingly in their arbitration agreements.

11 Cf. YVES FORTIER, L. The Occasionally Unwarranted Assumption of Confidentiality. *Arbitration International*. 1999, Vol. 15, no. 2, p. 132; cf. also KÖNIG, V. *Präzedenzwirkung internationaler Schiedssprüche*. Berlin: De Gruyter, 2013, p. 56, including the references in fn. 268.

12 KURKELA, M. S., TURUNEN, S. *Due Process in International Commercial Arbitration*. Oxford: Oxford University Press, 2010, p. 137.

13 Ibid.

14 Cf. LOH, Q. S. O., LEE, E. P. K. *Confidentiality in Arbitration: How Far Does It Extend?* Singapore: Academy Publishing, 2007, p. 85.

15 TRAKMAN, L. E. Confidentiality in International Commercial Arbitration. *Arbitration International*. 2002, Vol. 18, no. 1, p. 2.

3 Privacy, Confidentiality and Their Scope

It is important to distinguish between the notion of privacy of arbitration proceedings and the confidentiality thereof.[16] Privacy means that the actual arbitral proceedings are held privately.[17] The hearing is private, i.e., attendance is limited to the arbitrator, the parties and their representatives and witnesses, both of fact and of opinion.[18] The public has access neither to the information of the proceeding taking place[19], nor is it possible for anybody to be present at a hearing except for the parties to the dispute. On the other hand, confidentiality standardly means that the documents used in (and resulting from) arbitration, including evidence and award, are not made available to the public.[20] Some authors use the term confidentiality to describe both privacy and confidentiality *stricto sensu* as explained above.[21]

16 The judge *Collin* in the case *John Forster Emmott vs. Michael Wilson & Partners Limited* distinguished three different legal principles in arbitration. The first principle is privacy. The second is the inherent confidentiality of the information contained in documents, such as trade secrets or other confidential information generated or deployed in an arbitration. And the third principle relates to all other documents in arbitration not falling under the scope of the second principle, i.e., which do not contain any confidential information, but the parties are under an obligation not to use those documents for any purpose other than arbitration. – Cf. Judgment of the England and Wales Court of Appeal (Civil Division), UK, of 12 March 2008, *John Forster Emmott vs. Michael Wilson & Partners Ltd.*, Case [2008] EWCA Civ 184. In: *British and Irish Legal Information Institute* [online]. Para. 79 [cit. 24. 4. 2022]. Available at: https://www.bailii.org/ew/cases/EWCA/Civ/2008/184.htm

17 HAAS, U. Vertraulichkeit im Zusammenhang mit Schiedsverfahren. In: GEIMER, R., SCHÜTZE, R. A. (eds.). *Recht ohne Grenzen: Festschrift für Athanassios Kaissis zum 65. Geburtstag*. München: Otto Schmidt Verlagskontor, 2012, p. 315; Despite this generally accepted conception of privacy, it is not an exception that the two notions are mixed together, cf. Art. 1 Appendix II of ICC Rules.

18 STEPHENSON, D. S. *Arbitration Practice in Construction Contracts*. Oxford: Blackwell Science, 2001, p. 87.

19 Some classify the fact that the arbitration is taking place to confidentiality rather than privacy. – Cf., e.g., CROFT, C., KEE, C., WAINCYMER, J. *A Guide to the UNCITRAL Arbitration Rules*. Cambridge: Cambridge University Press, 2013, p. 467.

20 It may also cover the identity of the arbitrators.

21 See KURKELA, M. S., TURUNEN, S. *Due Process in International Commercial Arbitration*. Oxford: Oxford University Press, 2010, pp. 136 ff.

The two notions were not distinguished in the past[22], but nowadays[23] both of them are given the above mentioned particular meaning.

The obligation of confidentiality imposed on parties and arbitral bodies may vary with the circumstances of the case (parties may agree on the confidentiality regime by contract) as well as the applicable arbitration law and arbitration rules.[24] The same applies for privacy. Generally, privacy tends to be accepted as an inherent principle of arbitration to a much greater extent than confidentiality.[25]

The most legal orders as well as statues of arbitral institutions are rather reticent as to the existence of privacy obligation, *a fortiori* as to the question whether the general privacy principle immanently implies the confidentiality obligation, i.e., the imperative not to publish or discuss in public the arbitral award.[26] The decisional practice has, however, demanded the question to be,

22 Cf. Judgment of the High Court of Justice of England and Wales (Queen's Bench Division, Commercial Court), UK, of 26 June 1984, *Oxford Shipping vs. Nippon Yusen Kaisha*, Case [1984] 2 Lloyd's Rep. 373. In: *Trans-lex.org* [online]. [cit. 24. 4. 2022]. Available at: https://www.trans-lex.org/302940/_/oxford-shipping-v-nippon-yusen-kaisha-%5B1984%5D-2-lloyd%27s-rep-373/

23 Cf. Judgment of the Court of Appeal (Civil Division), UK, of 21 March 1990, *Dolling-Baker vs. Merrett*, Case [1990] 1 W.L.R. 1205. In: *Practical Law* [online]. [cit. 24. 4. 2022]. Available at: https://uk.practicallaw.thomsonreuters.com/D-016-8129?transitionType=Default&contextData=(sc.Default)&firstPage=true, in which it was concluded that the two notions are different, but also that privacy implies confidentiality. In a different way it was decided in the Judgment of the High Court of Australia of 7 April 1995, *Esso Australia Resources Ltd. and others vs. The Honorable Sidney James Plowman (The Minister for Energy and Minerals)*, Case (1995) 128 ALR 391. In: *High Court of Australia* [online]. [cit. 24. 4. 2022]. Available at: https://staging.hcourt.gov.au/assets/publications/judgments/1995/013--ESSO_AUSTRALIA_RESOURCES_LTD_AND_OTHERS_v_THE_HONOURABLE_SIDNEY_JAMES_PLOWMAN_AND_OTHERS--(1995)_128_ALR_391.html

24 UNCITRAL Notes on Organizing Arbitral Proceedings. In: *UNCITRAL* [online]. 2016, p. 18 [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf

25 ONYEMA, E. *International Commercial Arbitration and the Arbitrator's Contract*. New York: Routledge, 2010, p. 141 – *"It is now acknowledged that the international commercial arbitral process is private but not necessarily confidential."* See also BLACKABY, N., PARTASIDES, C., REDFERN, A., HUNTER, M. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 2015, pp. 124–125; DIMOLITSA, A. Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration. In: *ICC Digital Library* [online]. 2009, p. 6 [cit. 25. 5. 2022]. Available at: https://library.iccwbo.org/

26 Cf. KÖNIG, V. *Präzedenzwirkung internationaler Schiedssprüche*. Berlin: De Gruyter, 2013, p. 57.

at least partly, enlightened. Arbitration parties may turn to the arbitrator and request him to rule on an issue of confidentiality, i.e., if the award in question can be discussed in public or even published as such.[27] Also it can be a court who has power to decide upon this question.[28] It will be shown in the following parts of the text how this issue has been handled in the rulings of the international arbitral institutions as well as in the national systems.

4 Interest for Publication of Arbitral Awards

Disclosure of arbitral awards can foster coherence in jurisprudence and in that way contribute to legal certainty and predictability as well as to enhance the overall confidence in arbitration mechanism as such. General confidentiality of arbitration awards causes that there is basically no guidance from previous awards, which in turn causes lack of decisional coherency. On the other hand, investment arbitral tribunals consider previous awards. That does not mean they feel bound by their previous decisions like in the system of common law precedence *(stare decisis)*. They try to maintain the coherence while acknowledging the lack of binding force of former decisions.[29]

It is not a rare case that there are two cases with practically the same factual situation, possibly governed by the same substantive law, and in spite of this decided in a different manner by arbitral bodies. Often times it is the lack of transparency that causes the disharmony.[30] Decisional coherence is surely not the only justification for consideration of arbitral awards publication but

27 TRAKMAN, L. E. Confidentiality in International Commercial Arbitration. *Arbitration International*. 2002, Vol. 18, no. 1, p. 3.

28 Cf. Judgment of the New South Wales Court of Appeal, Australia, of 27 June 1995, *Commonwealth of Australia vs. Cockatoo Dockyard Pty Ltd.*, Case [1995] 36 N.S.W.L.R. 662. In: *New South Wales Law Reports* [online]. [cit. 24. 4. 2022]. Available at: https://nswlr.com.au/view/36-NSWLR-662

29 VADI, V. *Analogies in International Investment Law and Arbitration*. Cambridge: Cambridge University Press, 2015, p. 186; It is also worth mentioning that while in commercial arbitration the third parties are generally excluded from the proceeding, in investment arbitration there have been cases where they participated in the case as *amici curiae*.

30 There are, however, cases which despite of certain level of transparency of arbitral outcomes (e.g., partial awards) have been decided differently. Example of this can be the *CMS vs. Argentina* case on one hand and *LG&E vs. Argentina* on the other hand. – Award of 25 May 2005, *CMS Gas Transmission Company vs. The Republic of Argentina*, ICSID Case No. ARB/01/8; Award of 3 October 2006, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. vs. The Republic of Argentina*, ICSID Case No. ARB/02/1, Decision on Liability.

in our eyes it is one of the most important ones. Publication of awards can be seen as a *sine qua non condition* for edification of *jurisprudence constante*.

For arbitral awards to have a factual precedent effect there are several conditions which have to be fulfilled apart from previous decisions being available. First of all, decisions have to state clear grounds. There is no point in publishing awards which do not state grounds on which the conclusions have been made. Most of the time arbitral rules provide that the awards should state clear grounds. Such is the case of ICC Rules of Arbitration[31], DIS-Schiedsgerichtsordnung[32] or also ICSID Convention[33]. Apart from that it is also fundamental that arbitrators also actually refer to the older decisions, so that the coherency is factually ensured.

5 Confidentiality in Rules of Investment Arbitration Institutions

Investment arbitration must be distinguished from commercial arbitration. The former takes place in the resolution of disputes between an investor and a state hosting the investment. It is mainly conducted by the International Centre for Settlement of Investment Disputes ("ICSID"). Its procedure is somewhat different from that of commercial arbitration. Indeed, it tends to follow the principle of transparency in the name of protection of public interest, which is according to *Lazareff* the only exception to the principle

Similar situation was in cases *Lauder vs. Czech Republic* and *CME vs. Czech Republic*. – Final Award of 3 September 2001, UNCITRAL Arbitration Proceedings in London, *Lauder vs. Czech Republic*. In: *Italaw.com* [online]. [cit. 24. 4. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf; Partial Award of 13 September 2001, UNCITRAL Arbitration Proceedings in Stockholm, *CME Czech Republic B.V. (The Netherlands) vs. The Czech Republic*. In: *Italaw.com* [online]. [cit. 24. 4. 2022]. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf; More closely cf. DOUGLAS, Z. Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration? *ICSID Review – Foreign Investment Law Journal*. 2010, Vol. 25, no. 1, pp. 109–110.

31 Art. 32 para. 2 ICC Rules of Arbitration – *"The award shall state the reasons upon which it is based."*

32 Art. 39 para. 1 point ii) 2018 DIS-Schiedsgerichtsordnung – *"Each arbitral award shall* […] *state* […] *the reasons upon which it is based, unless the parties have agreed that reasons need not be given…"*

33 Art. 48 para. 3 ICSID Convention – *"The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."*

of confidentiality.[34] As investment arbitration concerns state interests, many recent arbitration rules provide for greater transparency. While the publication of commercial arbitration awards is rare, in investment arbitration it seems to be perceived in a much more generous way. As a proof of this tendency may also serve the UNCITRAL Transparency Rules[35]. According to Article 3 of this soft-law document the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence, and most importantly, all orders, decisions and awards of the arbitral tribunal should be made publicly available as far as investment arbitration is concerned.

In the case of ICSID, which is trying in this regard to catch more or less the suggestions mentioned in the soft-law document, all its awards are published and a register of current and past arbitrations is kept. Article 48 para. 5 of the ICSID Convention states that *"the Centre shall not publish the award without the consent of the parties"*. Notwithstanding this prima facie rigid provision, the ICSID Convention is complemented by the Rules of Procedure for Arbitration Proceedings adopted by the Administrative Council of the ICSID Centre pursuant to Article 6 para. 1 letter c) of the ICSID Convention. Arbitration Rule 48 para. 4 stipulates that although *"the Centre shall not publish the award without the consent of the parties*[, it] […] *shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal"*.[36]

Besides the normative regulation about the publication of parts of ICSID awards, there is also a numerous decisional practice when it comes to the principle of confidentiality from the side of the parties. An important ICSID ruling which should be mentioned as first is the *Biwater Gauff vs. Tanzania*, in which it has been stated that *"in the absence of any agreement between the parties* […], *there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise* […], *however, there is [also] no provision imposing a general rule of transparency*

34 LAZAREFF, S. Confidentiality and Arbitration: Theoretical and Philosophical Reflections. In: *ICC Digital Library* [online]. 2009, p. 90 [cit. 25. 5. 2022]. Available at: https://library.iccwbo.org/

35 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

36 The ICSID decision database is available on ICSID official website on the Internet. Similarly, the Financial Industry Regulatory Authority (FINRA), which has a monopoly on financial investment disputes between investors and securities firms, systematically publishes its arbitration awards on its official website on the Internet as well.

or non-confidentiality in any of these sources."[37] In a similar way decided ICSID the dispute in *Loewen vs. United States* case, rejecting *"that each party is under a general obligation of confidentiality in relation to the proceedings"* and stating *"that in an arbitration under NAFTA, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties, the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs."*[38] The arbitral tribunal in the *World Duty Free vs. Kenya* case stated similarly that *"… unless the agreement between the Parties includes* […] *a* [relevant] *restriction, each of them is* […] *free to speak of the arbitration."* Emphasizing the peculiarities of investor-state arbitration, it expressed its views in a very pertinent manner on the confidentiality stating that *"especially in an arbitration to which a Government is a Party, it cannot be assumed that the Convention and the Rules incorporate a general obligation of confidentiality which would require the Parties to refrain from discussing the case in public".*[39]

6 Confidentiality in Rules of Commercial Arbitration Institutions

As for commercial arbitration, here the rules of arbitral institutions have a tendency to be much more reluctant towards publication of awards. London Court of International Arbitration ("LCIA") Rules provide for general obligation of confidentiality (Article 30 para. 1). Disclosure is permitted, however, if it is a party's legal duty or if it is required to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.[40] Article 30 para. 3

37 Procedural Order No. 3 of 29 September 2006, *Biwater Gauff (Tanzania) Ltd. vs. United Republic of Tanzania*, ICSID Case No. ARB/05/22, para. 121.

38 Decision on Hearing of Respondent's Objection to Competence and Jurisdiction of 5 January 2001, *Loewen Group, Inc., and Raymond L. Loewen vs. United States of America*, ICSID Case No. ARB(AF)/98/3, para. 26.

39 Decision on a Request by the Respondent for a Recommendation of Provisional Measures of 25 April 2001, *World Duty Free Co Ltd. vs. The Republic of Kenya*, ICSID Case No. ARB/00/7, para. 16.

40 This exception is a mirrored conclusion of the Judgment of the High Court of Justice of England and Wales (Queen's Bench Division, Commercial Court), UK, of 22 December 1992, *Hassneh Insurance Co. of Israel vs. Mew*, Case [1993] 2 Lloyd's Rep 243. *Practical Law* [online]. [cit. 24. 4. 2022]. Available at: https://uk.practicallaw.thomsonreuters.com/D-016-8131?transitionType=Default&contextData=(sc.Default)

of LCIA Rules explicitly states that *"the LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal"*. Similarly it is in the case of China International Economic and Trade Arbitration Commission ("CIETAC") Rules.[41] The International Bar Association ("IBA") Rules of Ethics (which are not a binding instrument as such, but can be applied if their application is agreed upon by the parties) also prohibit any publication of awards without explicit consent of the parties.[42] Similarly, according to the Administered Arbitration Rules of the Hong Kong International Arbitration Centre, the publication, disclosure or communication of any information relating to an award made in the arbitration is not allowed, unless otherwise agreed by the parties.[43] When it comes to the World Intellectual Property Organization ("WIPO") Arbitration Rules, they provide for confidentiality by default, unless the parties agreed otherwise or the award falls into the public domain as a result of an action before a national court or other competent authority. Apart from that WIPO Rules also think about the case when the publication of the award is necessary in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party (Article 77 para. 3). Presence of this provision in the case of WIPO Rules has a very good reason as will be explained later.

Detailed regulation of confidentiality in commercial arbitration was elaborated by ICC International Court of Arbitration. The ICC decided to take the opposite approach from most of the other commercial arbitration institutions and introduce greater transparency into its arbitration. In principle, ICC publishes entire arbitral final awards, as well as any other award and dissenting or concurring opinion made in the case with the aim

41 Art. 33 para. 2 CIETAC Arbitration Rules – *"… the parties and their representatives, the arbitrators, the witnesses, the interpreters, the experts consulted by the arbitral tribunal, the appraisers appointed by the arbitral tribunal and other relevant persons shall not disclose to any outsider any substantive or procedural matters relating to the case."*

42 IBA Rules of Ethics for International Arbitrators 1987 – *"The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation."*

43 Art. 45.1 letter b) 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules.

to create guidance for the benefit of lawyers and arbitrators.[44] Access to the ICC decision database is available in partnership with *Jus Mundi*[45], which is the search engine for international law and arbitration. All publishable ICC International Court of Arbitration awards and related documents made as of 1 January 2019 are fully available for the public no less than two years after the date of said notification, as regulated in Article 58 of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration from 1 January 2021.[46] *Mourre*, former President of the ICC International Court of Arbitration, states that *"the increased availability of awards will contribute to improve the quality of ICC arbitration as much as to strengthen the legitimacy of arbitration in general."*[47]

The publication of ICC arbitral awards and related documents includes the names of the parties and of the arbitrators. On the other hand, according to the Article 59 of the Note to Parties and Arbitral Tribunals from 1 January 2021, any party at any time before publication may object to publication or require that any award and related documents be in all or part anonymised or pseudonymised (replacement of any name by one or more artificial identifiers or pseudonyms). In case of a confidentiality agreement, order or explicit provisions under the law of the place of arbitration the publication of certain aspects of the arbitration or of the award will be subject to the parties "specific consent".[48] The Secretariat is empowered, in its discretion, to exempt any ICC awards and related documents from publication (Article 62 of the Note to Parties and Arbitral Tribunals). Moreover, according to the Article 1 para. 5 of the Appendix II to the Rules

44 BLACKABY, N., PARTASIDES, C., REDFERN, A., HUNTER, M. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 2015, p. 129.

45 Latest ICC arbitral awards published on *Jus Mundi* webpage on the Internet.

46 Art. 58 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration. In: *ICC International Court of Arbitration* [online]. P. 10 [cit. 25. 5. 2022]. Available at: https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf

47 MOURRE, A. A Unique Partnership for the Publication of ICC Arbitral Awards. In: *International Chamber of Commerce* [online]. [cit. 25. 5. 2022]. Available at: https://jusmundi.com/en/partnership/icc

48 Art. 60 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration. In: *ICC International Court of Arbitration* [online]. P. 11 [cit. 25. 5. 2022]. Available at: https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf

of Arbitration of the International Chamber of Commerce[49] *"the President or the Secretary General of the Court may authorize researches undertaking work of an academic nature to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings."*

7 Confidentiality in National Laws

Generally speaking, it is quite rare for national laws to explicitly regulate confidentiality in arbitration. National laws usually do not prescribe obligatory publication of awards but they do not forbid such publication of arbitration awards either. Unfortunately, as will be shown, national laws do not always provide for confidentiality *expressis verbis*, but they rather rely on judicial practice to deduce the confidentiality principle from other maxims of international arbitration. The UNCITRAL Model Law which should serve as a template for national laws does not contain any provisions in this regard either. Paradoxically, UNCITRAL Arbitration Rules do not provide for confidentiality either, as the Working Group considered that the matter is to be dealt with in the applicable law rather than the Rules.[50] According to some scholars UNCITRAL missed an opportunity to bring a degree of harmonisation to practice of confidentiality in international arbitration.[51] Most countries do not see in principle of privacy (which is widely accepted) an implied obligation to confidentiality. For example, the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd vs. AI Trade Finance Inc* held that there was no implied duty of confidentiality in arbitrations and that the Swedish law does not make arbitration proceedings secret unless the parties contract for secrecy.[52]

49 Rules of Arbitration of the International Chamber of Commerce, in force as from 1 March 2017, Appendix II: Internal Rules of the International Court of Arbitration.

50 CROFT, C., KEE, C., WAINCYMER, J. *A Guide to the UNCITRAL Arbitration Rules*. Cambridge: Cambridge University Press, 2013, p. 193.

51 BROWN, J. C. P. The Protection of Confidentiality in Arbitration Balancing the Tensions Between Commerce and Public Policy. *In: London Metropolitan University* [online]. 2021, p. 40 [cit. 25. 5. 2022]. Available at: http://repository.londonmet.ac.uk/6685/1/Brown-Julian-Christopher-Patric_Final-Submission_26Feb2021.pdf

52 Judgment of the Swedish Supreme Court (Högsta domstolen), Sweden, of 27 October 2000, *Bulgarian Foreign Trade Bank vs. A. I. Trade Finance Inc.*, Case No. T 1881-99 (2000). In: *lagen.nu* [online]. [cit. 24. 4. 2022]. Available at: https://lagen.nu/dom/nja/2000s538

Neither arbitral rules nor party agreements can derogate the cogent norms of applicable national law.[53] In general, it is the law of the seat of the arbitration that shall be applicable to the question of confidentiality, at least when it comes to the publication of an award from the side of the arbitral body itself.[54] Other than that it seems reasonable to consider applicable the law of the place in which disclosure is sought to be enforced or prevented, as the award turns with its publication to an ubiquitous phenomenon.[55] It is, however, understandable that application of mandatory rules of *lex fori* might present themselves more as a rule than an exception in this regard. National laws may require to make the award publicly available due to disclosure obligations incumbent on publicly traded companies or also, for example, in the course of collateral litigation (such as setting aside or enforcement proceedings).[56] Or more generally speaking, owing to prevailing public interest.[57] Also tax officials, police and security trading or banking supervision agencies may have a legal interest to have access to the content of awards.[58] It is obvious that there are various levels to which the confidentiality can be attenuated. Whilst police having access to the award is unquestionably

53 See GUSY, M. F., HOSKING, J. M., SCHWARZ, F. T. *A Guide to the ICDR International Arbitration Rules*. New York: Oxford University Press, 2011, pp. 24–25; cf. also Art. 27 para. 4 International Centre for Dispute Resolution (ICDR) Rules; Art. 30.1 LCIA Rules.

54 Cf. Award of 24 October 2012, *The Louis Berger Group Inc. / Black & Veatch Special Projects Corp. Joint Venture vs. Symbion Power LLC*, ICC Case No. 16383/VRO, para. 656. – *"… in the absence of an agreement between the Parties providing for the confidentiality of the award, it should look first to the law of the seat of the arbitration, French law."*

55 Cf. TRAKMAN, L. E. Confidentiality in International Commercial Arbitration. *Arbitration International*. 2002, Vol. 18, no. 1, p. 4.

56 See GUSY, M. F., HOSKING, J. M., SCHWARZ, F. T. *A Guide to the ICDR International Arbitration Rules*. New York: Oxford University Press, 2011, p. 241; The example of a case where the award was disclosed by US District Court within an enforcement procedure of Award of 31 March 1986, *Liberian Eastern Timber Corporation vs. Republic of Liberia*, ICSID Case No. ARB/83/2.

57 Judgment of the High Court of Australia of 27 June 1995, *Commonwealth of Australia vs. Cockatoo Dockyard Pty Ltd.*, Case [1995] 36 N.S.W.L.R. 662. In: *NSW Law Reports* [online]. [cit. 24. 4. 2022]. Available at: https://nswlr.com.au/view/36-NSWLR-662 – *"it is both significant and urgent that the material should be made available, for the protection of public health and the restoration of the environment* […] *Where one of those parties is a government, or an organ of government, neither the arbitral agreement nor the general procedural powers of the arbitrator will extend so far as to stamp on the governmental litigant a regime of confidentiality or secrecy which effectively destroys or limits the general governmental duty to pursue the public interest."*

58 KURKELA, M. S., TURUNEN, S. *Due Process in International Commercial Arbitration*. Oxford: Oxford University Press, 2010, p. 137.

a limitation to confidentiality, it is far from the award being publicly available for a factual precedent-like coherent decision-making system to be built upon it. And, on the contrary, it can also happen that national law renders certain information concerning a nationalised company confidential due to its national interests.[59]

In general, proceedings before arbitration courts are preferred to proceedings before national courts. This is particularly true in cases when parties are interested in protecting their trade secrets and when they intend to preserve the principle of confidentiality. However, this protection could be granted by national courts as well. For example, in the Russian Federation the national court hearings held in camera are allowed not only when, e.g., protecting the state secret, but also according to the Article 11 para. 2 of the Commercial Procedure Code, on request of a party to the proceeding. This request should refer to the need to preserve commercial, official or other secrets protected by law.[60] The party requesting a court hearing held in camera should prove the existence of necessity to preserve commercial, official or other secrets. The court is not obliged to grant a party's request and as a rule, parties shall be denied a hearing held in camera in the procedure for the recognition and enforcement of international commercial arbitration awards.[61]

Unlike national courts, which are fully established and regulated by national law, including the rules of procedure and the question of confidentiality, the arbitral courts have a different nature. They do not hold a form of a governmental body or organisation, but they are more like an institution formed by the parties to resolve a dispute between them. However, in the law on arbitration the State expresses its consent that arbitration awards are capable of producing legal effects within its jurisdiction.[62]

There are two types of national arbitration legislations – the dualist one and the one with the monistic approach. The dualist countries have a separate

59 TRAKMAN, L. E. Confidentiality in International Commercial Arbitration. *Arbitration International*. 2002, Vol. 18, no. 1, p. 4.

60 Russian Federation. Art. 11 para. 2 Act No. 95-FZ, Commercial Procedure Code.

61 МАХРИНА, М. Г. Принцип конфиденциальности в международном коммерческом арбитраже. *Сфераправа*. 2020, no. 1, p. 31.

62 БАХИН С. В. Преюдиция: государственные суды и международные коммерческие арбитражи (соотношение государственной и третейской юрисдикций). *Журнал международного частного права*. 2015, no. 3, p. 46.

legislation for international and national arbitration, whilst the monistic ones prefer to have single arbitration rules for both of them. Without making reference to any particular legal order, we can define international arbitration as the one giving rise to the question of determination of its legal framework,[63] or more commonly in a narrower sense, the one in which interests of international business are at stake.[64]

For instance, in the Russian Federation there is the dualist type of national arbitration legislation regulating separately both international and national arbitration. The principle of confidentiality of arbitration is explicitly enshrined in the Articles 18 and 22 of the Federal Law No 102-FZ On Arbitration Courts in the Russian Federation of 24 July 2002. The arbitrator is not allowed to disclose information learned during the arbitration proceedings without the consent of the parties or their legal successors. Moreover, the arbitrator may not be questioned as a witness about any information that became known to him during the arbitration proceedings.[65] In contrast, the Russian Federal Law No 5338-I On International Commercial Arbitration of 7 July 1993 does not explicitly contain the request to observe the principle of confidentiality, but this principle is said to stem from theory and practice.[66] On the contrary, French practice shows that, although French law represents the dualist theory too and as well as Russian law provides for the presence of confidentiality principle in national[67] arbitration, the law being quiet about confidentiality principle in the case of international arbitration means that there is no general rule or presumption of confidentiality in such arbitration that would indicate that the final award should be presumed

63 LIMA PINHEIRO, L. de. *Estudos de Direito da Arbitragem*. Lisboa: AAFDL Editora, 2022, p. 281.

64 Cf. ibid., p. 282.

65 Russian Federation. Art. 22 Act No. 102-FZ, on Arbitration Courts in Russian Federation.

66 СКВОРЦОВ, О. Ю. Принцип конфиденциальности третейского разбирательства и его соотношение со смежными институтами публичного права. *Вестник Санкт-Петербургского Университета*. 2014, Vol. 14, no. 4, p. 182.

67 France. Art. 1464-4 Act No. 75-1123, Code of Civil Procedure – *"Sous réserve des obligations légales et à moins que les parties n'en disposent autrement, la procedure arbitrale est soumise au principe de confidentialité."*

to be confidential.[68] Every state can choose to regulate confidentiality arbitrarily, as there is no international instrument which would regulate this matter, and states are free to differentiate in this regard between national internal arbitrations and the international ones.[69]

On the other hand, the principle of confidentiality in arbitration proceedings in the Russian Federation is not absolute and might be revealed by national court. In the court proceeding the court at the request of a party to the proceeding might petition from an arbitration institution or from an institution authorised to store the arbitration case materials, in accordance with the legislation of the Russian Federation the case material for which an enforcement order is sought.[70]

In addition, public procurement is subject to a special regime in the Russian Federation that excludes the principle of confidentiality in arbitration, including the publication of arbitral awards. In 2014 the Russian Higher Commercial Court in the decision No 11535/13 dealt with the question if the public procurement could be a subject of arbitration proceedings and the details of this arbitration proceeding, including the arbitral awards,

68 Award of 24 October 2012, *The Louis Berger Group Inc. / Black & Veatch Special Projects Corp. Joint Venture vs. Symbion Power LLC*, ICC Case No. 16383/VRO, para. 656. The decisional practice has not, however, been consistent in this regard. In the *Aïta vs. Ojjeh* case – Judgment of the Court of Appeal of Paris (Cour d'Appel de Paris), France, of 18 February 1986, *Aïta vs. Ojjeh*. In: *Revue de l'Arbitrage*, 1986, pp. 583 ff., the party which sought in France nullification of award made in England, was imposed a significant penalty against by Court of Appeal of Paris, because the court held that the proceedings violated the principle of confidentiality, emphasising that the action *"caused a public debate of facts which should remain confidential,"* and that *"the very nature of arbitral proceedings [requires] that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed."* – cit. according to BROWER, C. N., SMUTNY, A. C. Recent Decisions Involving Arbitral Proceedings. *The International Lawyer*. 1996, Vol. 30, no. 2, p. 283. On the contrary, in the case *Nafimco vs. Forster Wheeler Trading Company* (Judgment of the Court of Appeal of Paris (Cour d'Appel de Paris), France, of 22 January 2004, *Nafimco vs. Forster Wheeler Trading Company*. In: *Revue de l'Arbitrage*, 2004, pp. 647 ff.) the court found that as the party failed to prove *"the existence and foundation of* […] [confidentiality] *duty in French international arbitration law"*, it cannot be implied by default (cf. also BLACKABY, N., PARTASIDES, C., REDFERN, A., HUNTER, M. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 2015, p. 130).

69 Other dualist states are for example Switzerland, Greece, Ireland or Denmark. Monist are, e.g., Germany, Austria, Spain or Czech Republic.

70 Russian Federation. Art. 238 para. 2 Act No. 95-FZ, on Commercial Procedure Code of the Russian Federation.

could be protected against disclosure by the principle of confidentiality.[71] The Public Procurement Act does not contain any provision regulating that contracting parties are not allowed to resolve their disputes in arbitration. However, the Court stated in its reasoning that relations in the field of public procurement are characterised by particular public importance. The main purpose of contracting in the field of public procurement is ultimately to meet public needs, contracts must not only be concluded but also executed in compliance with the principles of openness and transparency, ensuring competition and prevention and counteraction of corruption. All phases of legal relationship, including the conclusion, performance, termination and application of liability for non-performance or improper performance, must be fully transparent. Principles of arbitration proceedings, including the principle of confidentiality, proceedings in camera, informal nature of the proceedings, simplified procedure for collecting and presenting evidence, lack of information about the decisions made, and the impossibility of checking and reviewing their merits, do not meet the objectives for which the public procurement system was introduced.

Regarding the publicly available awards, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation enables publication of arbitral awards and judgments when agreed by the Presidium under conditions, that the names of the parties and other identifying information which might prejudice the legitimate interests of the parties are deleted.[72]

In the United States the publication of arbitral awards is not forbidden in general since the Federal Arbitration Act nor the Uniform Arbitration Act does not contain any special provision in this regard.[73] Unless agreed otherwise by the parties (or without having adopted a set of arbitration rules containing a pertinent confidentiality provision), there is no obligation

71 Decision of the Presidium of the Highest Commercial Court of the Russian Federation of 28 January 2014, Case No. 11535/13. In: *Garant.ru* [online]. [cit. 25. 5. 2022]. Available at: https://base.garant.ru/70661280/

72 Art. 46 para. 4 Rules of Arbitration of International Commercial Disputes to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.

73 Cf. BLACKABY, N., PARTASIDES, C., REDFERN, A., HUNTER, M. *Redfern and Hunter on International Arbitration*. Oxford: Oxford University Press, 2015, p. 128.

to confidentiality.[74] However, some states in the US have adopted special regulation in this matter. The Civil Procedure of North Carolina (USA) contains the following rule: *"Unless otherwise agreed by the parties, or required by applicable law, the arbitral tribunal and the parties shall keep confidential all matters relating to the arbitration and the award"*.[75]

Another example of a country, where confidentiality is considered as an inherent principle to arbitration, is New Zealand. Confidentiality of arbitral awards is granted by national legislation there. The New Zealand Arbitration Act defines confidential information as *"information that relates to the arbitral proceedings or to an award made in those proceedings"*. Any award of the arbitral tribunal is considered as an inherent part of confidential information.[76] At the same time every arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information, i.e., including the arbitral award.[77]

Adopting those provisions in New Zealand was most likely a reaction to the decision of the High Court of Australia of 7. 4. 1995 in *Esso Australia Resources vs. Plowman and Others* where the Court ruled on the privacy of arbitration proceedings, confidentiality of documents and information and limitation of this confidentiality. The Court refused to protect confidentiality of documents produced in those proceedings, including the award and reasons for the award. Furthermore, the Court held that in Australia there is neither a general obligation requiring confidentiality about arbitration proceedings nor any obligation to maintain confidentiality

74 Cf. Judgment of the United States District Court, Southern District of New York, USA, of 17 April 2003, *Contship Container lines Ltd vs. PPG Industries Inc.*, Case 2003 US Dist. 6857. In: *Casetext.com* [online]. [cit. 24. 4. 2022]. Available at: https://casetext.com/case/contship-containerlines-ltd-v-ppg-industries; Judgment of the United States District Court, Southern District of New York, USA, of 1987, *Giacobassi Grandi Vini SpA vs. Renfield Corporation*, Case US Dist. LEXIS 1783 (1987); Judgment of the United States District Court, Southern District of New York, USA, of 1 April 1984, *Industrotech Constructors Inc. vs. Duke University*, Case 67 NC App. 741, 314 S.E.2d 272 (1984). In: *Casetext.com* [online]. [cit. 24. 4. 2022]. Available at: https://casetext.com/case/industrotech-constructors-v-duke-university

75 USA, North Carolina. Art. 45B para. 1-567.54 – 54 letter d) 2014 North Carolina General Statutes.

76 New Zealand. Art. 2 Act No. 99, Arbitration Act.

77 New Zealand. Art. 14B Act No. 99, Arbitration Act.

in regard to information and documents disclosed in those proceedings.[78] As a consequence of this case, Australia has become less attractive and competitive as a country for arbitration of overseas disputes.[79]

The same interpretation of the principle of confidentiality in arbitration like in New Zealand was admitted in England. Although the Arbitration Act 1996 which regulates arbitration proceedings within the jurisdiction of England, Wales and Northern Ireland is still silent on the question of confidentiality[80], the importance of privacy and confidentiality in arbitral proceedings in England goes back to 1880, when in case *Russel vs. Russel* was highlighted the obligation of parties not to discuss details about their arbitration in public.[81] In 1997 in the case *Ali Shipping Corporation vs. Shipyard Trogir*, the England and Wales Court of Appeal held that *"privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of the arbitration outside the four walls of the arbitration"*.[82] In 2008, the England and Wales Court of Appeal in the case *John Forster Emmott vs. Michael Wilson & Partners Limited* held that the duty of confidentiality is an implied obligation (arising out of the nature of arbitration itself) in arbitration *"arising out of the nature of arbitration"*. All documents produced in the arbitration, including transcripts or notes of the evidence in the arbitration or the award,

78 Judgment of the High Court of Australia of 7 April 1995, *Esso Australia Resources Ltd. and others vs. The Honorable Sidney James Plowman (The Minister for Energy and Minerals)*, Case (1995) 128 ALR 391. In: *High Court of Australia* [online]. [cit. 24. 4. 2022]. Available at: https://staging.hcourt.gov.au/assets/publications/judgments/1995/013--ESSO_AUSTRALIA_RESOURCES_LTD_AND_OTHERS_v_THE_HONOURABLE_SIDNEY_JAMES_PLOWMAN_AND_OTHERS--(1995)_128_ALR_391.html

79 BENNETT, D. Q. C. Public Interest, Private Arbitration and Disclosure. In: *Australian Construction Law Newsletter* [online]. 1996, no. 49, p. 16 [cit. 25. 5. 2022]. Available at: http://classic.austlii.edu.au/au/journals/AUConstrLawNlr/1996/54.pdf

80 The Law Commission on 30 November 2021 announced that it will conduct a review of the Arbitration Act 1996, including the law concerning confidentiality and privacy in arbitration proceedings. See Law Commission to review the Arbitration Act 1996 [online]. *The Law Commission.* 30. 11. 2021 [cit. 25. 5. 2022]. Available at: https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/

81 Judgment of the High Court of Justice of England and Wales (Chancery Division), UK, of 6 February 1880, *Russel vs. Russel*, Case (1880) LR 14 Ch D 471. In: *Trans-lex.org* [online]. [cit. 24. 4. 2022]. Available at: https://www.trans-lex.org/302010/_/russel-v-russel-lr-14-ch-d-471/

82 Judgment of the England and Wales Court of Appeal (Civil Division), UK, of 19 December 1997, *Ali Shipping Corporation vs. Shipyard Trogir*, Case [1997] EWCA Civ 3054. In: *Practical Law* [online]. [cit. 24. 4. 2022]. Available at: https://uk.practicallaw.thomsonreuters.com/D-001-1354?transitionType=Default&contextData=(sc.Default)

should not be disclosed or used for any other purpose, unless: i) where there is a consent by the parties; ii) where there is an order or leave of the court; iii) where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; iv) where the interests of justice require disclosure and also (perhaps) where the public interest requires disclosure.[83] Confidentiality is in England considered as an important advantage over the courts as a means of dispute resolution and therefore confidentiality is a necessary consequence of the concept of private arbitration.[84]

Implicit confidentiality has been deduced also in Singapore. The court, however, found that it is legitimate to disclose certain materials to the relevant public authorities because *"there was reasonable cause to suspect criminal conduct."*[85] So that basically means that public policy exceptions are allowed and shall be ad hoc evaluated.

8 Potentially Conflicting National, International and Institutional Regulation

The legal regime of confidentiality and its limits may depend on one or more of the following: the arbitration agreement, the applicable institutional rules, the law at the seat of the arbitration, and the law of the states on the territory of which the award is (potentially) available.[86] One cannot neglect the crucial question of which rules should prevail in case of conflict between these sources of regulation, notably when it comes to the conflict between national law of the state in which the arbitration proceedings take place,

83 Judgment of the England and Wales Court of Appeal (Civil Division), UK, of 12 March 2008, *John Forster Emmott vs. Michael Wilson & Partners Ltd.*, Case [2008] EWCA Civ 184. In: *British and Irish Legal Information Institute* [online]. Para. 79 [cit. 24. 4. 2022]. Available at: https://www.bailii.org/ew/cases/EWCA/Civ/2008/184.htm

84 Judgment of the High Court of Justice of England and Wales (Queen's Bench Division, Commercial Court), UK, of 22 December 1992, *Hassneh Insurance Co. of Israel vs. Mew*, Case [1993] 2 Lloyd's Rep 243. In: *Practical Law* [online]. [cit. 24. 4. 2022]. Available at: https://uk.practicallaw.thomsonreuters.com/D-016-8131?transitionType=Default&contextData=(sc.Default)

85 Judgment of the Supreme Court of Singapore of 2011, *AAY and others vs. AAZ (AAY)*. In: *The Singapore Law Reports*. 2011, no. 1, pp. 1093 ff.

86 *Dimolitsa* states that the confidentiality can depend also on the law governing the arbitration agreement. – DIMOLITSA, A. Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration. *ICC Digital Library* [online]. 2009, p. 5 [cit. 25. 5. 2022]. Available at: https://library.iccwbo.org/. We neglect this potential aspect in this article.

state where the arbitral award is to be published, and institutional arbitral rules used by the particular arbitral court in question. For example, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation clearly states that arbitral awards and judgments can be published only anonymously. At the same time, the confidentiality in arbitral proceedings in the Russian Federation, including awards, could be revoked and the names of the parties and other identifying information could be made public under the conditions mentioned above, imposed by the effective national law, in particular by the Federal Law No 102-FZ On Arbitration Courts in the Russian Federation. Does this mean that certain rules of the arbitral institutions are not applicable, if they are in conflict with the national law? And what if the law of the state in which the arbitration proceedings took place *(lex loci arbitri)* entirely forbids publication of awards? Is the legal regime of award confidentiality dictated always by the law of award's origin, i.e., generally by law of the state where the arbitration took place *(lex loci arbitri)*? And what if the award is made available on the territory of state which forbids publication of arbitral awards by its law?

De Lima Pinheiro states that legal framework of arbitration comprises both procedural and substantive law issues, namely the arbitration agreement, jurisdiction, the operation of the arbitral tribunal, the determination of the substantive applicable law, and the prerequisites of arbitral award.[87] According to some opinions, the institutional rules of arbitral tribunals are not subordinated to the law of any particular state as they do not form part of one single state's political organisation, and thus no country holds the jurisdiction to define their legal framework.[88] They are told to be transnational.[89] For such cases there are several ways of determination of the applicable regulation which the decisional practice and doctrine invented. Most of the time the rules are told to come from customary decisional practice of the arbitral institution in question and its institutional arbitral rules whilst being independent from the national *lex loci arbitri*.

87 LIMA PINHEIRO, L. de. *Estudos de Direito da Arbitragem*. Lisboa: AAFDL Editora, 2022, pp. 281–282.

88 Ibid., p. 283, cf. also all the remarks in the fn. 7.

89 Ibid., pp. 297–298, 299–304.

A different part of doctrine claims that when it comes to conflict of arbitral rules and national *lex loci arbitri*, the default position is that the geographical place of arbitration creates the factual connection of contractual and procedural rights and obligations between the parties and arbitrators.[90] The rules of the arbitration court are inherently subordinated to *lex fori (lex loci arbitri)* since *lex fori* rules are part of the national legal system that governs arbitration and gives it binding force and effect.[91] That means that the rules cannot override imperative national regulation. These national rules are created by state – a subject of international law. Therefore, generally speaking, rules of arbitral tribunal should be in conformity with its *lex loci arbitri* and in case of conflict between the rules of the arbitral tribunal and national law, the regulation of national law shall prevail.

While we do not want to express our stance towards these general doctrinal theories, we would like to show that even if the transnational theory was accepted, the nature of publication of awards is somewhat different from all the elements of the mentioned "legal framework" of international arbitration and must be treated in a different manner. Confidentiality of award is not a prerequisite of such, but rather a postrequisite. Even if we admit that the rules of arbitral institutions could exist on their own without a particular national legal order, this would be true only to a certain extent. Thus, we would like to raise this exception towards the all-encompassing position[92] that rules of institutions are applicable as a whole independently from the point of view taken by a particular national legal order. While we understand the alibistic rationale behind this stance which has been expressed also in the decision of ICC International Court of Arbitration No 8938[93] (it was held that the provisions of ICC Rules are *"independent rule of international*

90 Judgment of the Supreme Court of India of 10 March 2017*, Imax Corporation vs. E City Entertainment India Private Limited*, Civil Appeal No. 3885 of 2017. In: *Indiankanoon.org* [online]. [cit. 24. 4. 2022]. Available at: https://indiankanoon.org/doc/190793657/

91 SVOBODOVÁ, K. Místo konání rozhodčího řízení – rozhodující kritérium určení "lex arbitri". In: SEHNÁLEK, D. et al. (eds.). *Dny práva – 2009 – Days of Law*. Brno: Masaryk University, 2009, pp. 1884 ff.; cf. also LIMA PINHEIRO, L. de. *Estudos de Direito da Arbitragem*. Lisboa: AAFDL Editora, 2022, pp. 299–300.

92 LIMA PINHEIRO, L. de. *Estudos de Direito da Arbitragem*. Lisboa: AAFDL Editora, 2022, p. 290.

93 Award of 1996, ICC Case No. 8938. In: *Yearbook of Commercial Arbitration*. 1999, Vol. 24, pp. 174 ff.

Arbitration Law"), we find this proclamation to be rather arbitrary and without a sufficiently logical ground when it comes to certain aspects such as to the question of confidentiality of the award.

What we focus on in this particular case is the information which is to be made public or kept confidential. Information is of ubiquitous nature, it can be present in every country simultaneously. In this sense it can be likened to intellectual property rights, whose scope and content are governed by the *lex loci protectionis* principle, which corresponds to their territorially limited nature. In a similar way, when it comes to publication of awards, of the information contained therein, its regulation is part of public policy and is thus always territorially limited.[94] Apart from that, the confidentiality of awards is not a question of arbitration as such. We are talking about regulation of what happens with the award once the arbitration proceeding is finished. For these reasons the anomalous nature of the question of confidentiality of awards should be emphasised and it should be concluded that the question of admissibility of publication of awards will always be regulated by the law of the state, which provides protection to the confidentiality of the award, i.e., the information contained therein.[95]

If the award is made public (and possibly worldwide accessible in Internet) according to the law applicable at the place of seat of the arbitral tribunal, other countries where the information will also be available should not sanction such a publication, as it is a result of parties' will. They chose the particular arbitral court and should have been acquainted with all the legal consequences of such choice.

On the other hand, in case when the applicable law (arbitral rules of the arbitral institution to the extent admissible by the *lex fori)* provides for confidentiality by default, the law of other countries may require publication.

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94 Cf. LIPSTEIN, K. Inherent Limitations in Statutes and the Conflict of Laws. *The International and Comparative Law Quarterly*. 1977, Vol. 26, no. 4, pp. 885 ff.

95 Another thinkable doctrinal approach could be seen in general application of *lex loci arbitri* for the question of confidentiality of award, and subsequently raising the *ordre public* exception or proclaiming the national norms of place of "confidential" award availability to have an imperative nature once they require publication of an award which is deemed confidential by the *lex loci arbitri*. We find this solution to be way too robust and it does not correspond with the fact that the confidentiality of arbitral awards as such has nothing to do with the country of origin once the arbitral process has ended.

Such publication should, however, be limited to the territory of that particular state. Otherwise, if the publication happened for example online without any geo-blocking technology engaged, it is possible that the party that "caused" the publication could be sanctioned in the country of origin of the award or even other countries which provide for confidentiality by default. Of course, this presupposes that the sufficient causal nexus would be proven. Such a nexus could be present in case when the party demands enforcement of the award in a country which for such enforcement requires publication and the publication would have a sufficient reach to the protecting country. This is, however, only a theoretical conclusion, as in practice the courts would usually require the available information to have a significant relation to the country where the tort is claimed to be committed, just like it is the case for trademarks used in the Internet. In addition, the causal nexus could be missing in this case as, after all, it is the state who publishes the award, not the party itself who demanded its enforcement. It is important to mention that the territoriality of information and consequently of arbitral award confidentiality does not exclude respect of foreign law towards the law of arbitration *(lex loci arbitri)*. It is already up to the protecting country to decide whether it will respect the legal settings in locus arbitri or not. However, such a respect towards *lex loci arbitri* cannot be taken for granted.

Notwithstanding all that has been said, there is one way for rules of an arbitration institution to take precedence over *lex loci arbitri* national legal order. Such a situation arises when the arbitration is held by an arbitration court which has not been established or accredited by a national law but rather by an international instrument, or possibly by an international organisation. In other words, it has been established by several states giving it its international legitimacy. International intergovernmental organisations are, like states, subjects of international law.[96] They have been given a certain level of authority derived from the sovereignty of states. Once the states provide authority to an international organisation, they are also obliged to respect the rules of arbitration issued according to the foreseen procedure. Such states are obliged to give full precedence to these rules over

[96] ГУРЕЕВ С. А. Субъекты международного права. *Московский журнал международного права* [online]. 2012, p. 29 [cit. 20. 5. 2022]. Available at: https://www.mjil.ru/jour/article/view/500/391

their national laws in order to comply with international law obligations. Territorial scope *(ratione loci)* of international organisation acts is derived from the territories of the contracting states establishing the authority for the organisation.

For instance, the United Nations specialised agency WIPO established the WIPO Arbitration and Mediation Center in 1994. This Center offers among others the arbitration to enable private parties to settle their domestic or cross-border commercial disputes related to intellectual property and technology.[97] As shown above, WIPO Arbitration Rules provide that awards can be disclosed *inter alia* in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.[98] It is only because the Rules state so, that the national laws can prescribe a publication of an award in this case, not vice versa. The same is true for awards issued by the International Centre for Settlement of Investment Disputes established by the ICSID Convention.[99]

9 Confidentiality Agreement

Only in some jurisdictions is confidentiality considered to be an implied duty of arbitration. Arbitration agreement means using a pre-agreed set of arbitration rules, which could also focus, among others, on the regulation of confidentiality and its extent. However, since confidentiality is often understood as a fundamental aspect of arbitration, it is not an exception that parties do not pay enough attention to arbitration clauses and their confidentiality agreements. This can cause severe problems for them in the future.[100] Very often parties simply adopt specific arbitration rules that provide a certain level of confidentiality but usually they do not regulate the exact scope of confidentiality, duration and remedies available in case

97 Alternative Dispute Resolution. *WIPO* [online]. [cit. 25. 5. 2022]. Available at: https://www.wipo.int/amc/en/

98 Art. 77 point iii) WIPO Arbitration Rules.

99 Art. 1 para. 1 ICSID Convention – *"There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre)."*

100 JULKA, N., BHASIN, M. Confidentiality in Arbitration: A Broken Promise. *International Journal of Law Management & Humanities* [online]. 2011, Vol. 4, no. 4, p. 3770 [cit. 25. 5. 2022]. Available at: https://www.ijlmh.com/wp-content/uploads/Confidentiality-in-Arbitration.pdf

of a breach. In order to avoid later disputes it is recommended for the parties to put an agreement among them in place to establish an exact scope of the duty to confidentiality.[101]

Parties in arbitration generally do not have any legal obligation to conclude confidentiality agreements. However, as shown above, national laws and institutional approaches towards confidentiality of arbitral awards vary greatly. This underlines the importance of confidentiality agreement as an instrument to create a pertinent *in casu* framework for confidentiality of the arbitral award notwithstanding the rules of a particular arbitration institution. In order to ensure the appropriate standard of confidentiality, it is advisable to discuss the confidentiality beforehand and include it in the arbitration agreement. However, it is possible to agree on confidentiality not only *ex ante*, but also at the time of a conflict.[102] In general, the parties' autonomy to decide the confidentiality rules is not limitless. Although the will of parties expressed in their confidentiality agreement can generally outweigh the default rules of particular arbitration institutions, this does not mean that it could, at the same time, prevail over the provisions of the national law. Parties may agree on confidentiality regime to the extent not precluded by the applicable arbitration law.[103] That means that the extent to which arbitration could be confidential depends not only upon the parties agreement to arbitrate, but also upon the law at the seat of the arbitration institution and other national laws of countries where the award might be exposed, both of which may require the disclosure in certain cases despite the contractual obligation of confidentiality. The obligation to keep

101 JANSEN D. Parties' Confidentiality Obligations in International Commercial Arbitration: A Dutch Perspective. *Kluwer Arbitration Blog* [online]. 22. 2. 2022 [cit. 25. 5. 2022]. Available at: http://arbitrationblog.kluwerarbitration.com/2022/02/22/parties-confidentiality-obligations-in-international-commercial-arbitration-a-dutch-perspective/

102 TRAKMAN, L. E. Confidentiality in International Commercial Arbitration. *Arbitration International.* 2002, Vol. 18, no. 1, p. 3; cf. further DIMOLITSA, A. Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration. *ICC Digital Library* [online]. 2009, pp. 3–22 [cit. 25. 5. 2022]. Available at: https://library.iccwbo.org/

103 UNCITRAL Notes on Organizing Arbitral Proceedings. *UNCITRAL* [online]. 2016, p. 17 [cit. 25. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf

the award confidential may also be time limited.[104] It can as well be extended to various persons such as witnesses, translators or transcribers involved in the arbitration process, which are not directly obliged by the arbitration agreement, unlike the parties themselves.[105] Nonetheless, the confidentiality agreement generally keeps its *inter partes* effect and the arbiter and other persons taking part in the arbitral proceedings are not legally bound by such an agreement. Unless the obligation of confidentiality extends to them due to the institutional rules (or the *lex loci arbitri)* and due to the following implied consent of the person in question to take part in the arbitration process, the confidentiality agreement has effect only in relation to the parties at dispute.

10 Conclusion

From what has been shown it is evident that the *status quo* of legal regulation is not sufficient to ensure legal certainty to parties who decide to arbitrate. The principle of confidentiality needs a concrete legal basis, which should ideally come from the international law level in the form of a convention which will harmonise the national confidentiality regulations. Considering the different legal systems from the point of view of the interconnected information society, a comprehensive confidentiality principle cannot be constructed as an inherent implicit value deduced possibly in a different way in each country. Let us remember that all the possible rules concerning confidentiality in institutional rules or party agreements cannot contradict the mandatory requirements of applicable law. The applicable law for the question of confidentiality/publication of awards is *lex loci protectionis*. International harmonisation of the question of award confidentiality regime would enhance coherence of movement of arbitral awards and would also enhance general efficiency of justice.

In order to determine the scope of confidentiality of arbitral awards, we could propose two possible theoretical approaches. One of them is the anonymized publication in cases when there is no confidentiality agreement.

104 Cf. ibid., p. 18.

105 SMELLIE, R. Is arbitration confidential? *Fenwick Elliott* [online]. 2013, p. 2 [cit. 25. 5. 2022]. Available at: https://www.fenwickelliott.com/research-insight/articles-papers/arbitration-confidential

This could be considered as a default setting with the aim of promoting decisional harmony and not harming disproportionally parties' confidentiality. However, it is evident that in arbitration with parties represented by large companies or in a well-known media case the anonymized publication of arbitral awards would not fully guarantee confidentiality since the scope of arbitration remains obvious from the award despite deployment of various methods of anonymization.

When parties have concluded a confidentiality agreement they might agree on publication of the key decision grounds, i.e., not the complete decision will be published but solely the grounds on which the arbitration court has decided the case. However, it should be taken into account that only key decision grounds are potentially not enough in order to learn about the case and about the decision-making practice of the particular arbitration court. Another proposed solution is to make arbitral awards available only to arbitral institutions, i.e., they will be available not to the general public but exclusively for competent arbitral institutions.

There are still several remaining questions related to the presented paper. For instance, whether there should be any difference in regulation of confidentiality in *ad hoc* arbitral courts. Should only arbiters be allowed to point out precedent cases or the same right should be granted to parties as well? What are the limits of the right to be heard and to what extent should this right be protected in arbitration? However, we believe that all those questions should be subject of further research projects.

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Contact – e-mail

hoder.john@gmail.com, vlastislavstavinoha@gmail.com

ORCID

0000-0002-6585-8783, 0000-0001-7203-3248

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Digitalisation of Judicial Cooperation in the EU: A Long Road Ahead[1]

Martina Tičić

Faculty of Law, University of Rijeka, Croatia

Abstract

This paper aims to highlight the development and pinpoint the issues that arise in the ongoing process of digitalisation of justice in the EU, particularly by analysing the relevant provisions of the new Proposal for a Regulation on the digitalisation of judicial cooperation. Different digital landscapes of the national courts in different Member States will also be showcased so as to detect possible issues in practices with the application of the new Proposal. The paper's main conclusion is that the Proposal, while a step in the right direction, leaves room for further differentiation of access to justice between Member States. Additional improvements before its adoption are therefore desirable.

Keywords

Digitalisation; e-Justice; European Civil Procedure; Judicial Cooperation in the EU.

1 Introduction

The process of digitalisation has, without a doubt, had one of the most significant impacts on the whole world in the recent history. Starting slow, it has since been gaining significant traction, which led to the global need of incorporating digital tools in almost all aspects of society. The legal sphere was certainly not the first area where this happened, which is unsurprising considering that the legal field can historically be described as resistant

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to change.[2] However, after a while, it inevitably also started to adapt to the new challenges brought by digitalisation and new technological tools which became available. Perhaps the biggest acceleration factor was the COVID-19 pandemic which truly showcased all of the possibilities that digital tools offer, as well as the limitations of legal rules, particularly the procedural ones, when we take into account the changing dynamics of the society itself. Because of this, majority of the countries started to develop their own digital tools both for legal practitioners and/or the parties in the national procedures. Even before the pandemic, some Member States had already started to implement information and communication technology ("ICT") in judicial proceedings, including digitalisation of court administration, start of the usage of videoconferencing or, for some, even handling the procedures completely online.[3] This is unsurprising considering the major advantages that digitalisation can bring to the justice system, such as optimisation of the use of resources, higher degree of efficiency, acceleration of court proceedings, facilitation of access to justice and information, as well as strengthening the confidence in the justice system.[4]

This also holds true when we look at the bigger picture of the EU as a whole, taking into account that the cross-border element in litigation without a doubt provides for many additional complexities in comparison to strictly national litigation.[5] Despite this fact, initiatives for increased usage of ICT

2 MANNINEN, H. Between Disruption and Regulation – How Do Lawyers Face Digitalisation? In: KOULU, R., HAKKARAINEN, J. (eds.). *Law and Digitalisation: Rethinking Legal Services*. Helsinki: University of Helsinki Legal Tech Lab Publications, 2018, p. 87.

3 KRAMER, X. Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU. In: BENYEKHLEF, K. et al. (eds.). *eAccess to Justice*. Ottawa: University of Ottawa Press, 2016, p. 351.

4 VELICOGNA, M. Justice Systems and ICT: What can be learned from Europe? *Utrecht Law Review*. 2007, Vol. 3, no. 1, p. 129; BANICA, R. Digitization of justice in the context of COVID-19 pandemic and the implications of digitalization on constitutional rights. *Revista de Drept Constitutional*. 2020, no. 2, p. 12; CASHMAN, P. K., GINNIVAN, E. Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions. *Macquarie Law Journal*. 2019, Vol. 19, p. 40; BODUL, D., NAKIĆ, J. Digitalizacija parničnog postupka (reforma načela ekonomičnosti?). *IUS-INFO* [online]. 7. 5. 2020 [cit. 30. 5. 2022]. Available at: https://www.iusinfo.hr/strucni-clanci/CLN20V01D2020B1373

5 VELICOGNA, M. et al. Connecting EU jurisdictions: Exploring How to Open Justice Across Member States Through ICT. *Social Science Computer Review*. 2018, Vol. 38, no. 3, pp. 278–279.

tools can be found not only on local and national, but also international level, with many interdependencies created among all of the aforementioned levels.[6] Particularly in regards to the EU, one of its main goals for a couple of decades already has been progress in the area of digitalisation in general, as well as particularly digitalisation of judicial cooperation in its Area of freedom, security and justice.[7] This is one of the points of EU's interest that has been gaining significant importance in the academic circles, as well as in practical ones, since cross-border judicial proceedings are becoming more of a regularity in the current times. This goal of digitalisation is visible in the plethora of action plans and reports presented in the last years by the EU, which all have modernisation of digital tools as one of the top priorities for future development.[8] On its path to promoting digitalisation in the judicial cooperation, the EU has accomplished many of its goals, some of which include the development of the European e-Justice Portal[9] and e-CODEX[10], which aim to help with the sharing of information on the national systems of the Member States and to provide a communication tool for cross-border cooperation between judges, lawyers and legal practitioners in general.

Despite promoting and developing multiple digital tools through different regulations and/or directives in all areas of law, the EU has so far not regulated the questions of digitalisation of judicial cooperation in one place. This will soon change, as the European Commission recently adopted two proposals, one for a Regulation which will lay down the rules of the digitalisation in judicial cooperation in civil, commercial and criminal matters ("the Proposal")[11], and one for a Directive which aims to align the existing

6 VELICOGNA, M. In Search of Smartness: The EU e-Justice Challenge. *Informatics*. 2017, Vol. 4, no. 4, p. 1.

7 Art. 67 Treaty on the Functioning of the European Union.

8 See, e.g., Multi-annual European e-Justice Action Plan 2009–2013, C 75/01 (2009); Multiannual European e-Justice Action Plan 2014–2018, C 182/02 (2014); 2019-2023 Strategy on e-Justice, C 96/03 (2019); 2019–2023 Action Plan European e-Justice, C 96/9 (2019).

9 European e-Justice Portal [online]. *European e-Justice* [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/home?action=home&plang=en

10 E-Codex [online]. *e-Codex* [cit. 30. 5. 2022]. Available at: https://www.e-codex.eu/

11 Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.

rules on communication with the rules established in the aforementioned Regulation.[12] This is undoubtedly an important step for judicial cooperation in the EU, long awaited by many. However, when establishing general rules such as these, it is highly important to take into account the significant differences of national digitalisation developments in different Member States. Since such differences are certainly not of a small scale, it is necessary to question whether one legislative document will solve all the existing problems, or, on the other hand, even exacerbate them.

This paper therefore aims to present and analyse the proposed rules of the new Regulation for digitalisation of judicial cooperation in the EU, focusing specifically on the cooperation in civil matters. By taking into account the national developments of some of the Member States in terms of digitalisation in the area of justice, it will showcase how the proposed rules will affect those Member States and the EU as a whole. By comparing the national developments with the EU's aims for the future, conclusions on the necessary steps that need to be taken will be brought, particularly in regards to the Proposal in question, as it can still undergo many changes before its adoption and implementation.

Chapter 2 will first depict the road to digitalisation by the EU so far, highlighting the most important achievements, as well as its drawbacks. Chapter 3 will offer a comparative view on some of the Member States national practices and developments of specific IT tools. This will provide the reader with a fuller picture of the current digital landscapes of the selected Member States. It is in these landscapes that the new Regulation will have to be implemented, therefore, it is important to detect possible issues that may occur in that process. Chapter 4 will then focus specifically on the new Proposal and the rules it provides. By analysing the rules and predicting the impact they will have on different Member States in question, strengths and weaknesses of the Proposal will be pinpointed and ideas for

12 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 2003/8/EC, Council Framework Decisions 2002/465/JHA, 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, and Directive 2014/41/EU of the European Parliament and of the Council, as regards digitalisation of judicial cooperation.

possible improvements offered. Finally, Chapter 5 will conclude with the final remarks on the future for the digitalisation of judicial cooperation and the long road that is ahead of the EU in that regard.

2 The Road to Digitalisation of Judicial Cooperation in the EU

2.1 Long Road With a Clear Goal in Mind?

Before diving into all of the accomplishments and future goals, it is important to start from the EU's initial ideas with regards to digitalisation progress in general. It has long been known that digital technologies hold a great importance and offer a plethora of possibilities for ways in which they could improve the lives of regular citizens. Despite some resistance against the unknown, aspects of digitalisation have started to seep into the area of justice within the EU in 2008.[13] On the one hand, this seems like not so long ago. In only 14 years that have passed, many accomplishments, which will be highlighted later on in the chapter, have been made. At the same time, it may seem like real steps towards digitalisation have only started to be made after the emergence of COVID-19 pandemic left the citizens and the authorities with no other choice.

First action plan by the EU was presented in 2009 and established the aims for the following five years.[14] It was created by the Justice and Home Affair Council with a vision of simplified judicial proceedings and easier access to justice. Its main and primary goal was the creation of a European portal.[15] This plan, therefore, presents the start of what is now one of the biggest achievements in the area of digitalisation of cross-border judicial proceedings in the EU, the creation of e-Justice. At the time of the publication of the Action Plan, many of the actions necessary for the accomplishment of that goal, such as the development of pilot projects and conducting complementary studies, have already been in progress, as stated

13 See, e.g., Digitalisation of justice. General information. *European Commission* [online]. [cit. 30. 5. 2022]. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice/general-information_en

14 Multi-annual European e-Justice Action Plan 2009–2013, C 75/01 (2009).

15 Ibid., para. 1.

in it.[16] One of the important facts also established is that the European e-Justice project must be distinguished from any national e-Justice projects that the Member States are free to conduct among themselves.[17] A beginning of a differentiation between the developments of the Member States can be seen here.

The second action plan followed in 2014,[18] while it has been superseded by the current 2019–2023 Action Plan[19] and 2019–2023 Strategy on e-Justice[20]. All of the aforementioned action plans show a clear vision for a digitised future of the EU. Since the first plan, e-Justice was established, along with other successful projects, and the ongoing plans aim not only to improve the already established mechanisms but to further enhance the use of digital technologies in all aspects of EU law. These kinds of overarching plans seem to be a good thing for the EU's future, as they take into account all of the ideas and projects that are currently in place or being prepared for the future. Only with the full picture in mind can the goal of digital and simplified justice be achieved. Another positive novelty is the "EU Justice Scoreboard"[21] which is an annually published document, starting from 2013, that analyses the national systems of the Member States depending on three factors: efficiency, quality, and independence.[22] Relevant for the purpose of this paper is the fact that it includes the digitalisation aspects of the Member States' legal systems as one of the particularly important points of research and analysis. In this way, the EU can "keep an eye" on the

16 Ibid., para. 30.
17 Ibid., para. 17.
18 Multi-annual European e-Justice Action Plan 2014–2018, C 182/02 (2014).
19 2019–2023 Action Plan European e-Justice, C 96/05 (2019).
20 2019–2023 Strategy on e-Justice, C 96/04 (2019).
21 See, e.g., The 2022 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of Regions, COM (2022) 234; The 2021 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2021) 389; European Commission, The 2020 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2020) 306.
22 The 2022 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of Regions, COM (2022) 234, p. 1.

progress of the national systems in regards of the digitalisation aspects, which can in turn help to establish EU rules which are in line with the Member States' possibilities.

However, the plans also show that the road to that goal is not a fast and easy one. Significant drawbacks and other bumps along the way are therefore to be expected. What is important is to keep the goal in mind and the EU seems to be on the right track in that regard.

2.2 Establishment of e-Justice and e-CODEX

On its path to digitalisation, the EU has already achieved some of the goals established from its beginnings. The most important one is certainly the creation of the European e-Justice portal.[23] Created as a "one-stop shop"[24] in the area of justice within EU, it serves as a main source of information on the general questions of EU law and cross-border judicial cooperation, on the national systems of the Member States, as well as a provider of online forms for the selected procedures that will be further elaborated upon in the next chapter. It also offers visitors the necessary details on taking legal actions in the EU, reclaiming one's legal rights and provides tools for finding legal professionals. Additionally, it is a good way for connecting between legal professionals, especially by providing judicial trainings and professional networks for communication and sharing best practices.

With everything previously mentioned in mind, it is obvious that e-Justice intends to combine different things in one place and offers a lot of different information. With so much information and possibilities in one place, it is important to keep in order all of the different aspects of the website. In terms of cross-border judicial cooperation and especially in terms of providing relevant information to the citizens looking to start proceedings in another Member State, the Member State's themselves have a duty to help by providing sufficient information on their national legal rules and update

23 *European e-Justice Portal* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/home?action=home&plang=en

24 Ibid.; see also LUPO, G., BAILEY, J. Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples. *Laws*. 2014, Vol. 3, no. 2, p. 364; VELICOGNA, M. In Search of Smartness: The EU e-Justice Challenge. *Informatics*. 2017, Vol. 4, no. 4, p. 7.

it regularly. This is the part that in some cases seems to be forgotten. Although e-Justice portal truly provides necessary information to anyone who wishes to do some research on their own, one cannot be sure whether that information is up to date.

Wrong information on the e-Justice can be seen on the example of Croatia and the information it provides in terms of court with jurisdiction for the applications to issue and review European Order for Payment. The e-Justice states that the competence lies exclusively with the Commercial Court in Zagreb *(Trgovački sud u Zagrebu)*.[25] However, this is not true as of 2019, after amendments to the Croatian Civil Procedure Act *(Zakon o parničnom postupku)* have been introduced, including the one on the courts with jurisdiction in terms of European Order for Payment Procedure.[26] The competence now lies with all the municipal or commercial courts that have jurisdiction. Similar issues have been noticed in the case of Italy,[27] concerning the payment of court fees in both European Order for Payment and European Small Claims Procedure, but has since been corrected and updated.[28] When searching for information, it should therefore be advisable to check the date of last changes which can be found at the bottom of each page. However, there is also a possibility that, for some of the Member States, the relevant information is not provided at all, which obviously poses additional problem.

Besides the impairments on the website itself, the usage of the e-Justice in practice must also come into question. Although without a doubt a useful tool, both for practitioners and citizens, it is not widely known, especially among citizens. Further steps could therefore be taken to popularise the website primarily among all EU citizens, which is not an easy task at all. However, further action is expected and definitely needed.

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25 See European payment order. *European e-Justice* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/353/EN/european_payment_order?clang=en

26 Croatia. Art. 507i zakon o parničnom postupku (Civil Procedure Act).

27 CONTINI, F., LANZARA, G. F. *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*. Berlin: Springer, 2014, p. 11.

28 See Court fees concerning European Payment Order procedure. Italy. *European e-Justice* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/305/EN/court_fees_concerning_european_payment_order_procedure?ITALY&member=1#05

Another one of the most important achievements in the area of digitalisation in the EU was the e-CODEX project (the e-Justice Communication via Online Data Exchange).[29] The project focuses on the creation of a transnational information infrastructure which would support and enhance cross-border communication in the EU legal sphere.[30] It is EU's first large scale project, which started more than a decade ago, in 2010.[31] Worth of significant 24 million €, the project is now managed by a consortium of Member States which is financed by an EU grant.[32] Without going into the technical intricacies of the e-CODEX system, it is a platform whose main purpose is to connect the already existing national e-justice systems with the European e-Justice Portal, which was discussed previously.

The e-CODEX facilitates secure communication and is to be used both in civil and criminal procedures.[33] It aims to provide for cross-border exchange of electronic documents and messages in a secure setting, which not only upgrades the interoperability between the legal authorities, but also enhances access to justice.[34] In regards to the documents, it also provides digital standardised forms that allow exchange of communication between all of the national IT systems in place. The e-CODEX consists of software products which are used to set up access point for secure communication.[35] Through it, other access points all over the EU can interconnect to provide opportunity for safe communication between them, which is particularly relevant for the judicial cooperation in cross-border cases.

29 *E-Codex* [online]. [cit. 30. 5. 2022]. Available at: https://www.e-codex.eu/

30 Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726.

31 Ibid., p. 1.

32 Ibid.

33 LUPO, G., BAILEY, J. Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples. *Laws.* 2014, Vol. 3, no. 2, p. 364.

34 KRAMER, X. Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU. In: BENYEKHLEF, K. et al. (eds.). *eAccess to Justice*. Ottawa: University of Ottawa Press, 2016, p. 351; CARBONI, N., VELICOGNA, M. Electronic Data Exchange Within European Justice: e-CODEX Challenges, Threats and Opportunities. *International Journal for Court Administration*. 2012, Vol. 4, no. 3, p. 109.

35 Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726, p. 1.

The new Proposal relies heavily on the e-CODEX system as a tool for achieving interoperability between the national IT systems. In that way, the Proposal builds on the already existing project so as to establish synergy between the two. This is obviously a positive aspect of the Proposal, since it is important to keep in line with the goal of simplicity and to avoid fragmentation in application. It is also positive in terms of technological aspect, as working and building upon an already existing installed base has many design advantages, according to many.[36] In terms of judicial cooperation in the EU, it is also necessary in order to avoid dismissal of all of the different national IT systems that have already been implemented.[37] The e-CODEX is therefore the main technical solution on which all of the interoperable IT systems rely on.

The e-Justice platform and the e-CODEX are certainly not the EU's only achievements in the area of judicial cooperation. Many of the digital systems were formed for different purposes, e.g., e-Curia[38] specifically for the Court of Justice of the EU or EUR-Lex[39] as the official website of EU legal acts, case-law and documents for both legal professionals and citizens. Some additional novelties in the digital world also include the creation of the Online Dispute Resolution (ODR) Platform provided by the European Commission with an idea to help resolve the cross-border disputes in an alternative way to regular litigation in court.[40] Apart from all of what has already been mentioned, there are many more instances of digital platforms and systems created at the EU level with the intention to push forward the digitalisation

36 LUPO, G., BAILEY, J. Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples. *Laws*. 2014, Vol. 3, no. 2, p. 356.

37 Ibid.

38 E-Curia. *Cour de justice de l'Union européenne* [online]. [cit. 30. 5. 2022]. Available at: https://curia.europa.eu/jcms/jcms/P_78957/fr/

39 Access to European Union law. *EUR-Lex* [online]. [cit. 30. 5. 2022]. Available at: https://eur-lex.europa.eu/

40 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR); see also Online Dispute Resolution. *European Commission* [online]. [cit. 30. 5. 2022]. Available at: https://ec.europa.eu/consumers/odr/main/?event=main.home2.show; see also KOULU, R., PAKASLAHTI, H. Why We Need Legal Technology. In: KOULU, R., HAKKARAINEN, J. (eds.). *Law and Digitalisation: Rethinking Legal Services*. Helsinki: University of Helsinki Legal Tech Lab Publications, 2018, p. 29.

in judicial cooperation, and in that way to simplify and speed up disputes in the EU, making life easier for its citizens. What is important to notice is the variety of different platforms and systems created, many of which the regular citizens are probably unaware of. It is therefore important to observe the introduction of the new Proposal and its provisions with all of these newly developed systems and platforms in mind.

2.3 Creation of Autonomous European Procedures

Another significant step in view of digitalisation of judicial cooperation was the creation of the first autonomous European procedures. European Order for Payment Procedure ("EOP")[41] has been established in 2006, while only a year later, in 2007, came the European Small Claims Procedure ("ESCP")[42]. Despite limited success, these procedures seem to have prompted further creation of additional procedures, since the new European Account Preservation Order ("EAPO") was also presented some years after, in 2014.[43] The significance of these autonomous procedures for the EU civil procedure is obvious, but what is particularly relevant for the purposes of this paper is that their creation was also highly assisted by relying on digital tools.

Both EOP and ESCP were created with the aim of simplifying, speeding up and reducing the costs of litigation in the cross-border cases.[44] While the EOP regulates uncontested pecuniary claims,[45] the ESCP deals with monetary claims of smaller value, concretely below 5,000 €.[46] Their main novelty point is that both are supposed to be conducted through the use of forms which can be filled out online and are available on the e-Justice website. The influence of the EU's aims to digitalise justice system can therefore directly be linked to the creation of the aforementioned

41 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

42 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

43 Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

44 Art. 1 para. 1 EOP; Art. 1 ESCP.

45 Art. 1 para. 1 letter a) EOP.

46 Art. 2 ESCP.

procedures. In terms of simplifying the litigation, both EOP and ESCP offer the possibility to conduct them without the assistance of a lawyer, using only the forms and the information available on e-Justice. This is a huge step in the simplification of legal proceedings, directly excluding the role of legal professionals. It would certainly not be possible without the use of digital technologies in law, particularly since these are strictly cross-border proceedings.

As for the EAPO, it presents a different type of procedure than the previously mentioned EOP and ESCP, enabling creditors to obtain an order which would secure the subsequent enforcement of his/her claim. This is done through a withdrawal or transfer of funds held by the debtor or on his behalf in a bank account in any of the Member States.[47] As this procedure is still fairly new, its success (or failure) is yet to be seen.

Despite the visionary ideas behind these procedures, it is important to look at the results before prematurely concluding that digitalisation can solve all of the procedural issues. Although EOP and ESCP seem like attractive choices for possible applicants, the reality is that they are seldom used in practice, as is the EAPO which is much newer so the low usage in practice is more understandable here. The procedures in general are still relatively unknown to the regular citizens, but even to those that are aware of such possibility, some issues with the procedures itself still remain. Despite the fact that EOP and ESCP should be manageable without legal assistance, in many cases this does not hold true in practice, as many points of the forms are not understandable to a layperson.[48] Many problems with the translation also remain,[49] as is often the case with cross-border procedures of any kind. Specifically with EOP and ESCP, although it is possible to fill out a form in one language on the e-Justice platform and have it directly translated to another, this only holds true with regards to some parts. The forms in general are done by the closed system of "ticking boxes". However, there are still some open fields, e.g., field for description of a claim. Those

47 Art. 1 para. 1 EAPO.

48 ONTANU, E. A., PANNEBAKKER, E. Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach. *Erasmus Law Review.* 2012, Vol. 5, no. 3, p. 174.

49 Ibid., p. 181.

parts of the form that are open field cannot be translated, which can present an issue (and additional need for a translator).

Although the EOP and ESCP could definitely be improved and the forms made more appropriate for laypersons, the main issue is the fact that they are still unknown to many. Perhaps a certain level of repulsion by some towards further digitalisation in the legal sphere still exists, therefore, procedures such as these ones cannot fully thrive. However, it is reasonable to expect that more and more people are going to be open to full scope of the possibilities that digitalisation offers. With regards to EOP and ESCP, their time is yet to come, but their existence is already a good proof that a different and novel way of access to justice is possible and that these new options that digital technology offers should be further explored.

2.4 A Vision for the Future

As for the next steps for the digitalisation aspects in the EU, it seems that the time of the biggest changes lies ahead in the imminent future. After establishing e-Justice and e-CODEX, as well as creating autonomous EU procedures and many of the other digital tools such as EUR-Lex, e-CURIA, ODR, etc., the next prospect seems to be the establishment of clear and succinct rules of digitised justice and extending their use to all aspects of legal procedure.

Particularly important is the further expansion and improvement of e-Justice, which is visible from the Action Plan and Strategy on e-Justice for the years 2019–2023,[50] after which a new action plan can be expected. As already mentioned in previous chapters,[51] e-Justice certainly can and needs to be improved for it to provide proper assistance in cross-border judicial cooperation and help for citizens.

The e-CODEX is also set to be further regulated and expanded, as was presented in the proposal for a new regulation in 2020.[52] The proposal is currently in the process of awaiting Council's 1st reading position. The e-CODEX proposal is therefore of high importance also for the Proposal,

50 2019–2023 Strategy on e-Justice, C 96/9 (2019).

51 See above Chapter 2.2.

52 Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726.

which is to be further discussed in this paper, since it directly correlates to the inner working of the e-CODEX on which all of the rules of communication between the citizens and authorities rely on.

Besides the aforementioned, new proposal for establishing a framework for a European Digital Identity is also currently awaiting Committee decision.[53] This proposal is set to amend the previous Regulation (EU) No 910/2014[54], which provides rules on the regulation of digital identity solutions and digital data.

All of the new proposals follow after the previously recast regulations on service of documents[55] and taking of evidence[56], which both establish comprehensive legal framework for electronic communication in cross-border judicial cooperation. These regulations also rely on the e-CODEX decentralized IT system. In a way, all of these new regulations and proposals establish an interconnected structure of digital procedure in the EU.

Finally, at the same time with the new Proposal that will be discussed in detail in Chapter 4, a new Directive aligning the existing rules on communication with the rules of the Proposal was presented.[57] The goal is to ensure the uniform application of the rules on communication, which can be regulated differently in different EU acts. This is to be amended by the proposed Directive which will align all of the rules with the Proposal.

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53 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity.

54 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23. 6. 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

55 Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25. 11. 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast).

56 Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 . 11. 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast).

57 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 2003/8/EC, Council Framework Decisions 2002/465/JHA, 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, and Directive 2014/41/EU of the European Parliament and of the Council, as regards digitalisation of judicial cooperation.

3 A Comparative View at the Selected Member States' Digitalisation Developments

Before analysing the new Proposal, it is important to have an overview of the digitalisation development at the national level. Implementing rules on the digitalisation of EU procedure depends heavily on the state of the current national procedures and the possibilities of using ICT tools while conducting the procedure.

This chapter will provide an overview of all the possibilities that the selected Member States offer to citizens, as well as authorities, for the use of digital tools in national proceedings. It will provide a comparison of the more advanced Member States with the less advanced ones. Additionally, it will present some of the innovative digital tools that were created in selected Member States, particularly in Croatia, Slovenia, and the Netherlands. By highlighting the developments particular to each of the Member States, similarities and differences of their journey to digitalisation will be found. In that way, further conclusions on the appropriateness of the newly proposed rules can be drawn for each of the Member States in question. Such analysis will also help to predict the impact that the Proposal will achieve in practice.

3.1 An Overview of Application of Digital Tools in the National Proceedings

The biggest push for the inclusion of the digital tools in the national judicial proceedings in the last years was certainly brought by the surge of COVID-19 throughout the world. When faced with the fact that human interaction must be heavily controlled and reduced, while the legal systems cannot simply stop operating, all of the Member States of the EU tried to mitigate the impact of the pandemic by relying on the use of digital technologies in the course of the proceedings. For some, this was a hard choice, since beforehand such tools were unimaginable in the justice system. For others, such change was long expected and praised. Because of such initial differences, the current state of digital developments and ICT usage still varies greatly depending on the Member States. Despite this, the biggest

positive after two years of life in a pandemic is that digital revolution is moving forward in the justice systems throughout the EU, no matter how small the steps taken by certain Member States may be.

In this chapter, practices of some of the Member States with regard to the introduction of digital tools in the national civil proceedings will be showcased. A broader overview will be given so as to paint a fuller picture of the usage of digital tools in different practices throughout the EU. As it may be expected, these practices differ greatly depending on the Member State in question. Since the new Proposal aims to push for further digitalisation in all of the national justice systems, it is important to view the changes that are before us in that regard from the viewpoint of different Member States, since expectations and opinions will certainly vary depending on whether it is one of the more advanced ones in the use of digital tools, or one of the less developed ones.

The first step to court is the initiation of the proceedings. With the restricted access of citizens, some of the Member States allowed for online initiation of such proceedings. For example, in Estonia, which is one of the more advanced Member States in terms of digitalisation,[58] the court proceedings can be initiated online via e-File system.[59] The system is available not only for civil cases, but also for administrative, criminal and misconduct proceedings. Any interested party is free to initiate the proceedings at any time. In the Netherlands, the electronic initiation of the court proceedings is not a novelty from the time of pandemic. Even before, from 2017, civil claims with compulsory legal representation, which covers the claims amounting over to 25,000 €, had to be conducted electronically.[60] However, this change

58 BODUL, D., NAKIĆ, J. Digitalizacija parničnog postupka (reforma načela ekonomičnosti?). *IUS-INFO* [online]. 7. 5. 2020 [cit. 30. 5. 2022]. Available at: https://www.iusinfo.hr/strucni-clanci/CLN20V01D2020B1373

59 E-File. *RIK Centre of Registers and Information Systems* [online]. [cit. 30. 5. 2022]. Available at: https://www.rik.ee/en/e-file; see also Estonia. Art. 60 Tsiviilkohtumenetluse seadustik (Code of Civil Procedure) 2005.

60 KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 220; see also Online processing of cases and e-communication with courts. Netherlands. *European e-Justice* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/280/EN/online_processing_of_cases_and_ecommunication_with_courts?NETHERLANDS&member=1

was not long-lasting nor over-encompassing, as it stopped being applicable after 2019 and it was only ever relevant for claims brought before the district courts of Central Netherlands and Gelderland.[61] Despite the drawback, the Dutch judiciary is still working on new ways of providing digital access to citizens.[62] On the other edge of the spectrum, some Member States still do not recognise initiation of court proceedings online. Such conduct is still not possible in Luxembourg, Bulgaria nor Cyprus.[63]

Similarly to the initiation of court proceedings online, the question of whether documents in general can be submitted electronically in a proceeding emerges. The practices of the Member States highly vary in this regard. On this point, the Croatian system provides for the possibility for the parties to submit documents electronically via an IT system.[64] Additionally, it obliges certain subjects such as lawyers, notaries and legal entities to always submit their documents electronically.[65] On the other hand, Germany does not always provide for such an option. Even though the law in principle does allow it, the usage in practice depends on the federal state in question, as well as on the type of proceedings.[66] In fact, the German federal system is one of the drawbacks for digitalisation attempts overall, as difficulties in coordination and fragmentation in decision making result in a fairly modest progress in the implementation of ICT tools for a Member State such as Germany.[67] For additional example, Slovenia also allows for submission of documents online, with Article 16a of the Slovenian *Zakon o pravdnem postopku* providing that an electronic form is equal to a written

61 KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 220.

62 Ibid.

63 The 2021 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2021) 389, p. 35.

64 Croatia. Art. 106a zakon o parničnom postupku (Civil Procedure Act).

65 Croatia. Art. 106a para. 5 zakon o parničnom postupku (Civil Procedure Act).

66 See Online processing of cases and e-communication with courts. Germany. *European e-Justice* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/280/EN/online_processing_of_cases_and_ecommunication_with_courts?GERMANY&member=1

67 KENNETT, W. *Civil Enforcement in a Comparative Perspective: A Public Management Challenge*. Cambridge: Intersentia, 2021, pp. 526–527.

form on the condition that the data in electronic form is capable of being processed at court.[68]

National practices also vary depending on whether there is a possibility for online payment of court fees. While, according to the 2021 EU Justice Scoreboard, many of the Member States do offer such possibility, it can be surprising to find out that some of the Member States, such as France or the Netherlands, do not provide for such practice.[69] Additionally, if we look at the possibilities of usage of digital technology in courts, instances of Member States not providing any possibility for conducting procedure by distance communication technology can be found, e.g., Bulgaria and Greece.[70]

This short overview of some of the basic practices relevant for court procedures in each of the Member States just shows how divergent the available options in different Member States are. While on the one end of the spectrum, some Member States clearly show strong ambition for inclusion of digital tools in the conduct of their proceedings, on the opposite end, others show a complete lack of it. The majority of the Member States, however, remain in the middle zone. For those Member States, the digitalisation practices shine only in some aspects, while in the other aspects, further progress is yet to come. Viewed in this light, it is important to question what effect will the new Proposal have in terms of pushing the Member States to improve and develop their national proceedings while also establishing sufficient base necessary for the cooperation on the cross-border level to function properly. With all of the differences in mind, it is safe to say that change cannot happen overnight and there are many obstacles that still need to be crossed before the final aim of the Proposal can be achieved.

3.2 Digital Innovations of the National Legal Systems

In addition to allowing for communication practices to be done online, many of the Member States also introduced some of its original IT systems

68 Slovenia. Art. 16a Zakon o pravdnem postopku (Civil Procedure Act).

69 The 2021 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2021) 389, p. 35.

70 Ibid., p. 32.

for different areas of procedure. These systems' objectives range from establishing online case files containing all the relevant documents of the case in question to establishing certain tools for specific areas such as enforcement. In a similar fashion, as the differences in the development discussed previously, the novel systems particular to Member States vary. In the following chapter, some of the national IT systems will be presented so as to highlight possible particularities of the selected Member States in handling of the different areas of justice in a digital manner.

One of the most prominent areas in which national IT systems were built is the creation of online case files as a replacement for paper files. Instances of such systems can be found in Croatia and the Netherlands. Croatian *e-Predmet* is in place since 2014 and the platform provides all the parties of the court procedure with free and public access to the basic information about their case.[71] The system is based on the similarly named *eSpis* system which presents an integrated case management information system used by the Croatian courts in all instances.[72] The *eSpis* system dates back to 2009 when it was only used by a smaller number of courts, but its use has since become mandatory.[73] Many of the other tools besides *e-Predmet* were also built upon the *eSpis* system, such as *e-Oglasna ploča* (e-Notice Board of the courts).[74] It is interesting to see that even the EU's newest Member State which can be considered as being behind many of the older Member States in different developmental aspects, still works hard on staying in line with the digital improvement in the justice system, even before the push caused by COVID-19.

Similar to the Croatian practice, the Netherlands provides for *MijnZaak* (My Case) system of digital case files which can be created by the parties and through which they can submit a claim.[75] Different categories of persons can log by different means, with private persons using their national

71 VIDAS, I. Novine koje donosi prijedlog Pravilnika o izmjenama i dopunama Pravilnika o radu u sustavu eSpis. *IUS-INFO* [online]. 21. 12. 2021 [cit. 30. 5. 2022]. Available at: https://www.iusinfo.hr/aktualno/u-sredistu/48766

72 Ibid.

73 Croatia. Sudski poslovnik.

74 E-Oglasna ploča sudova. *e-Oglasna ploča sudova* [online]. [cit. 30. 5. 2022]. Available at: https://e-oglasna.pravosudje.hr/

75 KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 219.

identification number, lawyers by using their lawyers pass, and organisations through specific *eHerkenning* system.[76] These means of identification equal as an electronic signature in the Dutch legal system.[77] While highly similar, the thing that differentiates the Dutch *MijnZaak* from the Croatian *e-Predmet* is the fact that the Croatian parties cannot initiate court proceedings by creating a file on their own. In Croatia, it is simply an online digital file system, while the Dutch version provides an extra possibility for the parties to create new case and submit their claim online. It is visible by this example that even with the national IT systems that are basically trying to achieve the same goal, significant differences remain. Additionally, in a similar fashion as the Croatian *eSpis*, the Netherlands also provides for *MijnWerkomgeving* (My Workspace) which is to be used only within the courts, by the judges and other court staff.[78] Again, the objectives slightly differ, as the scope of the subjects that can (and are obliged to) use the Croatian *eSpis* is broader than for the Dutch *MijnWerkomgeving*.[79]

One of the other important objects of the newly created digital tools are the enforcement proceedings. Croatia presented its *eOvrha* (e-Enforcement) which is an information system for managing court cases.[80] The Rules of Procedure in the *eSpis* system apply accordingly also to the matters of *eOvrha*.[81] An external user of the system can submit a motion for enforcement electronically, on the condition that it is signed by a qualified electronic signature that must be in a machine-readable form.[82] A proposal

76 KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 219.

77 Ibid.

78 Ibid.

79 Croatia. Pravilnik o radu u sustavu eSpis (Rules of procedure in the eSpis system); VIDAS, I. Novine koje donosi prijedlog Pravilnika o izmjenama i dopunama Pravilnika o radu u sustavu eSpis. *IUS-INFO* [online]. 21. 12. 2021 [cit. 30. 5. 2022]. Available at: https://www.iusinfo.hr/aktualno/u-sredistu/48766; KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 220.

80 E-Ovrhe. *e-Građani* [online]. [cit. 30. 5. 2022]. Available at: https://e-ovrhe.pravosudje.hr/#/home

81 Croatia. Art. 4 Pravilnik o obrascima u ovršnom postupku, načinu elektroničke komunikacije između sudionika i načinu dodjele predmeta u rad javnom bilježniku.

82 Ibid., Art. 6 para. 1.

for enforcement can then be formed in the electronic enforcement system. However, this option of submitting a motion for enforcement electronically is only available for a specific type of enforcement, particularly the Croatian enforcement on the basis of trustworthy document.[83] Other types of enforcement cannot be initiated electronically.

A similar IT tool can be found in Slovenia. Prior to 2008, e-filing in the enforcement procedures was not possible and the Slovenian courts were required to perform a number of different activities which are usually left to the creditors in different legal systems.[84] Such conduct often led to mistakes and delays in the processing time which, combined with the organisational fragmentation of the enforcement proceedings, resulted in high workload of courts.[85] Fortunately, this bad state in which the courts were in led to the necessary change and creation of a new IT system for enforcement on the basis of authentic documents. *Central Department for Enforcement on the Basis of Authentic Documents* ("COVL"), has been in function since 2008.[86] It forms a special organisational unit of the Local Court in Ljubljana which now has competence for enforcement of authentic documents that was previously held by 44 different local courts.[87] The project's aim was to achieve a combination of simplicity and user-friendly approach which would in turn relieve the backlog of the Slovenian courts and solve the problem of inefficiency.[88] Claims for enforcement on the basis of authentic documents can be submitted by the interested parties through the online system where they will be processed and validated. Considering that the work, previously done at 44 different courts, is now specialised in the Local Court in Ljubljana, combined with the statistics that point to the lowering of the number of pending cases and faster decision-making time,[89] show that the COVL is a well-functioning system that achieved its initial goals.

83 Croatia. Art. 3 para. 10 and Art. 4 Pravilnik o obrascima u ovršnom postupku, načinu elektroničke komunikacije između sudionika i načinu dodjele predmeta u rad javnom bilježniku.

84 CONTINI, F., LANZARA, G. F. *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*. Berlin: Springer, 2014, p. 111.

85 Ibid., p. 112.

86 Ibid., p. 110.

87 Ibid., p. 118.

88 Ibid., p. 110.

89 Ibid., pp. 128–129.

When comparing the Slovenian COVL and the Croatian *eOvrha* systems, many important differences can be pointed out. The Croatian *eOvrha* does neither relieve the enforcement courts nor does it specialise just one court in a way that Slovenian COVL does. Technological differences can also always be found between these types of systems. Question of necessity of electronic signature also arises, as this is strictly necessary when filing a claim through *eOvrha*,[90] but not applicable when starting enforcement proceedings through the COVL in Slovenia.[91] All of these differences point to the fact that, while the new national systems that have been developed in recent years so as to diminish some of the difficulties by creating digital tools may seem similar, their aims often differ in reality. Looking at it from the EU's perspective, it is certainly a hard mission to try to connect all of the IT systems specific to each of the Member States so as to create a unique solution built upon all of what has already been made. In light of all the aforementioned differences between the progress of the Member States, the analysis of the rules of the new Proposal will be featured in the following Chapter.

4 Proposal for a Regulation on the Digitalisation of Judicial Cooperation and Access to Justice in Cross-Border Civil, Commercial and Criminal Matters: A Path to Digitalised EU?

4.1 Main Aspects of the Proposal

The Proposal was presented by the European Commission on 1 December 2021 and is currently awaiting the committee decision. It states that its main goal is to appropriately regulate communication between courts and competent authorities, particularly by using digital tools as a way of enhancing

90 Croatia. Art. 6 Pravilnik o obrascima u ovršnom postupku, načinu elektroničke komunikacije između sudionika i načinu dodjele predmeta u rad javnom bilježniku.

91 CONTINI, F., LANZARA, G.F. *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*. Berlin: Springer, 2014, pp. 122, 124.

its reliability, security, and time-efficiency.[92] An interesting point is made in the Explanatory Memorandum accompanying the Proposal, where it states that the use of digital technologies has a great potential in providing extra efficiency to all of the judicial systems within the EU, while also pointing to the fact that leaving these matters solely to the national IT solutions of a particular Member State may lead to fragmentation in approach.[93] While this may be true, considering the diversity of approaches that the Member States can take in developing their own IT solutions, it does not change the fact that fragmentation can certainly be an obstacle even when trying to regulate on the EU level. This will be shown in the following chapters analysing the proposed rules.

Starting with the main subject matters and scope, the new Regulation establishes a legal framework for electronic communication between competent authorities and between natural or legal persons and competent authorities. The main rules regard the use of videoconferencing or other distance communication technology, the application of electronic trust services, the legal effects of electronic documents, and the electronic payment of fees. It anticipates a creation of a decentralised IT system for communication between competent authorities,[94] while the establishment of European electronic access point on the e-Justice Portal is envisaged for communication between natural or legal persons and competent authorities.[95] The use of videoconferencing and other distance communication tools is to be allowed upon parties' request, if such technology is available.[96] The other party to the procedure must also be provided with a possibility to submit opinion on such use.[97] As for electronic signatures and electronic seals, the Proposal points to the application of the rules set in the Regulation (EU) No 910/2014, on the electronic identification and trust services for

92 Para. 10 Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.
93 Ibid., p. 2.
94 Ibid., Art. 3 para. 1.
95 Ibid., Art. 4 para. 1.
96 Ibid., Art. 7 para. 1.
97 Ibid.

electronic transactions in the internal market.[98] Any documents that are transmitted by electronic communication cannot be denied their legal effect solely based on the fact that they are in electronic form.[99] Member States would also have to provide for the possibility of electronic payment of fees for all of the other Member States.[100]

The presented provisions also call for additional amendments to certain other EU acts in the area of civil and commercial matters. In that regard, the Proposal also amends the Regulation on the creation of European Order for Payment Procedure, Regulation establishing a European Small Claims Procedure, Regulation establishing a European Account Preservation Order Procedure, and Regulation on insolvency proceedings,[101] all in a way as to point to the rules of the newly proposed Regulation in terms of the digitalisation aspects it establishes.

4.2 A Space for Further Improvements

When talking about the need for digitalisation of judicial cooperation in the EU and particularly its regulation, some aims remain constant and can be detected from all of the annual plans, strategies, previous acts on different matters of digitalisation and, finally, the Proposal itself. The two most prominent aims, i.e., two necessities for proper regulation of digitalisation of judicial cooperation, can be distinguished, those being the need for simplicity and the need for harmonisation.

Starting with the first aim, the one of simplicity, it is certainly not an easy task when regulating matters of digitalisation, which are complex by its own nature. However, it is important to keep in mind the relative newness of the digitalisation aspects in law and proceed accordingly with the attempts for regulation. Clear rules and a smaller number of digital tools that should

98 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

99 Art. 10 Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.

100 Ibid., Art. 11 para. 1.

101 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

be used in judicial cooperation and communication between parties should therefore be a priority so as to not oversaturate the already complicated field on its own. Despite this being the EU's goal, the final product still lacks the simplicity of solutions.

The second important aim, that is the need for harmonisation and preventing possible further fragmentation in any aspect, is a point which any EU regulation seeks to achieve. It is one of the most important purposes of any of the European laws. However, in practice, this can be almost impossible to achieve even if it was the original aim. This can be seen in all of the regulations on the judicial cooperation in civil matters, particularly the vast number of regulations which were presented in this ever-growing field of law. Despite the initial goal being to harmonise the rules of different Member States, it was done in a fragmented and "disorderly" manner,[102] which allowed for further obstacles and complexities in this area of law.[103] The same can certainly be done in aspect of digitalisation, which would even enhance the already existing issue of fragmentation. A careful consideration of the proposed rules should therefore be done before any adoption.

In view of these two aims, an analysis of the presented rules will follow.

Looking first at the rules on communication between competent authorities, the Proposal provides that such communication shall be carried out through a "secure and reliable decentralised IT system".[104] This IT system would be based on the already mentioned e-CODEX system and the Proposal itself forms a legal basis for its usage.[105] It would also serve as an interoperable point through which other national IT systems would interconnect. This means that the Member States remain free to develop or further improve their already used national systems which would then all be interconnected. Starting with this first point, it is already visible that differentiation between

102 See, e.g., KRUGER, T. The Disorderly Infiltration of EU Law in Civil Procedure. *Netherlands International Law Review*. 2016, Vol. 63, no. 1, pp. 1–22.

103 VELICOGNA, M. In Search of Smartness: The EU e-Justice Challenge. *Informatics*. 2017, Vol. 4, no. 4, p. 7.

104 Art. 3 para. 1 Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.

105 Ibid., p. 3.

the Member States is expected here since each of the national IT systems will remain in place. At this point in time, many of the Member States already have their own systems in place and it is impossible to have no fragmentation in approach when taking it into account. However, it is necessary to connect all of the different national systems and diminish their differences so as to ensure equal access to justice and equal opportunities to all parties of the cross-border procedure. The creation of a decentralised IT system which would be a connecting factor for all is a good novelty in this sense.

The Proposal goes on by establishing the possibility of using alternative means for communication between competent authorities, under conditions that electronic communication is not possible due to the disruption of the said IT system, the nature of the material that is subject to communication or other exceptional circumstances.[106] It does not provide any additional explanation regarding what kind of alternative means it is referring to. Furthermore, the Proposal provides for the possibility of using "any other means of communication" in instances where the use of decentralised IT system cannot be used considering the specific circumstances of the relevant communication on a case-by-case basis.[107] Although necessary, considering the many obstacles that are inevitably going to be faced with when dealing with digital tools, this kind of approach leaves much space for diverging interpretation and differentiation of practices between the Member States. What kind of alternative means will be used and in which particular circumstances will the Member States use this option remains to be seen. It is to be expected that various approaches to the interpretation of this provision are going to be created depending on different Member States.

This type of communication concerns only the communication between competent authorities, not the communication between natural or legal persons and competent authorities. The latter is regulated in a separate article of the Proposal, which anticipates the establishment of a European electronic access point on the European e-Justice Portal.[108] It can be seen that the new rules are building upon the systems already created in the area of digital justice,

106 Ibid., Art. 3 para. 2.
107 Ibid., Art. 3 para. 3.
108 Ibid., Art. 4 para. 1.

with the rules of communication in the new regulation depending on the existing e-CODEX system and e-Justice platform. This can certainly only be a good thing, considering that these systems have been tested and improved since their creation. The European electronic access point shall be managed by the Commission, and it will provide a place where all natural and legal persons can file claims, launch requests, and communicate with the competent authorities.[109] However, the Proposal does not oblige parties to communicate through this access point. Instead, it only offers it as a possibility in cases where natural or legal persons gave their prior consent to use it.[110] Otherwise, national IT portals can also be used, if they are available. This again provides an opportunity for differentiation of practices between Member States. With varying level of usage of digital tools, it is to be expected that some Member States will wholeheartedly accept this opportunity for communication, while others will not use it to its full potential.

One important aspect of the Proposal is the obligation for authorities to accept electronic communication transmitted through the previously established means.[111] Although many of the Member States have already set on similar paths, one common rule for the whole of the EU can certainly help with the goal of further harmonisation.

The next important aspect of the Proposal are the rules on videoconferencing and the use of other distance communication tools for hearings. Similarly to the previous provisions on the communication between parties and authorities, the rules on videoconferencing and other distance communication technology leave room for differentiation of practices between Member States, as well as offer some of the less-concrete choices for regulation.

The Proposal grants the possibility of hearing in civil and commercial matters through videoconferencing or other distance communication technologies on the request of a party to the proceedings or their representatives, as well as on the own motion of the competent authorities.[112] In both cases, the

109 Art. 4 para. 2, 3 Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.
110 Ibid., Art. 5 para. 2.
111 Ibid., Art. 6.
112 Ibid., Art. 7 para. 1, 3.

usage of such technologies will be possible provided that two conditions are met.[113] Firstly, such technology must be available. This, as is the case with all of the previously mentioned provisions, can lead the Member States that already have highly developed digital tools in place to advance even more in digitalisation aspects, while others stay stagnant in such practices. Second condition is that the other party (or both parties in case of authorities' own motion) has to be given the possibility to submit their opinion on the use of such technologies in the procedure.

The use of videoconferencing and other distance communication tools therefore depends on each individual case, on the availability of the necessary tools in the concrete court and the opinions of the parties on such use. Problems could arise in terms of the latter, when the parties could possibly refuse the use of such technology for the other party to the procedure, which could lead to further delays and issues. However, the Proposal only prescribes the obligation of giving an opportunity for all the parties to express their opinions on the use of videoconferencing and the use of distance communication tools, not the obligation also to follow along with the parties wishes that may sometimes be unreasoned.

Parties' request for using videoconferencing or other distance communication technology in the proceedings can be refused by the competent authorities in cases where *"the particular circumstances of the case are not compatible with the use of such technology"*[114]. This leaves space for the relevant authority to consider the particularities of each case and the appropriateness of using distance communication in the specific case at hand. When providing such discretion, it may always be overused or underused, depending on the features of the court and the national systems in question. Variance of views in the interpretation of this provision is therefore to be expected.

With regards to the electronic signatures and electronic seals, the Proposal points out to the rules of Regulation on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation).[115] In this

113 Ibid., Art. 7 para. 1.
114 Ibid., Art. 7 para. 2.
115 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

way, it connects already existing EU rules without making additional ones and contributing to the fragmentation of rules and approaches to digitalisation aspects.

The Proposal also provides that all of the documents being transmitted through instruments of electronic communication cannot be denied their legal effects nor be considered inadmissible just for the fact that they are in electronic form.[116] This is also in line with the overall EU's goals and will certainly push some of the Member States which still do not offer the possibilities in their national procedures to reconsider such a stance. The same holds true in terms of electronic payment of fees, which the Proposal makes an obligatory option which must be available in each Member State.[117]

Besides the aforementioned, the Proposal also amends some of the existing legislative acts on civil and commercial matters, particularly the Regulation on the creation of European Order for Payment Procedure, Regulation establishing a European Small Claims Procedure, Regulation establishing a European Account Preservation Order Procedure, and Regulation on insolvency proceedings. It amends the existing rules so as to point to the new Regulation in terms of all of the topics that it offers new rules on.

4.3 The Issue of Costs

Despite the previously mentioned drawbacks of the new Proposal, perhaps one of the most prominent issues is not that of the rules itself, but the one of costs. When regulating digitalisation aspects which are to be implemented only by establishing and interconnecting certain IT systems, it is important to keep in mind that none of the imposed rules matter if there are no such systems in place. For the new Regulation to produce effect, it is necessary to create secure and reliable systems beforehand. Furthermore, it is necessary to adjust them and make them interoperable in view of creating a connected system for the whole of the EU. None of this is possible without significant financial investments. This is where the costs aspect of the Proposal comes into discussion.

116 Art. 10 Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.

117 Ibid., Art. 11 para. 1.

The Proposal envisages that each Member State must bear the costs of the installation, operation and maintenance of the decentralised IT system's access point which is situated in the territory of the said Member State.[118] It is on the Member State to also adjust its national IT systems, or establish one if there is none yet, in such a way that they are interoperable with the access points. All of the expenses connected to the creation, operation, and maintenance fall on the burden of the Member State in question. On the other hand, the Commission bears the costs of the European electronic access point.[119]

It is understandable that in order to push for further achievements in terms of digitalisation in the EU, it is necessary for all the Member States to participate in the efforts to do so. That participation is primarily reflected in the financial aspects. However, it is doubtful that this option will achieve the goal of harmonisation and speedier turn to digital solutions in judicial cooperation. Considering the already varying aspects of digitalisation and the use of digital tools employed in different Member States, it is obvious that there is no one and the same starting point for all on which this Proposal would build on. As highlighted in Chapter 3, usually the Member States which cannot invest bigger amounts of money into digitalisation are also the ones which lack in those aspects, which is obvious on its own. There is no doubt that the provision obliging them to suddenly develop and maintain their own IT systems and access points interoperable with other ones, is not going to produce much effect when they are solely responsible for taking the financial burden that this creates. On the other hand, Member States that have much more opportunities for such investments have already developed their systems and this will therefore be easier task for them. As was already established with many of the proposed rules, this will again create significant disbalance between different Member States.

In order to push for equal opportunities for digitising access to justice for all, a different distribution of costs should be more advisable for achieving the said goal. Particularly, specific funds could be created just for the aims of this new Proposal that would allocate resources according to the means

118 Ibid., Art. 14 para. 1.
119 Ibid., Art. 14 para. 6.

already available in each of the Member States. In such a way, uniformity between the possibilities offered, as well as between the final products in each of the Member State would be achieved. Throughout the previous analysis in this chapter, as well as in Chapter 3, it has been established many times that the differences between Member States in terms of digitalisation aspect are significant. Because of this, it is important to provide the Member States which are still in the earlier phases of their path to digitalisation of justice with sufficient funds so as to give them a possibility of "catching up" with the rest. Otherwise, the differences will just keep on growing and the final aim of harmonising the digitalisation aspects throughout the EU will not be achieved.

This is obviously also a matter of politics. It is to be expected that this costs aspect will give rise to additional negotiations before the adoption of the Proposal.[120] However, keeping politics aside, it would be advisable to reconsider the current rules on costs. How likely this suggestion is in reality still remains to be seen.

5 Conclusion: A Long Road Ahead

Digitalisation of legal systems, both at the national and EU level, is without a doubt one of the most important agendas of the EU and its Member States. Even though this has been true for many years already, a real progress with the true technological advancements in the legal sphere can only now be really seen. Whether those are specialised national IT systems or a mere possibility for the parties to initiate proceedings online or to send court documents via the Internet, it shows that all of the Member States share the same goal as the EU legislator. This is especially significant since legal digitalisation within the EU can only be successful if all the Member States join their efforts and collaborate to achieve this goal.[121] With the unwanted push that the COVID-19 pandemic has provided, the digitalisation developments will only have to be made faster and in a more advanced way.

120 KRAMER, X. Digitising Access to Justice: The Next Steps in the Digitalisation of Judicial Cooperation in Europe. *Revista General de Derecho Europeo.* 2022, Vol. 56, p. 6.

121 See also KOULU, R., PAKASLAHTI, H. Why We Need Legal Technology. In: KOULU, R., HAKKARAINEN, J. (eds.). *Law and Digitalisation: Rethinking Legal Services*. Helsinki: University of Helsinki Legal Tech Lab Publications, 2018, p. 39.

The new Proposal is only one part of the bigger picture when discussing digitalisation of law and legal sphere. However, it is of utmost importance to access to justice and judicial cooperation between the Member States which is an area that will also have to be further developed and improved. While it may still undergo changes before its adoption and implementation, the Proposal currently presents the EU legislators' vision of what is to come in the near future. One main conclusion that can be brought is that it is a step in the right direction for the EU, as the regulation of the use of digital tools in access to justice and judicial cooperation is necessary so as to harmonise the diverging rules that are very visible when looking at the different national legal systems of EU's Member States. Without clear and precise rules throughout the whole of the EU, there cannot be harmonised progress and achievement of the goal that is common to all. The biggest advancements of the new Proposal are that it does create a certain legal framework for electronic communication and that it obliges the Member States to provide possibility for the use of videoconferencing and other distance communication tools, as well as electronic payment of fees. Additionally, it clearly equates legal effects of electronic documents with the non-electronic ones. In that regard, the Proposal does create a basis for the use of these electronic means in the course of the procedure. This is particularly important since, until now, the one characteristic of the involvement of the Member States in the development of the e-Justice in the EU was that such involvement was only voluntary, which limited the overall possible impact.[122]

However, when looking beyond the basis of the framework of digitalisation, some points can still be further improved upon. While the new Proposal surely provides solutions to some of the problems that can be encountered, it must be stated that it also opens doors to different ones. This is particularly related to the fact that the differences between the digitalisation developments of the Member States still remain significant. The Proposal should therefore aim to harmonise them to the highest possible extent. In that regard, some adjustments of the provisions could be considered before its adoption

122 KRAMER, X. Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU. In: BENYEKHLEF, K. et al. (eds.). *eAccess to Justice*. Ottawa: University of Ottawa Press, 2016, p. 363.

so as to eliminate the need for additional amendments soon after its adoption, which is one of the undesirable characteristics of EU legislature.

Some of the adjustments could include simplification of the rules on the means of communication, as the Proposal currently envisages different means of communication depending on whether it is between competent authorities or between natural or legal persons and competent authorities. Furthermore, it offers many alternatives in practice and does not really provide a clear and simple vision of means of communication for all of the Member States. While this Proposal aims to simplify the rules on communication, it is questionable whether it will actually achieve this aim in practice.

Some clarification of the rules in regard to the use of distance communication technology could also be advisable so they could not be open to much interpretation and so the Member States would all apply them according to their initial aim.

One additional change that should be considered is a different distribution of costs. While this point is not of a legal matter *per se*, it unfortunately remains of the highest importance if the EU wishes to implement its proposed rules and achieve significant progress with the digitalisation developments throughout its territory. Since not all of the Member States can be provided with the same starting point considering their divergent national progress in terms of digitalisation of legal systems and court procedures, the least that the EU can do is to provide an opportunity to the lesser developed ones to "catch up" with the rest, instead of furthering the divide. The fastest way to do so is the different distribution of costs, particularly not putting the same high burden on the Member States when not all of them can sustain it equally.

With all of that in mind, there is certainly a long road that awaits the EU before all of its ideas of a digital nature come into fruition. One important fact is that there certainly exists a clear final aim that seeks to improve access to justice and simplify court proceedings for all. What needs to be maintained through the long process before us is a clear vision of this aim and work on its realisation in the long run, instead of turning to quick solutions which, in time, always uncover more additional problems.

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Contact – e-mail

mticic@pravri.uniri.hr

ORCID

0000-0002-5055-607X

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Resolving Cross-Border Consumer Disputes: The Digital Experience in China

Chan Monica

Faculty of Law, University of Macau, China

Abstract

The surge of e-commerce has significantly changed the landscape of consumers' purchasing behaviour in the past twenty years or so around the world. Together with the integration of sophisticated technological infrastructures, e.g., digital platforms for online shopping, has indeed accelerated the emergence of cross-border disputes by the fast-growing number of online transactions. Online consumption is particularly prevalent in China as its development of e-commerce has skyrocketed in the past decades across industries, and lately driven by the outbreak of the COVID-19. According to the latest statistics provided by the China Internet Network Information Center (CNNIC), the user size of online shopping alone accounts for 842 million (as of December 2021).[1] Quantitatively, with the sharp increase in the online transactions being concluded, it is anticipated that the number of disputes related to cross-border consumer transactions may also rise in one way or another. As far as the dispute resolution mechanisms are concerned, some argued that potential lockdown or the imposition of travel restrictions may disrupt the effectiveness of filing a case against a party; whereas others may be reluctant to file a lawsuit with the court due to the tedious legal procedures that one may think it would take when a case involves cross-border disputes, which is normally complex in nature.

This paper attempts to provide an overview of online dispute settlement mechanism resolving online consumer disputes using China as the

1 The 49th Statistical Report on China's Internet Development. *China Internet Network Information Center (CNNIC)* [online]. February 2022 [cit. 30. 4. 2022]. Available at: https://www.cnnic.com.cn/IDR/ReportDownloads/202204/P020220424336135612575.pdf

background, by revisiting the legal framework and relevant legislations, the existing Chinese online dispute settlement mechanisms, and a brief discussion on some potential challenges that may occur when resolving disputes via online settlement mechanisms with selected case studies in online consumer disputes.

Keywords

Chinese Internet Court; Consumer Association; Cross-Border Online Disputes; Digitalisation.

1 Introduction

In recent decades, the advancement in digitalisation has reshaped not only the way how we live and communicate but, at the same time, the application of technology has escalated the proliferation of online consumer transactions concluded by just pressing a button in a split second with any electronic devices. As a consequence of this, the development of e-commerce business has been growing at a tremendous speed worldwide across various industries. Engaging in online shopping activities is somehow virtual and borderless, as it allows parties anywhere and anytime in the world to buy and sell nearly all kinds of commodities and services. By virtue of benefits like speed and convenience that online transactions have to offer to the parties, cross-border online disputes are nonetheless becoming more complex than ever, in particular the way how consumer transactions were traditionally perceived, i.e., go to a shop physically and purchase goods, or through door-to-door, etc. To a great extent, this complexity is attributed to the fact that at least one of the parties involved tends to be a foreigner or an overseas company. Other decisive factors which contribute to the potential challenges in online consumer disputes, in particular from a consumer's perspective, may include considerations such as what is the applicable law to cross-border disputes if the parties did not have any consensus at the time the contract was entered into; which dispute resolution mechanism is to be adopted if a conflict arises; or simply whether the party shall take any cause of action when the dispute started, and if so, how.

Apparently, these questions may look as direct as they are. Very often, when looking for the right path in the dispute settlement, they are easier said than done. As the online transaction figures continue to manifest, the desire to have sufficient and proper consumer-related legislations dealing with online issues in place still carry on as an on-going agenda as part of the legal reform around the world, which is not unique to China. To enhance a better understanding of the topic in the Chinese context, this article attempts to provide an updated overview on how cross-border consumer disputes can be resolved through exploring the options that are currently available, by first delving into the discussion of the current Chinese legal framework related to consumer disputes in Part 2. An introduction to online consumer-related dispute settlement mechanisms using China as the context, in particular the Chinese Internet Court and the Chinese Consumer Association will be introduced in Part 3 of this paper, by further analysing their scopes and functionalities in terms of operation within China. The article will then touch on some specific considerations posed by digitalisation in online consumer dispute resolution in Part 4 through looking at the general overview and practical considerations in the Chinese context. The paper will then move on to study two selected cases in the context of online cross-border disputes involving foreign elements in the context of Chinese Internet Courts in Part 5. In Part 6 of this article, a brief discourse on the challenges for advancing the use of online dispute settlement mechanism in cross-border disputes will be addressed. Last but not least, this article will end with a conclusion and brief observations on the forthcoming outlook relating to the use of digitalisation in online consumer dispute settlement.

2 Chinese Legal Framework Related to Consumer Disputes

In learning what are the existing online consumer dispute mechanisms which are availed of in China and how they operate pragmatically, it is perhaps also important to know the applicable laws to consumer disputes. Under the current Chinese legal framework, consumer disputes are, by and large, regulated by specific sets of rules and legislations, both substantial and procedural. The following legislations illustrate some of the major pertinent

legal authorities (not an exhaustive list) that are associated with online and/or offline consumer disputes in China, which specifically comprise of:

- Civil Code,[2]
- Civil Procedure Law,[3]
- Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment),[4]
- E-Commerce Law,[5]
- Decision of the Standing Committee of the National People's Congress on Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013),[6]
- Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I),[7]
- Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court,[8]
- Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China,[9]
- Measures for Penalties against Infringement of Consumers' Rights and Interests (2020 Revision).[10]

Due to the restricted scope of this paper, principally with a focal point on the discourse of online consumer disputes, a number of selected legislations

2 The People's Republic of China. Order No 45, Civil Code (2021).
3 The People's Republic of China. Order No 106, Civil Procedure Law (2021 Amendment).
4 The People's Republic of China. Order No 7, Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment).
5 The People's Republic of China. Order No 7, E-Commerce Law (2019).
6 The People's Republic of China. Order No 7, Decision of the Standing Committee of the National People's Congress on Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013).
7 The People's Republic of China. Interpretation No 8, Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I) (2022).
8 The People's Republic of China. No 216, Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court (2018).
9 The People's Republic of China. No 11, Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2022 Revision).
10 The People's Republic of China. Order No 73, Measures for Penalties against Infringement upon Consumers' Rights and Interests (2020 Revision).

with online relevance will be examined in the present discussion, notably references will be made to the Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment), E-Commerce Law of the People's Republic of China and Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I) in the section below.

2.1 Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment)

Way back in 1990s, prior to the appearance of Internet and the launch of e-commerce platforms, the first consumer law in China, i.e., Law of the People's Republic of China on Protection of Consumer Rights and Interests ("Law on the Protection of Consumer Rights and Interests") which came into effect in 1994, was introduced with a legislative intent to *"protect the legitimate rights and interests of consumers, maintain the socio-economic order and to promote healthy development of socialist market economy"*[11].

With a sharp increase in transactions completed online, resulting in an urge for a revision of the late consumer law, the Chinese lawmakers have relentlessly made a significant step forward by introducing new rules and revisions. For instance, the Law on the Protection of Consumer Rights and Interests alone has undergone two amendments, in 2009[12] and 2013[13], respectively. One of the most prominent legal reforms undertaken in the latest amendment, that is the 2013 Amendment, was the incorporation of an additional provision protecting consumers' rights and interests in online trading platform.[14] Different from the original consumer law enacted in 1994[15] and

11 Art. 1 Law of the People's Republic of China on Protection of Consumer Rights and Interests.

12 The People's Republic of China. Order No 18, Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2009 Amendment).

13 The People's Republic of China. Order No 7, Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment).

14 Art. 44 Law of the People's Republic of China on the Protection of Consumer Rights and Interests.

15 The People's Republic of China. Order No 11, Law of the People's Republic of China on Protection of Consumer Rights and Interests (1994).

the first amendment in 2009[16], Article 44 of the Law on the Protection of Consumer Rights and Interests (2013 Amendment) provided express statutory protection to online consumers by allowing them to seek damages not only against the seller who sells goods or renders services directly through online trading platform, but also enabling them to seek remedies against an online trading platform provider who failed to supply the accurate contact information of the seller whom the consumer is seeking compensation against.[17] Furthermore, pursuant to the same provision, an online trading platform provider may also be held jointly and severally liable if he knows the seller has infringed the consumer's legitimate rights and interests and fails to take appropriate measures.[18]

2.2 E-Commerce Law of the People's Republic of China

Aside from the Law on the Protection of Consumer Rights and Interests (2013 Amendment), which addresses general principles towards various kinds of consumer transactions, the Chinese E-Commerce Law of the People's Republic of China ("E-Commerce Law") puts emphasis on the governance of e-commerce.[19] With the objectives of *"safeguarding the lawful rights and interests of all parties to e-commerce, regulating e-commerce conduct, maintaining the market order, and promoting the sustainable and sound development of e-commerce"*[20], the E-Commerce Law clearly lays down the appropriate rules associated with, e.g., the formation and performance of e-commerce contracts;[21] the settlement of e-commerce disputes[22] and the respective legal liabilities[23], etc. Accordingly, when a contract is formed or performed by way of information system in e-commerce, contracting parties would be legally bound by it.[24] At the time the contract was entered, it is required under law

16 The People's Republic of China. Order No 18, Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2009 Amendment).
17 Art. 44 Law of the People's Republic of China on the Protection of Consumer Rights and Interests.
18 Art. 44 Law of the People's Republic of China on the Protection of Consumer Rights and Interests.
19 The People's Republic of China. Order No 7, E-Commerce Law (2019).
20 Art. 1 E-Commerce Law of the People's Republic of China.
21 Chapter 3 E-Commerce Law of the People's Republic of China.
22 Chapter 4 E-Commerce Law of the People's Republic of China.
23 Chapter 6 E-Commerce Law of the People's Republic of China.
24 Art. 48 E-Commerce Law of the People's Republic of China.

that a seller or service provider of the e-commerce business *"shall clearly, fully, and explicitly inform users of matters such as procedures for formation of a contract, the dos and don'ts, and download methods and ensure easy and complete reading and downloading by users"* [25].

It was perhaps at the time when this legislation was drafted that, in view of the rapidly growing amount of online consumer disputes envisaged back in 2000s, the E-Commerce Law provided guidance on e-commerce dispute settlement by encouraging the e-commerce business to come up with various means to resolve these online disputes. For instance, Article 59 of the E-Commerce Law stipulates that *"an e-commerce business shall develop an easy and effective complaint and report mechanism, release complaint and report means and other information, and accept and handle complaints and reports in a timely manner"* [26]. Alternatively, other settlement options such as *"reconciliation through consultation, requesting mediation by a consumers' organization, an industry organization, or any other mediation organization established according to the law, filing a complaint with the relevant authorities, referring it to arbitration, bringing an action, or any other means"* [27] or even setting up their own *"online dispute settlement mechanism with dispute settlement rules"* [28] are some of the possible measures in dispute resolutions open to the e-commerce business as well as e-commerce platform as recommendations under the current legislation.

2.3 Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I)

Alongside the abovementioned two legislations, as well as other relevant laws and regulations, the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I) ("SPC Provisions on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption") also serve as an important piece of detailed guidance, in particular to indicate how a case in relation to online consumer

25 Art. 50 E-Commerce Law of the People's Republic of China.
26 Art. 59 E-Commerce Law of the People's Republic of China.
27 Art. 60 E-Commerce Law of the People's Republic of China.
28 Art. 63 E-Commerce Law of the People's Republic of China.

disputes shall be tried in order to protect the legitimate rights and interests of the consumers.[29] Besides supervising over the transactions concluded via e-commerce platforms, the SPC Provisions on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption also regulate activities engaged in e-commerce platforms (e.g., online live broadcast marketing platforms and online catering service platforms).[30]

In line with Article 25 of the Law on the Protection of Consumer Rights and Interests (2013 Amendment)[31], Article 2 of the SPC Provisions on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption allows online consumers who bought goods through Internet, television, telephone, or by mail order, to return the ordered goods within seven days (since the day of the receipt) without reasons, unless the commodities purchased fall into one of the four statutory exceptions.[32] Other protections to online consumers are further enhanced under the SPC Provisions on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption, for example, by ensuring that standard clauses are fair and reasonable to buyers and sellers;[33] and spelling out clearly in the relevant provisions as to the conditions where a party either in e-commerce platform,[34] online live broadcast marketing

29 The People's Republic of China. Interpretation No 8, Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I) (2022).

30 Ibid.

31 Art. 25 Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment).

32 The four exceptions include (1) custom-made commodities; (2) fresh, live, or perishable commodities; (3) audio-visual recordings, computer software, and other digital commodities downloaded online or unpacked by consumers; and (4) newspapers or periodicals delivered. See ibid. and Art. 25 and 2 Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I).

33 Art. 1 Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I).

34 Art. 4–8 Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I).

platform[35] or catering service platform is at fault, and who will be liable for compensations in the online consumer disputes, etc.

3 Online Consumer Dispute Settlement Mechanisms in China

3.1 Chinese Internet Court

Following the success of the establishment of Hangzhou Internet Court in 2017, the second and third internet courts were set up in Beijing on 9 September 2018, and in Guangzhou on 28 September 2018, respectively. Given the rise of e-commerce and the increasing number of internet-related disputes in the past decade or so, the Chinese Internet Court, which serves as one of the pioneers in online dispute resolution mechanisms, was launched with the initial aim of streamlining the litigation process and promoting an efficient and convenient means[36] to the public at large in settling internet-related disputes by building a unified digital litigation platform.[37]

Essentially, the Chinese Internet Court, which acts as the Court of First Instance, does not have an absolute discretion over all kinds of cases. Instead, its jurisdiction is one that is centralised in nature, with a limited scope to hear specific types of internet-related cases as tried by the basic people's courts.[38] Specifically, these Internet Courts have the authority to hear cases limited to, for instance, those involving the signing or performance of online shopping contracts through e-commerce platforms, disputes over network service contracts or financial loan contracts and small loan contracts in which the signing and performance are completed on the Internet, or disputes arising

35 Art. 11–17 Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I).

36 Part 1 Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court.

37 Part 2 Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court.

38 Introduction to Beijing Internet Court. *Beijing Internet Court* [online]. [cit. 30. 4. 2022]. Available at: https://www.bjinternetcourt.gov.cn/cac/zw/1535125700291.html; Introduction to Guangzhou Internet Court. *Guangzhou Internet Court* [online]. [cit. 30. 4. 2022]. Available at: https://ols.gzinternetcourt.gov.cn/#lassen/guangzhou/introduce; Also see Part 3 para. 2 Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court.

out of the infringement of intellectual property rights of works published or disseminated online on the Internet, etc.[39]

In order to bring a more user-friendly experience for the disputing parties and to expedite the case management process (from case filing, to virtual court hearing and even the rendering of ruling), digitalisation has been widely adopted in the entire process of online litigation by incorporating advanced tools such as "artificial intelligence, big data, blockchain and other algorithm techniques" so as to ensure smoothness and effectiveness of the litigation process.[40] Hence, if the disputing parties wish to initiate a case via the Internet Court channel, they first have to comply with certain requirements, e.g., *"identity authentication by online means such as certificate and license comparison, biometric identification or certification on the unified identity authentication platform of the state, and obtain special accounts for logging into the litigation platforms"*[41].

Once the application made through the online litigation platform is accepted, the Internet Court can contact the parties to the dispute, as well as any third party concerned, by online[42] and/or offline[43] means, and inform them to conduct the necessary formalities, e.g., to carry out identity authentication, to submit the relevant documentation and materials by *"upload*[ing] *to and*

39 Other disputes over which the Internet Courts would have jurisdiction include disputes arising from the ownership, infringement and contract disputes of Internet domain names; disputes arising from infringement of other people's personal rights, property rights and other civil rights and interests on the Internet; product liability disputes arising from product defects that infringe personal and property rights and interests of others for products purchased through the e-commerce platform; internet public interest litigation cases filed by procuratorial organs; administrative disputes arising from administrative acts such as internet information service management, internet commodity trading and related service management; other internet civil and administrative cases designated by the people's court at a higher level. See Beijing Internet Court's Scope of Jurisdiction. *Beijing Internet Court* [online]. [cit. 30. 4. 2022]. Available at: https://www.bjinternetcourt.gov.cn/cac/zw/1536301521905.html and Judicial Process. *Guangzhou Internet Court* [online]. [cit. 30. 4. 2022]. Available at: https://ols.gzinternetcourt.gov.cn/?lang=en-US

40 Part 3 para. 3 Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court.

41 Art. 6 Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts.

42 Examples include e-mail addresses and/or instant messaging. – See Art. 8 Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts.

43 Examples include mobile phone numbers and/or fax numbers. – See Art. 8 Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts.

import[ing] *into the litigation platform the online electronic data, or to electronically process the offline evidence (by scanning, copying, duplicating) or other means and then upload it to the litigation platform for the purpose of proof"*[44] for the preparation of the case through the online litigation platform, etc.[45] Upon receiving the necessary documents from the parties concerned and fixing the timetabling, the Internet Court will predominantly hold the hearing virtually online (subject to certain exceptional circumstances depending on the views and discretion of the Internet Court, the hearing may be conducted offline).[46] Following the provisions governing the online court attendance, if a party fails to take part in the online hearing as scheduled or leaves the online court proceeding without obtaining approval in advance, the Internet Court has the right to deem such act as a "refusal to appear in court" or "a retreat during a court session without good cause".[47] The ruling provided by the Chinese Internet Court is not one that is necessarily final. Pursuant to the "Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court", if the parties to the dispute are not satisfied with the outcome or judgment rendered by the Internet Court, the appellate case shall be referred to the Intermediate People's Court for trial.[48] However, for cases concerning "ownership or infringement of any Internet copyright" or "any Internet

44 Art. 9 Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts.

45 Art. 8 Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts.

46 Art. 12 Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts; Also see Part 3 para. 3 Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court.

47 Art. 14 Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts. Exceptions to this provision would apply if parties genuinely encounter circumstances such as network failure, equipment damage, power interruption or *force majeure*.

48 When an appeal is sought against the Beijing Internet Court's ruling, it shall be tried by the No 4 Intermediate People's Court of Beijing Municipality, whereas for a ruling rendered by the Guangzhou Internet Court, the appellate case can be tried by the Intermediate People's Court of Guangzhou City. See Part 3 para. 2 Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court.

domain name", these appeal cases shall be heard before the Intellectual Property Court[49] where the respective Internet court is seated.[50]

3.2 China Consumer Association

An alternative option which an individual may consider to pursue a settlement via non-contentious way is to lodge a complaint with one of the consumer organisations formed under the China Consumer Association ("CCA"). By way of an overview, the CCA, which was established with the approval of the State Council in 1984, has over 3,000 consumer organisations (with at least 47 of those at provincial-level)[51] within China.[52] The status of the consumer organisations is well-recognised by the current Chinese Protection of Consumer Rights and Interests as *"social organisations* [that are] *legally formed to exercise social supervision over commodities and services and to protect the lawful rights and interests of consumers"*[53]. In day-to-day operation, the CCA, as well as the consumer organisations, play an important role in, e.g., the provision of consumer information, participation in supervising and inspecting the commodities and services by relevant administrative departments, acceptance of complaints filed by the consumers, conducting investigations and mediation for the complaints, as well as entrusting qualified expert to make an appraisal and form an appraisal opinion.[54]

49 Art. 4 Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts. For rulings rendered by the Beijing Internet Court over the disputes on "ownership of or infringement upon any Internet copyright" or "any Internet domain name", the venue for the appellate case would be Beijing Intellectual Property Office. For those kinds of rulings rendered by the Guangzhou Internet Court, the venue for the appellate case would be Guangzhou Intellectual Property Office. See Part 3 para. 2 Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court.

50 Part 3 para. 2 Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court.

51 Contact Details of the Various National Consumer Associations for Complaints and Enquiry. *Chinese Consumer Association* [online]. [cit. 30. 4. 2022]. Available at: https://www.cca.cn/tsdh/list/20.html

52 About us. *China Consumer Association* [online]. [cit. 30. 4. 2022]. Available at: https://www.cca.cn/En/AboutUs.html

53 Art. 36 Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment).

54 Art. 37 Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013 Amendment); see also Art. 8 Articles of Associations of the Chinese Consumer Association. *Chinese Consumer Association* [online]. [cit. 30. 4. 2022]. Available at: https://www.cca.cn/public/detail/851_3.html

Prior to the launch of the CCA's Complaint Settlement Supervision Platform on 15 March 2016, when a consumer organisation at county- or provincial-level received a complaint filed by a consumer in paper form, such consumer organisation would normally entertain the complaint when the evidential materials show substantial level of *"causal relationship between the purchase or use of goods or services and the damage"*[55] and the complainant shall furnish any outstanding materials on time with the consumer organisation concerned[56]. Thus, in majority, the burden of proof rests with the complainant.[57] As part of the complaint procedure, the consumer organisation would also take into account the basic personal information of the complained party and the complainant, the details of the complained subject matters, etc. as filed by the complainant.[58]

In view of the growth in the number of online consumer transaction, as mentioned above, the CCA introduced the Complaint Settlement Supervision Platform in 2016, which serves as a direct, cheaper and efficient method to lodge the claim entirely online.[59] Similar to the paper submission, once the online complaint form has been filled in with the preferred venue for conducting the settlement, the submission can be sent online for handling.[60] As of the first quarter of 2022, the CCA has received and handled around 285,358 consumer-related complaints nationwide and, out of those filed complaints, 222,487 cases have been resolved.[61] Among those complaints that concerned online shopping disputes (a total of 2,330 cases), the majority of those claims deals significantly with the issue of quality (472 cases), contractual-related issues (617 cases), false advertisement (460 cases), and after-sales services (498 cases).[62]

55 Complaint Handling Workflows With the Compulsory Documentation for Application and Application Form. *Chinese Consumer Association* [online]. [cit. 30. 4. 2022]. Available at: https://www.cca.cn/tsdh/list/21.html

56 Ibid.

57 Ibid.

58 Ibid.

59 CCA's Complaint Settlement Supervision Platform. *Chinese Consumer Association* [online]. [cit. 30. 4. 2022]. Available at: https://hjxt.cca.cn

60 Ibid.

61 Analysis on the Acceptance of Complaints by the National Consumer Association in the First Quarter of 2022. *Chinese Consumer Association* [online]. [cit. 30. 4. 2022]. Available at: https://www.cca.cn/tsdh/detail/30417.html

62 Ibid.

4 Specific Considerations on the Use of Digitalisation in the Online Consumer Dispute Settlement Mechanisms in China

4.1 General Overview

Deploying digitalisation to resolve consumer disputes is no stranger to many users and practitioners around the world, especially when Online Dispute Resolution (ODR) first emerged in late-1990s.[63] Apparently, the application of digitalisation in online dispute settlement mechanism and other systems has become increasingly important in recent years. In light of the outbreak of the pandemic, and with the aid of Artificial Intelligence ("AI") and other algorithm techniques, online transactions have increased vastly through the e-commerce marketplace as well as online shopping platforms. This has, in turn, led to a sharp rise in the number of consumer-related disputes pending resolution, either through the court system or by non-contentious fashion, such as filing complaints with a consumer organisation.

Despite the fact that ODR and other online settlement mechanisms, e.g., Internet Courts in the case of China, employ modern technology in the settlement process in order to assist parties to come up with an ultimate determination, yet in comparison, ODR tends to put more emphasis on the software application in the dispute resolution process[64] without much human interaction as compared with the use of Internet Courts. Indeed, for many individuals, it remains true that practical factors such as costs, *forum conveniens* and flexibility[65] are some of the primary concerns that many of them share. And perhaps, the flip side of these considerations are somehow true, that resolving disputes through online dispute settlement mechanisms may have inherent drawbacks, e.g., confidentiality issue, authenticity issue, technical failure, and accessibility problem in contrast to physical court setting.

63 KATSH, M. E. Dispute Resolution in Cyberspace. *Connecticut Law Review*. 1996, Vol. 28, no. 4, pp. 953–980; RULE, C. Online Dispute Resolution and the Future of Justice. *Annual Review of Law and Social Science*. 2020, Vol. 16, pp. 277–292.

64 RULE, C. Online Dispute Resolution and the Future of Justice. *Annual Review of Law and Social Science*. 2020, Vol. 16, pp. 277–292.

65 GOODMAN, J. W. The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites. *Duke Law & Technology Review*. 2002, Vol. 2, pp. 1–16.

In the following section, this paper will highlight some of the practical considerations in online settlement specifically in the Chinese context.

4.2 Practical Considerations in the Chinese Context

4.2.1 Choice of Forum

Amongst many of the factors, when a party intends to file a case with an Internet Court or lodge a complaint with a consumer organisation in China, oftentimes the choice of forum forms a crux of the matter which is not seen as an obvious factor to many individuals. To start with, it is important for one's best interest to consider, whether it is worthwhile pursuing a legal proceeding with one of the three Internet Courts or simply lodging a complaint with a local consumer organisation to settle the dispute taking into account the costs and time issues. This question may look a bit trivial yet critical, as the ultimate outcome would vary depending on the way how the dispute is being settled. Hence, disputing parties shall seriously consider the right route at the beginning, be it ending up in litigation or non-litigation path, and ideally being more rational and practical in making a wise guess on the most feasible outcomes they could get, which can either be damages, enforcement of judgment, other forms of remedies, etc., or a combination of those kinds.

For the parties themselves, once the online dispute settlement mechanism is properly chosen, the next question that they have to bear in mind is the issue of *locus standi*. Perhaps, for many consumers, they may select the settlement mechanism which they think might be most favourable, most efficient and convenient, yet without noticing that in fact they lack certain grounds to file an application with a specific Internet Court or a local consumer organisation. For instance, when a dispute arises from an online consumer contract which involves two Chinese parties seated in the same city in China, say Beijing, intuitively the proper selection of forum seems to be either Beijing Internet Court or the consumer council located in Beijing. Of course, it would also depend on the scope of the online consumer dispute that is involved as well as other criteria, e.g., the type of final outcome that the parties aimed at. However, sometimes it may become trickier for the

party to pick the right forum, especially in the case of Internet Court, when one party is either located outside the three cities where the Chinese Internet Courts are located, or when one party is located outside China, which could well be a company registered outside its territory. In order to put this point into the context of the Chinese legal application, the relevant discussion will be further delved into in the next section related to the discussion on the selected case studies.

4.2.2 Authenticity Issue

Apart from choice of forum, authenticity is another interesting point that has been addressed in many sources. Be that as it may, the discussion on the authenticity issue confining to online settlement dispute mechanisms with a Chinese perspective is still underdiscussed. For instance, authenticity is one of the most important aspects in the online dispute settlement mechanisms when it comes to cross-border disputes, not only because it is essential in the confirmation of a party's identity or the extent to which the document is valid or not, but more eminently, the authenticity itself is regarded as part of the formal procedure in litigation[66] or the complaint, which is viewed as a decisive factor for an Internet Court or a consumer organisation in China, specifically when reviewing and making a decision of acceptance or rejection in an application that contains foreign elements (e.g., involvement of a party located overseas).

Within the existing Chinese legal framework, in particular, statutory provisions under the Civil Procedure Law of the People's Republic of China (2021 Amendment) have expressly provided the necessary prerequisites for authenticity.[67] Subject to Article 62 of the Chinese Civil Procedure Law, when a legal representative acts on behalf of a party (who is a Chinese citizen but residing in a foreign country), an authenticated power of attorney is required.[68] Such a power of attorney which is sent from overseas to China has to undergo so-called 'authentication procedure' by submitting the documents to 'the embassy or consulate of the People's

66 Art. 62 Civil Procedure Law of the People's Republic of China (2021 Amendment).
67 The People's Republic of China, Civil Procedure Law of the People's Republic of China (2021 Amendment).
68 Art. 62 Civil Procedure Law of the People's Republic of China (2021 Amendment).

Republic of China in that country' for authenticity.[69] In the circumstance where there is neither Chinese Embassy nor Chinese Consulate within the foreign jurisdiction where the Chinese party is located, it is required by law that the power of attorney *"shall be first authenticated by an embassy or consulate of a third country which has a diplomatic relationship with the People's Republic of China in that country and then be authenticated by the embassy or consulate of the People's Republic of China in the third country or be authenticated by the local patriotic overseas Chinese organization"*[70]. Despite the relevant legislations in place regarding authenticity, some parties may still have some concerns about the hidden costs, effort and the time spent purely in the process of authenticity, which is way before the start of the court case or the complaint being filed. On top of that, one needs to think twice before deciding whether or not it is worth pursuing the route of online settlement dispute mechanism if the amount in dispute is far smaller than the costs being incurred solely for authenticity.

4.2.3 Other Considerations

In addition to those abovementioned factors, there are other considerations in online dispute settlement mechanism which are universally recognised as challenges that may overwhelm the parties when determining whether to put forward a case or not virtually. For instance, since the outbreak of COVID-19, one of the 'new normal' that many of us have to live with, is to use Zoom for work and communication. Like any courts and consumer organisations around the world, due to lockdown and travel restrictions, holding online hearings and meeting remotely has essentially become a pragmatic solution to minimise the disruption caused by the pandemic. Therefore, using videoconferencing for meeting sessions and/or virtual hearings, which may sometimes take longer hours than expected or parties located overseas may experience time zone difference, are likely to turn out to be an alternative to a traditional court setting or filing a complaint face-to-face with a consumer organisation. However, like anything else, there are two sides of the same coin. As time goes by, long-hour hearings and virtual meetings may impair one's physical and mental state to a certain

69 Art. 62 Civil Procedure Law of the People's Republic of China (2021 Amendment).
70 Art. 62 Civil Procedure Law of the People's Republic of China (2021 Amendment).

extent, and can lead to the so-called "zoom fatigue".[71] On another note, not all kinds of cases would fall under the ambit of the Chinese Internet Court's jurisdiction. Effectively, even if a case falls within the scope of disputes that the Chinese Internet Court has the right to handle and hear, this does not necessarily guarantee parties that their application with the Internet Court is automatically accepted and will certainly be held online. At the end of the day, by looking at all facts and circumstances, the judge of the Internet Court would still retain discretion to have the case heard offline if the Internet Court is of the view that the initial application does not meet the necessary criteria for online trial, or does not suit for a virtual hearing from the start.[72] Having said that, by the same token, parties (whose case has been accepted by the Chinese Internet Court) would have the say, anytime during the virtual hearing, to raise an application to the court, to either withdraw or switch the mode of hearing from online to physical presence depending on the circumstances of the case, while making sure that the necessary procedures are complied with.[73]

To put everything into perspective, the following section is devoted to demonstration of two selected case studies on cross-border online consumer disputes with a foreign party involved as a defendant: (1) *Chen Zhenfa vs. Gome (Hong Kong) International Trading Co., Ltd. and Gome Online Electronic Commerce Co., Ltd.*[74]; and (2) *Cui Jin Seng vs. Jung Han Shin*[75] using Chinese Internet Court as the online dispute settlement mechanism.

71 DENIZ, M. E., SATICI, S. A., DOENYAS, C., GRIFFITHS, M. D. Zoom Fatigue, Psychological Distress, Life Satisfaction, and Academic Well-Being. *Cyberpsychology, Behavior, and Social Networking*. 2022, Vol. 25, no. 5, pp. 270–277.

72 Part 3 para. 3 Notice of the Supreme People's Court on Issuing the Plan for Establishing the Beijing Internet Court and the Guangzhou Internet Court.

73 CHEN, G. and Z. YU. Practical Exploration and System Construction on the Court of Internet in China. *China Legal Science*. 2017, Vol. 5, no. 3, pp. 15–16.

74 Judgment of Beijing Fourth Intermediate People's Court, China, of 23 January 2019, Case No. (2018) Jing 04 MinChu, no. 507.

75 Judgment of Beijing Fourth Intermediate People's Court, China, of 15 January 2019, Case No. (2018) Jing 04 MinChu, no. 548.

5 Selected Case Studies on Consumer Disputes Resolving Through Chinese Internet Court

5.1 Chen Zhenfa vs. Gome (Hong Kong) International Trading Co., Ltd. and Gome Online Electronic Commerce Co., Ltd. (2018) Jing 04 MinChu, no. 507

The plaintiff, *Chen Zhenfa* ("Chen"), bought a pack of Gerber (U.S.) Puffs (cereal snack) with sweet potato flavour via the online platform provided by *Gome Online Electronic Commerce Co., Ltd.* for $ 36. The ordered product was regarded as unsafe due to the absence of labelling in Chinese language, and at the same time, the advertisement was considered as false by claiming the product as the "Best Selling Brand" in the U.S. sales, and "Number 1" among the baby food branding in the U.S. without any substantial evidence in support. As one of the defendants, *Gome (Hong Kong) International Trading Co. Ltd.*, is a company registered in Hong Kong in the present dispute, according to the "Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China", provision stipulated in Article 551 would be applicable.[76] Pursuant to Article 551, it provides that *"The People's Courts may apply, mutatis mutandis, the special provisions on foreign-related civil procedures to civil actions that involve the Hong Kong Special Administrative Region, the Macao Special Administrative Region, or the Taiwan Region"*[77].

In order to explore the solutions for this potential dilemma, perhaps it is of paramount importance to answer the following questions: (1) where the contract is actually formed and (2) whether the Chinese Internet Court is the competent court to hear the case. Article 20 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015) provides that, *"for a sales contract concluded on an information network, if the subject matter is delivered on the information network, the place of domicile of the buyer shall be the place where the*

76 The People's Republic of China. Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015).

77 Art. 551 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015).

contract is performed; or if the subject matter is delivered by any other means, the place of receipt shall be the place where the contract is performed, unless the parties have agreed otherwise on the place of performance in the contract" [78]. Therefore, by studying this provision loosely, it can be understood that if the buyer is located in Beijing (the place of domicile of the buyer), then Beijing would be regarded as the place where the contract is concluded if the subject matter is delivered through information network. Otherwise, unless parties have alternative arrangement, and if the subject matter was not delivered by means of information network, then the location of the receipt would be deemed as the place where the contract is concluded.

In deciding whether the Internet Court has jurisdiction to hear a case involving a party, say a defendant, not located in China, Article 265 of Civil Procedure Law of the People's Republic of China (2017 Amendment)[79] may shed some light on this discussion point. Pursuant to Article 265, it states that: *"where an action is instituted against a defendant that has no domicile within the territory of the People's Republic of China for a contract dispute or any other property right or interest dispute, if the contract is signed or performed within the territory of the People's Republic of China, the subject matter of action is located within the territory of the People's Republic of China, the defendant has any impoundable property within the territory of the People's Republic of China, or the defendant has any representative office within the territory of the People's Republic of China, the people's court at the place where the contract is signed or performed, where the subject matter of action is located, where the impoundable property is located, where the tort occurs or where the domicile of the representative office is located may have jurisdiction over the action"* [80].

5.2 Cui Jin Seng vs. Jung Han Shin (2018) Jing 04 MinChu, no. 548

The plaintiff, *Cui Jin Seng* ("Cui"), who bought three packs of instant noodles for RMB 504 from the defendant, *Jung Han Shin* ("Jung"), a Korean national who sold the products in his online store called "PLEASEME" on Taobao online shopping platform on 9 November 2017. Later, as the

78 Art. 20 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015).

79 This provision is equivalent to Art. 272 Civil Procedure Law of the People's Republic of China (2021 Amendment).

80 Art. 265 Civil Procedure Law of the People's Republic of China (2017 Amendment).

order was delivered to *Cui's* home in Beijing, he noted that the package, which was in English, did not contain any labelling or warning in Chinese. Coincidentally, upon checking *Jung's* selling webpage, neither declaration on the absence of Chinese labelling/warning nor the applicable law for settling the contractual disputes were identified. In the present case, the ultimate issues are (1) whether the place of signing and performance of the contract is within China, and (2) whether the court in China has the jurisdiction over the dispute which involves a foreign national.

Similar, if not the same, to the first case study, this case involves a defendant who was a foreign party. Thus, being a foreign national, the special provision prescribed by Article 522 para. 1 of the "Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China" was applied.[81] Based on the limited facts and circumstances provided in the case, it seems to indicate that the people's court in China would be regarded as the most suitable venue to hear the case, given that no evidence was adduced to suggest that the defendant has a domicile in China, nor any other identity information in relation to the defendant was provided.

In the instant case, no special arrangement was expressly entered into between the parties regarding the place of the performance of the contract. What is clear, though, in terms of factual evidence is that the Chinese plaintiff, located in Beijing, bought food through Taobao, an online shopping platform based in China, and properly concluded the contract online[82] in China. As such, one may infer that the court in Beijing would have jurisdiction over the dispute subject to Article 265 of the Civil Procedure Law of the People's Republic of China (2017 Amendment).[83] Provided that the case was filed on 19 October 2018, the Beijing Internet Court is viewed as the competent court to determine this online consumer dispute.

81 Art. 522 para. 1 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China.

82 Art. 20 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China.

83 Art. 265 Civil Procedure Law of the People's Republic of China (2017 Amendment).

6 Brief Discourse on the Challenges for Advancing the Use of Online Dispute Settlement Mechanism in Cross-Border Disputes

6.1 Predicament in Promoting Online Dispute Settlement Mechanisms and the Incorporation of an Online Dispute Settlement Clause in the Agreement

For a very long time, incorporating a dispute settlement clause (such as an arbitration agreement) in a contract has been regarded as a resort for parties to resolve the disputes before bringing the case for litigation. Nowadays, quite a number of courts around the world started to embrace the use of digitalisation in trials, and a vast majority of international arbitration institutions attempts to promote dispute settlement mechanisms,[84] in the hope that disputes can be sorted out through non-litigation means in a quicker and more efficient manner. For instance, some of those well-established international arbitration institutions have provided recommended model clauses for parties to incorporate in the contract at their wish.[85] That being said, strictly speaking, parties are not bound by those terms as party autonomy and freedom of contract, being core principles of contract law in both common law and civil law jurisdictions, are always observed in the process of contract formation and its performance. Regardless of the nature of the transaction being concluded, be it online or offline, not only do the parties have the right to opt in or opt out a dispute settlement clause in the contract at the outset; they are also given the choice to resolve the conflict either online or by other dispute resolution regimes. As a result, this may make it even harder for the promotion of the use of online dispute resolution

84 For instance, American Arbitration Association, Hong Kong International Arbitration Centre, International Centre for Settlement of Investment Disputes, International Chamber of Commerce.

85 For example, Arbitration Clause. *ICC* [online]. [cit. 15. 10. 2022]. Available at: https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/; Model Clauses. *HKIAC* [online]. [cit. 15. 10. 2022]. Available at: https://www.hkiac.org/arbitration/model-clauses; Recommended Clauses. *LCIA* [online]. [cit. 15. 10. 2022]. Available at: https://lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses; SIAC Model Clause. *SIAC* [online]. [cit. 15. 10. 2022]. Available at: https://siac.org.sg/siac-model-clauses; Model Clause. *CIETAC* [online]. [cit. 15. 10. 2022]. Available at: https://www.cietac-eu.org/model-clause/

mechanism. Lack of social awareness of the availability of various existing online dispute settlement mechanisms in place seems to create additional obstacles too.[86] Not only do existing promotional measures seem to be far from sufficient, but unfamiliarity with digitalisation due to the technology gap and embedded human perception to resolve problems in court tend to invite new challenges.[87] Hence, striking a fine balance between the pros and cons that online dispute settlement mechanisms have to offer remain a dilemma in many cross-border disputes.

6.2 Practical Impediments of Using Online Technology-Driven Platforms in Resolving Contractual Disputes

Despite the fact that online dispute settlement mechanisms were not as prevalent as one would think, in particular in consumer disputes, they started to gradually gain their popularity especially after the outbreak of COVID-19 due to the travel restrictions and lockdown worldwide, including China. Moreover, like anything else in the technology world, potential risks in cybersecurity and personal data breach remain paramount concerns, notably for those who customarily contract online. Therefore, aspects such as system security have begun to ring a bell to people at large, arguably when determining whether or not to have the case heard in the physical presence (like the court setting) or through online means (e.g., in a Chinese Internet Court).[88] In the case of China, when filing a case to the court or other institutions for virtual hearing, at times parties have to take into account the issue of locality, i.e., where the contract is formed. This is because, as mentioned in the case studies above, the location would be one of the decisive factors in relation to the applicant's standing. Indeed, for parties who conclude a contract in a place other than the cities where the three Chinese Internet Courts are located, depending on how the contractual terms are drafted, they may well have to take the case to another competent court physically, or a respective arbitration commission where the contract

86 YU, Z., DONG, P. On Practical Exploration and Development Path of Online Dispute Resolution System. *China Legal Science.* 2019, Vol. 7, no. 4, p. 57.

87 Ibid.

88 LI, X. Research on the Building of China's Smart Court in the Internet Era. *China Legal Science.* 2020, Vol. 8, no. 3, p. 46.

was actually entered in China, or even possibly start a lawsuit in another jurisdiction where they are currently living. Thus, in a way, the limited number of Chinese Internet Courts available may, to certain extent, geographically confine the accessibility and choice of forum for the disputants who so wish to pursue the case resolved through online court.

7 Conclusion

Consuming online is no longer a trend, but for many people, this has become a necessity. The way how technology advances and how online shopping mode developed expeditiously have pushed lawmakers to respond quicker taking measures, such as enacting new laws and setting up institutions to supervise the consumer activities, etc. in a timely fashion. On the one hand, China being one of the Asian countries, which is strongly influenced by Confucian tradition and values, stresses harmonisation in maintaining positive relationship, resolving disputes through litigation means is not a preference at all times, but rather a last resort. Filing a complaint with a local consumer organisation may seem to be a better alternative, yet with the uncertainty on the enforceability of the decision made by consumer organisation, and the aim to seek compensation out of the court setting, Internet Courts seem to be a way out for many, especially amid the pandemic.

Like any legal regime in the world, there are pros and cons embedded in any kind of online dispute settlement mechanism. As a party to the dispute, perhaps one has to consider what is best for them – resolving through litigation or non-litigation means taking into account all the factors and resources that they may have, specifically when the case involves a foreign party as the defendant. In the case of China, as long as the applicant satisfies the prerequisite conditions that are required under the law (e.g., the place where the contract was performed or concluded, the place of domicile, etc.) for filing a case with the Chinese Internet Court or Chinese Consumer Association, notwithstanding the nationality and other aspects concerned, the party can exercise their legitimate right by filing the claim in either way. On the technology side, especially with artificial intelligence which is anticipated to bring a stronger impact on all disciplines worldwide, the law in relation to online consumer disputes, or even consumer law in general,

needs to bear in mind the fast pace change in this kind of technology, and to catch up with the latest legal development in the same respect as other jurisdictions have been handling by exchanging views and/or other means. With the prevalent application of AI around the world, it is expected that AI will continue to have a powerful impact on the realm of e-commerce, and it will be interesting to see whether the new online dispute settlement mechanisms will be created to tackle conflicts, e.g., an online consumer dispute with AI embedded technology being the subject matter. All in all, this area of law may require further exploration on the topic which is beyond the scope of the present paper.

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Contact – e-mail
yc07214@umac.mo

ORCID
0000-0001-8404-5967

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Law Applicable to Non-Consumer Contracts Concluded at an Electronic Auction

Krzysztof Żok

Faculty of Law and Administration, Adam Mickiewicz University, Poland

Abstract

The article examines the law governing a non-consumer contract concluded at an electronic auction. The paper discusses substantive international law and private international law, in particular Rome I Regulation. The analysis focuses on the autonomous interpretation of the auction and the country where this contracting process takes place. The considerations are supplemented by the study of selected auction platforms. The paper concludes that a contract formed at an electronic auction is typically governed by the law of the country where the seller has his or her habitual residence.

Keywords

Conflict of Laws; Electronic Auction; European Law; Private International Law.

1 Introduction

Electronic auctions are one of the most popular ways of concluding a contract. This is probably due to the convenient access to a wide selection of goods offered at these auctions. In addition, electronic auctions make it easier to reach a contractor, regardless of the geographic distance. They can therefore facilitate the conclusion of a contract between persons located in different countries, which in turn raises the question of the law governing such an agreement.

It should also be noted that legal scholars have so far mainly focused on consumer contracts, which is understandable given the significance of these

agreements. This paper, however, adopts a different perspective. It focuses on non-consumer contracts, i.e., agreements which are not concluded between a consumer and a trader within the meaning of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation").[1] This frame of reference seems justified since the study of electronic auctions performed for this paper indicates that a considerable number of auction platforms can be used by non-consumers. This applies to regular platforms where two professionals or two non-professionals may conclude a contract *(e.g., Allegro.pl, eBay.com)*. There are also specialised platforms related to contracts made exclusively between professionals *(e.g., Autobid.de, B2Bauctions.dk)*, charity contracts *(e.g., CharityAuctionsToday.com, CharityStars.de)* and contracts made with the government or other public institution *(e.g., GovDeals.com, Municibid.com)*. The paper may thus investigate a less explored intersection of electronic commerce and private international law.

Moreover, it is worth noting that the line between electronic auctions and on-line shops is becoming increasingly blurred. The ongoing convergence of the forms of electronic commerce thus raises new legal questions, in particular regarding the law applicable to a contract concluded in one of such virtual marketplaces.

Finally, a contract for an electronic auction should not be confused with a contract concluded at an electronic auction.[2] The first agreement is binding between the user and the auction platform provider. It serves to describe how the auction platform is used to conclude contracts. More importantly, the law governing this agreement is usually explicitly stipulated in the terms and conditions. For example, *B2Bauction.dk* declares that Danish law applies to this contract[3], while *ShopGoodwill.com* – the laws of the State of California[4].

1 Art. 6 para. 1 Rome I Regulation.

2 The distinction is accepted by FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 142; LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 118.

3 Terms & Conditions. *B2Bauctions* [online]. Section 24 [cit. 24. 5. 2022]. Available at: https://b2bauctions.dk/en/terms-conditions

4 Terms of Use. *Shopgoodwill.com* [online]. 28. 12. 2016 [cit. 24. 5. 2022]. Available at: https://shopgoodwill.com/about/terms-of-use

On the other hand, the contract concluded at an electronic auction creates an obligation between the users of the platform. The platform provider is not a party to this agreement, which is sometimes clearly stipulated in the terms and conditions.[5] Furthermore, a contract concluded at an electronic auction typically does not provide for the choice of law. As a result, the law applicable to this contract can only be determined after referring to the specific rules of private international law. This paper analyses only the contracts concluded at electronic auctions.

2 Legal Framework

2.1 International Substantive Law

Contracts for the sale of goods are well-established agreements which play an important role not only in domestic but also in international trade. Likewise, auctions are not a new legal concept. It is therefore worth considering whether at least some of the rights and obligations of the parties to a contract concluded at an electronic auction are specified in harmonised or unified international substantive law.

At first glance, the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("CISG") appears as an act which could apply to the discussed contracts. However, the CISG only covers contracts concluded between parties whose places of business are located in different countries.[6] The Convention therefore applies to contracts between professionals, which leaves some non-consumer contracts outside its scope of application. More importantly, sales by auction are explicitly excluded from the scope of the CISG.[7] As indicated in the Explanatory Note, this exclusion results from the special rules which many countries

5 See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 7 (point 7.1) [cit. 24. 5. 2022]. Available at: https://assets.allegrostatic.com/popart-attachments/att-eec9077a-a20c-4a2d-a54e-1ceb405539eb; Auction General Rules. *GovDeals* [online]. [cit. 24. 5. 2022]. Available at: https://www.govdeals.com/index.cfm?fa=Main.Faq; User Agreement. *eBay* [online]. 11. 3. 2022, section 2 [cit. 24. 5. 2022]. Available at: https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259

6 Art. 1 para. 1 CISG.

7 Art. 2 letter b) CISG.

adopt for contracts concluded at an auction.[8] Consequently, according to the predominant position, the CISG does not apply to contracts concluded at an electronic auction, although some scholars argue that the restriction should be limited to typical off-line auctions, and not to Internet auctions.[9]

This remark is to some extent consistent with the views expressed under Rome I Regulation, where scepticism prevails regarding the application of the rule concerning a contract for the sale of goods by auction to a contract concluded at an electronic auction (see section 5).[10] Yet, the result of both positions is different. The narrow interpretation of sales by auction leads to the application of the CISG, while the narrow interpretation of a contract for the sale of goods by auction leads to the application of the law of the country where the seller has his or her habitual residence.[11] While this issue would certainly require a more thorough analysis, it seems that the Convention could indeed constitute the basis for defining the rights and obligations of the parties to a contract concluded at an electronic auction. This however does not change the fact that the CISG does not cover all non-consumer contracts considered in this paper. It is also worth noting that the terms and conditions of certain auction platforms expressly exclude the application of the CISG.[12]

Alternatively, the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) ("CUECIC")

8 United Nations Convention on Contracts for the International Sales of Good. *UNCITRAL* [online]. 2010, p. 35 [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf

9 SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG)*. New York: Oxford University Press, 2005, p. 48; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWIŃSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz*. Warszawa: C. H. Beck, 2021, pp. 42–43; see also SCHROETER, U. Die Anwendbarkeit des UN-Kaufrechts auf grenzüberschreitende Versteigerungen und Internet-Auktionen. *Zeitschrift für Europäisches Privatrecht*. 2004, pp. 31–32.

10 Art. 4 para. 1 letter g) Rome I Regulation.

11 Art. 4 para. 1 letter a) Rome I Regulation.

12 See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 17 (point 17.1) [cit. 24. 5. 2022]. Available at: https://assets.allegrostatic.com/popart-attachments/att-eec9077a-a20c-4a2d-a54e-1ceb405539eb; General Terms and Conditions of Business, online. *Autobid.de* [online]. 30. 1. 2022, section I (point 5) [cit. 24. 5. 2022]. Available at: https://autobid.de/index.php?id=98&L=1; Terms & Conditions. *B2Bauctions* [online]. Section 16 [cit. 24. 5. 2022]. Available at: https://b2bauctions.dk/en/terms-conditions

may be regarded as the reference point for determining the rights and obligations of the parties to a contract concluded at an electronic auction. The CUECIC, like the CISG, covers only contracts concluded between professionals.[13] However, contracts concluded at an auction are generally not excluded from the scope of CUECIC.[14] The Convention thus seems to be of some assistance in determining the rights and obligations of the parties to a contract concluded at an electronic auction. Nevertheless, a closer examination of the CUECIC reveals that the Convention has limited value for professionals. This stems from the fact that the CUECIC entered into force only in 15 countries.[15] Furthermore, countries where electronic commerce plays an important role in the economy, such as the United States, Canada, China or the Member States of the European Union ("EU"), are not part of the CUECIC. The territorial scope of the Convention is therefore narrow.

More importantly, the CUECIC focuses primarily on the exchange of electronic communications in connection with the formation or performance of a contract.[16] However, it does not contain many rules regarding the general performance of the contract, which is acknowledged in the Explanatory Note.[17] As a result, the Convention seems insufficient to comprehensively define the rights and obligations of the parties to a contract concluded at an electronic auction.

Interestingly, the Explanatory Note shows that the legislators who drafted the CUECIC considered Internet auctions.[18] However, they focused mainly

13 Art. 1 para. 1 CUECIC.

14 Similarly MARTIN, C. H. The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law. *Tulane Journal of International and Comparative Law*. 2008, Vol. 16, no. 2, p. 470; MARTIN, C. H. The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided? *Pace International Law Review*. 2005, Vol. 17, no. 2, pp. 274–275 (comparing the scope of the CISG and the CUECIC).

15 United Nations Convention on the Use of Electronic Communications in International Contracts. *UNCITRAL* [online]. [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications

16 Art. 1 para. 1 CUECIC.

17 United Nations Convention on the Use of Electronic Communications in International Contracts. *UNCITRAL* [online]. 2007, p. 28 [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf

18 Ibid., p. 46.

on identifying the buyer and the seller who did not disclose their names and surnames. The legislators also pointed out that click-wrap contracts concluded at an Internet auction may be legally binding.[19] Apart from these brief statements, the Convention and the Explanatory Note do not expressly mention electronic auctions.

2.2 Private International Law

The lack of comprehensive and certain unified rules makes it necessary to refer to private international law in order to determine the rights and obligations of the parties to a contract concluded at an electronic auction. In the context of the EU, Rome I Regulation appears to be the primary point of reference. It should also be noted that the Regulation replaced the Convention on the Law Applicable to a Contractual Obligation (Rome, 1980) ("Rome Convention").[20] However, the Convention may still apply in some cases. This refers to the territories which fall within the scope of the Convention and to which the Regulation does not apply according to the Treaty on the Functioning of the European Union.[21]

Moreover, Rome I Regulation does not take precedence over the international conventions to which one or more Member States were parties at the moment when the Regulation was adopted and which lay down conflict of law rules relating to contractual obligations.[22] As a consequence, the Convention on the Law Applicable to International Sales of Goods (The Hague, 1955) ("the Hague Convention (1955)") could also determine the law governing a contract concluded at an electronic auction. The Convention is in force in 8 countries, most of which are the Member States of the EU.[23] It should be noted that the revised and expanded versions of the Hague Convention (1955), i.e., the Convention on the Law Applicable to Contracts for the

19 United Nations Convention on the Use of Electronic Communications in International Contracts. *UNCITRAL* [online]. 2007, p. 68 [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf

20 Art. 24 Rome I Regulation.

21 Art. 299 Treaty on the Functioning of the European Union.

22 Art. 26 Rome I Regulation.

23 Status table. 31: Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods. *HCCH* [online]. [cit. 24. 5. 2022]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=61

International Sale of Goods (The Hague, 1986) ("the Hague Convention (1986)") has not yet entered in force.[24] So far, it has only been signed by 5 countries, of which only Argentina has ratified the Convention and the Republic of Moldova has acceded to it. Hence, this paper does not discuss the Hague Convention (1986) in detail.

This paper focuses on Rome I Regulation as it is of most relevance to the Member States of the EU. However, it should be noted that the rules of the Regulation and the rules of the Rome Convention and the Hague Convention (1955) are similar in determining the law applicable to a contract for the sale of goods by auction. Therefore, choosing the above point of reference for further considerations does not adversely affect the scope of analysis.

Finally, it should also be clarified that Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) does not provide for rules of private international law. While this is explicitly mentioned in the Directive[25], a question arose about the so-called country of origin principle.[26] The Court of Justice of the European Union closed this controversy in the *eDate Advertising* decision.[27] The judgment correctly states that the provisions of the Directive do not require transposition in the form of a specific conflict of laws rule. The conclusion is also accepted by most scholars.[28]

24 Status table. 03: Convention of 15 June 1955 on the law applicable to international sales of goods. *HCCH* [online]. [cit. 24. 5. 2022]. Available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=31

25 Art. 1 para. 4 and Recital 23 Directive on electronic commerce.

26 See Art. 3 Directive on electronic commerce.

27 Judgment of the CJEU (Grand Chamber) of 25 October 2011, *eDate Advertising GmbH vs. X* and *Oliver Martínez, Robert Martínez vs. MGN Limited*, Case C-509/09 and C-161/10, para. 53–68.

28 LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 98; MAYER, P., HEUZÉ, V. *Droit international privé*. Issy-le-Moulineaux: LDGJ, 2014, pp. 536–537; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, pp. 206–207; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 621. The prevailing position is, however, questioned by RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 778; see also AUDIT, B., D'AVOUT L. *Droit international privé*. Paris: Economica, 2013, p. 816.

3 Rules Provided for in Rome I Regulation

Taking Rome I Regulation as the main point of reference for determining the law applicable to a contract concluded at an electronic auction does not eliminate all doubts. The Regulation provides for several rules for identifying the law governing this agreement which of course cannot be applied simultaneously. The possible conflict of rules should be resolved by referring to the most detailed rule, in accordance with the principle *lex specialis derogat legi generalis*. This in turn requires a thorough analysis of the provisions in the Regulation and an autonomous interpretation of the terms used in this legal act. However, such a cascade of rules is not unique to Rome I Regulation. A similar legislative solution is also found in the Rome Convention and the Hague Convention (1955).[29]

First of all, Rome I Regulation provides for that a contract for the sale of goods should be governed by the law of the country where the seller has his or her habitual residence.[30] The Regulation also indicates that the term "sale of goods" should be understood in the same way as when applying the provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation").[31] However, it should be noted that Brussels I Regulation is repealed by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation (recast)").[32] Rome I Regulation thus aims to achieve the consistency between the provisions on jurisdiction and the provisions on the applicable law. Yet, neither Brussels I Regulation nor Brussels I Regulation (recast) include a definition of a contract for the sale of goods.

29 See Art. 3 Hague Convention (1955); Art. 4 Rome Convention.
30 Art. 4 para. 1 letter a) Rome I Regulation.
31 Recital 17 Rome I Regulation referring to Art. 5 para. 1 letter b) Brussels I Regulation.
32 Art. 7 para. 1 letter b) Brussels I Regulation (recast) corresponds to former Art. 5 para. 1 letter b) Brussels I Regulation.

It is therefore necessary to adopt an autonomous interpretation of the term in question. For this purpose, the CISG can be taken as a starting point.[33] The Convention does not explicitly define a contract for the sale of goods. However, the definition can be formulated based on the description of the obligations of the seller and the buyer.[34] Consequently, a contract for the sale of goods within the meaning of the CISG should be understood as an agreement under which one party is obliged to deliver goods, hand over any documents relating to them and transfer property in the goods, while the other party is obliged to pay the price for the goods and take delivery of them.[35] A similar definition is also accepted by scholars who do not refer to the CISG in this regard.[36] In addition, it is rightly stated that the discussed rule covers sales contracts concluded with the use of electronic means of communication.[37]

The providers of auction platforms do not always specify the contract to be concluded at the auction. Nevertheless, some of the terms and conditions clearly indicate that the users of the platform conclude a sales

33 FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, pp. 92–93; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 624.

34 JAGIELSKA, M. Umowa sprzedaży. In: POPIOŁEK, W. (ed.). *Międzynarodowe prawo handlowe*. Warszawa: C. H. Beck, 2013, p. 867; LOOKOFSKY, J. *Understanding the CISG. A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*. Alphen aan den Rijn: Kluwer Law International, 2008, p. 17; SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG)*. New York: Oxford University Press, 2005, p. 26; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWIŃSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz*. Warszawa: C. H. Beck, 2021, p. 19. Similarly, MARTINUSSEN, R. *Overview of International CISG Sales Law. Basic Contract Law according to the UN Convention on Contracts for the International Sale of Goods (CISG)*. Charleston: Book Surge Publishing, 2006, p. 14.

35 Art. 30, 53 CISG.

36 LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, pp. 99–100; RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 777.

37 FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, pp. 93, 142. Similarly LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 117.

contract. For instance, *Autobid.de* states that the buyer and the seller enter into a purchase contract[38], while *Municibid.com* defines itself as a platform where users can buy and sell products.[39] This is also in line with the general assumption that electronic auctions are used to enter into such agreements. Consequently, the contract concluded at an electronic auction should be governed by the law of the country where the seller has his or her habitual residence. This rule follows from the characteristic performance theory and can be viewed as a specific case of its application.

However, it appears that the flexibility of electronic auctions may allow the user to conclude a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property. In this case, the applicable law cannot be identified with the law of the country where the seller is domiciled. This is because the autonomous understanding of goods within the meaning of Rome I Regulation does not include immovable property.[40] A similar understanding of goods is also prevailing under the CISG.[41] Hence, a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property concluded at an electronic auction should be governed by the law of the country where the property is situated.[42]

38 General Terms and Conditions of Business. *Autobid.de* [online]. 30. 1. 2022, section III (point 5) [cit. 24. 5. 2022]. Available at: https://autobid.de/index.php?id=98&L=1

39 Municibid Terms of Use Agreements. *Municibid* [online]. 23. 10. 2020, section h) [cit. 24. 5. 2022]. Available at: https://municibid.com/Home/Terms

40 FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar.* München: C. H. Beck, 2018, pp. 93–94; MAYER, P., HEUZÉ, V. *Droit international privé.* Issy-le-Moulineaux: LDGJ, 2014, p. 537; RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht.* Saarbrücken: Juris GmbH, 2015, p. 777; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz.* Warszawa: C. H. Beck, 2018, pp. 624–625. Similarly THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3.* Köln: Dr. Otto Schmidt Verlag, 2016, p. 229.

41 JAGIELSKA, M. Umowa sprzedaży. In: POPIOŁEK, W. (ed.). *Międzynarodowe prawo handlowe.* Warszawa: C. H. Beck, 2013, p. 870; SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG).* New York: Oxford University Press, 2005, p. 30; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWIŃSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz.* Warszawa: C. H. Beck, 2021, p. 22.

42 Art. 4 para. 1 letter c) Rome I Regulation.

Nevertheless, the study of auction platforms shows that this rule is rarely applied in practice. The terms and conditions of auction platforms often explicitly specify that an auction concerning immovable property does not lead to the conclusion of a contract.[43] Instead, the auction should be treated as a legally not binding advertisement. This stems from the fact that contracts relating to a right *in rem* in immovable property or to a tenancy to immovable property are usually extensively regulated in substantive law. For instance, the transfer of real property ownership may require the contract to be registered or drawn up by a notary or other trusted official. A contract concluded at an electronic auction typically does not meet these requirements even if there is no conflict of law. Therefore, the terms and conditions seem to result primarily from the requirements of substantive national law. However, the terms and conditions are also significant from the point of view of private international law, as they effective exclude the application of the law of the country where the property is situated to the contract concluded at an electronic auction.

Moreover, Rome I Regulation provides for that a contract for the sale of goods by auction should be governed by the law of the country where the auction takes place, if such a place can be determined.[44] As pointed out previously, contracts concluded at an electronic auction can be classified as contracts for the sale of goods within the meaning of Rome I Regulation. Consequently, according to the *lex specialis derogat legi generali* principle, it takes precedence over the rule referring to the law of the country where the seller has his or her habitual residence. The above rule is thus especially worth considering in the context of this paper. For this purpose, the following sections examine the concept of an auction within the meaning of the Regulation and the question of identifying the country where the electronic auction takes place.

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43 See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 3 (point 3.3) [cit. 24. 5. 2022]. Available at: https://assets.allegrostatic.com/popart-attachments/att-eec9077a-a20c-4a2d-a54e-1ceb405539eb; User Agreement. *eBay* [online]. 11. 3. 2022, section 7 [cit. 24. 5. 2022]. Available at: https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259. Similarly, Municibid Terms of Use Agreements. *Municibid* [online]. 23. 10. 2020, section h) [cit. 24. 5. 2022]. Available at: https://municibid.com/Home/Terms

44 Art. 4 para. 1 letter g) Rome I Regulation.

Finally, if a contract concluded at an electronic auction is manifestly more closely connected with a country other than that indicated by the above rules, then the law of that country should apply.[45] However, this corrective rule can only be invoked if all the circumstances of the case clearly support the existence of such a strong connection between the contract and the country. This in turn can only be verified on a case by case basis. Nevertheless, the corrective rule may apply in a situation where both parties are domiciled in the same country other than that where the electronic auction takes place.[46] In this case, it could be argued that the law of the country where the parties have their habitual residence should take precedence and govern the contract.

4 Electronic Auction as an Auction Within the Meaning of Rome I Regulation

As a preliminary point, it is worth noting that the rule concerning a contract for the sale of goods by auction was not originally invented in Rome I Regulation. It should rather be seen as a continuation of the previous legislation. For example, the same rule is found in the Hague Convention (1955).[47] More importantly, the adoption of the rule in question pre-dates the development of electronic commerce. It is therefore necessary to determine whether an electronic auction can be classified as an auction within the meaning of Rome I Regulation.

This may not seem difficult at first, as the meaning of the term "auction" seems intuitive. A closer examination however reveals the richness of forms which an auction can take. For instance, depending on the different classification criteria, it is possible to distinguish Chinese, English or Dutch

45 Art. 4 para. 3 Rome I Regulation.

46 ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, pp. 636–637. Similarly, outside the context of electronic auction, FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 123; MARTINY, D. In: HEIN, J. von (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Vol. 12*. München: C. H. Beck, 2018, p. 211; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 255; see also AUDIT, B., D'AVOUT L. *Droit international privé*. Paris: Economica, 2013, p. 819.

47 Art. 3 para. 3 Hague Convention (1955).

auctions, forward or reverse auctions as well as auctions with absolute price or price reservation. Finding a common core for such diverse contracting processes may thus raise doubts. Moreover, Rome I Regulation does not define an auction. Scholars in turn usually indicate that the term "auction" used in the Regulation should be interpreted similarly as in the CISG.[48] While this comment is correct, its significance is limited by the fact that the CISG also does not explain how to understand an auction. Nevertheless, an auction can be defined as a type of contracting process where (1) offers (bid) are made public and (2) participants compete with each other by placing increasingly advantageous offers. The participant who placed the best bid wins the auction and concludes the contract.[49] This definition seems specific and flexible enough to describe and include different types of auctions. A similar understanding is also recognised under Rome I Regulation.[50]

From this point of view, electronic auctions can be classified as auctions within the meaning of Rome I Regulation.[51] On-line and off-line auctions are obviously not identical. However, the differences between them should not be overestimated. In particular, the participants of off-line auctions usually make their bids public by meeting at the same time and place. When one of them places the bid, others know it immediately. In contrast, the participants of electronic auctions use electronic means of communication

48 FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 107; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

49 SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG)*. New York: Oxford University Press, 2005, p. 48; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWIŃSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz*. Warszawa: C. H. Beck, 2021, p. 42.

50 FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 107; LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 105. Similarly ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

51 FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 107. On the contrary, AUDIT, B., D'AVOUT L. *Droit international privé*. Paris: Economica, 2013, p. 816.

for placing the bid as an equivalent of meeting at the same time and place. However, off-line auctions usually also allow their participants to place the bids remotely (e.g., over the telephone).[52] For example, Sotheby's allows the participant to place the bid not only in the saleroom, but also on-line via a dedicated bidding platform, telephone and even place an absentee bid.[53] More importantly, the participant of an electronic auction usually has access to information about already placed bids. This functionality is usually available on the auction platform (e.g., *eBay.com*, *B2Bauctions.dk*, *CharityStars.com*). However, sometimes the participant receives information that he or she has been outbid in an e-mail.[54] Therefore, the technical differences between on-line and off-line auctions are not legally relevant.

The process of concluding a contract at an electronic auction is not always clearly defined by the platform provider. Nevertheless, the description of the process provided for in some of the terms and conditions resembles an off-line auction. For instance, eBay.com briefly states that the seller indicates the starting prices and the buyers compete with each other by placing higher bids.[55] Similarly, *PropertyRoom.com* and *ShopGoodwill.com* stipulate that the person who placed the highest bid at or above the minimum prices and the bid was accepted by the seller is bound by the transaction.[56] According to a more elaborate definition formulated by Allegro.pl, an auction is *"a type of an Offer initiated by the Seller as part of which the Bidder declares the price for which*

52 This is also accepted in the context of Article 4 para. 1 letter g) of Rome I Regulation. See RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 780; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

53 Buy and Sell at Sotheby's. *Sotheby's* [online]. [cit. 24. 5. 2022]. Available at: https://www.sothebys.com/en/buy-sell#buying-basics

54 See, e.g., How do I Place a Bid?. *Charity Auctions Today* [online]. [cit. 24. 5. 2022] Available at: https://www.charityauctionstoday.com/p/help/how-do-i-place-a-bid/; Terms & Conditions. *B2Bauctions* [online]. Section 4 [cit. 24. 5. 2022]. Available at: https://b2bauctions.dk/en/terms-conditions

55 How bidding works. *eBay* [online]. 11. 3. 2022 [cit. 24. 5. 2022]. Available at: https://www.ebay.com/help/buying/bidding/bidding?id=4003

56 Bidding And Buying. *PropertyRoom.com* [online]. [cit. 24. 5. 2022]. Available at: https://help.propertyroom.com/support/solutions/articles/44001804935-bidding-and-buying; Terms of Use. *Shopgoodwill.com* [online]. 28. 12. 2016 [cit. 24. 5. 2022]. Available at: https://shopgoodwill.com/about/terms-of-use

they are ready to purchase the Goods"[57]. It also adds that transactions should be understood as *"procedures for entering into and performing contracts of sale for Goods between Users on Allegro"*[58]. This is in line with the general assumption that electronic auctions use bidding as a means of determining the party who concludes a contract.

The study of electronic auctions shows that auction platforms often automate the bidding process.[59] The user usually declares the highest price he or she is willing to pay. The platform then automatically places incremental bids up to the limit set by the user. At first glance, this may seem significantly different from off-line auctions. In my opinion, however, the automation of the bidding process does not preclude the classification of electronic auctions as auctions within the meaning of Rome I Regulation. This is because the competition between the participants as the main feature of the bidding process remains unchanged.

Nevertheless, electronic auctions often allow the seller to set the "Buy It Now" or a similarly named option.[60] In this case, the seller sets a fixed price for the good offered at the electronic auction. The contract is concluded when the user clicks on the button "Buy It Now". Hence, there is no competition between the users of the auction platform, which undermines the key aspect of the bidding process. In my view, such a contract should not be regarded as concluded at an auction within the meaning of Rome I Regulation. Instead, the law of the country where the seller has his or her habitual

57 Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 1 [cit. 24. 5. 2022]. Available at: https://assets.allegrostatic.com/popart-attachments/att-eec9077a-a20c-4a2d-a54e-1ceb405539eb

58 Ibid.

59 See, e.g., Auction General Rules. *GovDeals* [online]. [cit. 24. 5. 2022]. Available at: https://www.govdeals.com/index.cfm?fa=Main.Faq; Automatic bidding. *eBay* [online]. 11. 3. 2022 [cit. 24. 5. 2022]. Available at: https://www.ebay.com/help/buying/bidding/automatic-bidding?id=4014; General Terms and Conditions of Business. *Autobid.de* [online]. 30. 1. 2022, section III (para. 2) [cit. 24. 5. 2022]. Available at: https://autobid.de/index.php?id=98&L=1; Terms & Conditions. *B2Bauctions* [online]. Section 10a [cit. 24. 5. 2022]. Available at: https://b2bauctions.dk/en/terms-conditions

60 See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 3 (para. 3.1) [cit. 24. 5. 2022]. Available at: https://assets.allegrostatic.com/popart-attachments/att-eec9077a-a20c-4a2d-a54e-1ceb405539eb; Auction General Rules. *GovDeals* [online]. [cit. 24. 5. 2022]. Available at: https://www.govdeals.com/index.cfm?fa=Main.Faq; General Terms and Conditions of Business. *Autobid.de* [online]. 30. 1. 2022, section III (para. 3) [cit. 24. 5. 2022]. Available at: https://autobid.de/index.php?id=98&L=1

residence should apply to such an agreement. This is also sometimes clearly recognised as a different contracting process.[61] Interestingly, some charity auction platforms enable the seller to set the "Make a donation" option thanks to which he or she may receive gratuitously a sum of money from the users of the platform.[62] The contract concluded by exercising this option is obviously not a contract for the sale of goods and should thus be governed according to the characteristic performance theory, possibly modified by the supplementary rule.[63]

It should also be emphasised that Rome I Regulation covers only a contract concluded at a private law auction.[64] Transactions at auctions governed by public law are thus excluded from the scope of the Regulation.[65] This concerns especially auctions conducted by a bailiff or a similar public official as part of compulsory debt collection. At the same time, it is worth noting that according to the European e-Justice, on-line judicial auctions are already organised in 12 Member States.[66] While the distinction between private and public law auctions may initially seem sharp, the careful analysis of electronic auctions should not be underestimated. In particular, the mere participation of the government or other public institutions in the auction does not preclude the application of Rome I Regulation. For instance, private law auctions may be identified where the government or other public institutions act simply as a seller, without exercising any authority.

61 See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 3 (para. 3.31) [cit. 24. 5. 2022]. Available at: https://assets.allegrostatic.com/popart-attachments/att-eec9077a-a20c-4a2d-a54e-1ceb405539eb

62 How do I Place a Bid? *Charity Auctions Today* [online]. [cit. 24. 5. 2022] Available at: https://www.charityauctionstoday.com/p/help/how-do-i-place-a-bid/

63 Art. 4 para. 2, 3 Rome I Regulation.

64 Art. 1 para. 1 Rome I Regulation.

65 FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 107; LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 105; MARTINY, D. In: HEIN, J. von (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Vol. 12*. München: C. H. Beck, 2018, p. 170; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

66 Judicial auctions. *European e-Justice* [online]. 14. 4. 2022 [cit. 24. 5. 2022]. Available at: https://e-justice.europa.eu/473/EN/judicial_auctions

This applies in particular to auctions concerning surplus disposition (e.g., *GovDeals.com*, *Municibid.com*). On the other hand, a more cautious approach should be adopted with regard to the auctions of seized, found or unclaimed items since they can often be regarded as a form of judicial auction (e.g., *PropertyRoom.com*).

The above considerations lead to the conclusion that an electronic auction can in principle be classified as an auction within the meaning of Rome I Regulation. However, the application of the rule concerning a contract for the sale of goods by auction also requires the identification of the country where the auction takes place. This question is covered in the next section.

5 The Country Where the Electronic Auction Takes Place

The characteristic performance theory underpins many of the rules provided for in Rome I Regulation for determining the law applicable to a contract.[67] However, the theory is not without exceptions. This relates to the discussed rule regarding a contract for the sale of goods by auction. In this case, the applicable law is determined by the law of the country where the contract is concluded, not the country where the seller has his or her habitual residence. This observation is not inconsequential. It should be noted that the country where the contract is concluded is generally considered to be a weak indicator of the law applicable to the contract.[68]

67 See Art. 4 para. 1 letters a), b), e), f) and para. 2 Rome I Regulation as well as Recitals 19 and 21 Rome I Regulation; see also THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 208. Similarly AUDIT, B., D'AVOUT L. *Droit international privé*. Paris: Economica, 2013, p. 816.

68 FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 123; LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 113; MARTINY, D. In: HEIN, J. von (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Vol. 12*. München: C. H. Beck, 2018, pp. 218–219; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 254; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 649.

The rule concerning a contract for the sale of goods by auction is justified by the specificity of the auction as a contracting process. In a typical off-line auction, the parties may not know each other.[69] In particular, one party may not have sufficient knowledge about the other party's domicile. This lack of information is relevant from the point of view of the characteristic performance theory. In the absence of the discussed rule, the contract for the sale of goods by auction would be governed by the law of the country where the seller has his or her habitual residence. This in turn could lead to the application of a law not intended by the parties, especially the buyer. Applying the law of the country where the auction takes place eliminates this uncertainty as the proper law is easy to determine.

Furthermore, it can be assumed that the parties accept this law since otherwise would not participate in the auction.[70] For these reasons, it can be argued that the contract is manifestly more closely connected with the country where the auction takes place than with the country where the seller has his or her habitual residence.[71] This is particularly important from

69 BOGDAN, M. Contracts in Cyberspace and the New Regulation "Rome I". *Masaryk University Journal of Law and Technology*. 2009, Vol. 3, no. 2, p. 222; LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 105; MARTINY, D. In: HEIN, J. von (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Vol. 12*. München: C. H. Beck, 2018, p. 169; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, pp. 208, 214, 254; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637. Similarly RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 780; see also SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG)*. New York: Oxford University Press, 2005, p. 48; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWIŃSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz*. Warszawa: C. H. Beck, 2021, p. 42.

70 ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

71 TANG, Z. Law Applicable in the Absence of Choice – The New Article 4 of the Rome I Regulation. *Modern Law Review*. 2008, Vol. 71, no. 5, p. 790. Similarly MAYER, P., HEUZÉ, V. *Droit international privé*. Issy-le-Moulineaux: LDGJ, 2014, pp. 539–540; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

the point of view of the Rome Convention which does not provide for a similar rule concerning sales by auction.[72] However, the Rome Convention emphasises the significance of the connection between the contract and the country.[73]

According to some scholars, the aforementioned lack of information does not occur in the case of electronic auctions.[74] Consequently, contracts concluded at such auctions should not be covered by the discussed rule since it is possible to identify the parties. In my opinion, this argument requires more careful consideration. Indeed, the study of electronic auctions indicates that the seller often provides some information about him or her, including the indication of the place where he or she lives or does business. The user may usually access this information by clicking on a button or a link available at each auction. In some cases, the auction platform provider requires a formal verification of the participant. For instance, *Autobid.de* requires every buyer to provide a scan of the personal identification document as well as evidence of his or her status as a professional.[75] However, this does not seem to be the prevailing practice, which to some extent undermines the argument that the level of information of persons participating in the electronic auction is satisfactory.

One should bear in mind the limited possibilities of verifying the identity of the participants of electronic auctions and the ease of creating false (fake) user accounts. Auction platform providers also frequently exclude their liability for the content of the seller's invitation to place bids.[76] In particular, they indicate that they do not verify the correctness of the information presented by the seller. On the other hand, at least some of the providers

72 See Art. 4 Rome Convention which corresponds to Art. 4 Rome I Regulation.

73 Art. 4 Rome Convention.

74 THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214.

75 General Terms and Conditions of Business. *Autobid.de* [online]. 30. 1. 2022, section II (para. 1) [cit. 24. 5. 2022]. Available at: https://autobid.de/index.php?id=98&L=1

76 See, e.g., Municibid Terms of Use Agreements. *Municibid* [online]. 23. 10. 2020, section h) [cit. 24. 5. 2022]. Available at: https://municibid.com/Home/Terms; Terms & Conditions. *B2Bauctions* [online]. Section 5 [cit. 24. 5. 2022]. Available at: https://b2bauctions.dk/en/terms-conditions. Similarly, in the context of charity auctions, see e.g., Terms of Service. *CharityStars* [online]. 24. 11. 2020 [cit. 24. 5. 2022]. Available at: https://www.charitystars.com/company/tos

aim to improve the certainty and transparency of the electronic transactions. This goal can be achieved by evaluating the sellers' performance. For example, *eBay.com* sets minimum standards which are used as a benchmark for distinguishing Top Rated, Above Standards and Below Standard sellers.[77] The amount of information concerning the other party to the contract concluded at an electronic auction should thus be analysed not only in terms of quantity but also in terms of quality.

Moreover, it should be emphasised that the rule regarding a contract for the sale of goods by auction applies only if the place of auction can be identified. This is also the point which raises most doubts concerning the application of the rule to contracts concluded at an electronic auction. At the same time, it is necessary to stress that the country where the contract is concluded is generally perceived as a weak indicator of the law which should govern the contract. Therefore, the discussed rule should not be overly extended. From this point of view, it is not surprising that scholars are usually sceptic as to whether this requirement can be met. Some of them even claim that it is impossible to identify the country where the electronic auctions take place and thus the rule does not apply to the contracts in question.[78]

The above doubts are certainly significant and should not be dismissed hastily. In my opinion, however, the application of the discussed rule to contracts concluded at an electronic auction requires a more differentiated position by taking into account the circumstances of a particular case. Electronic means of communication seem to provide a sufficient degree of flexibility to align the contracting process to the requirements laid down in Rome I Regulation. In particular, the auction platform may be used simply as a tool for communicating the bids in an auction which takes place in a clearly identifiable physical location.[79] Moreover, the item offered at the

77 Seller levels and performance standards. *eBay* [online]. [cit. 24. 5. 2022]. Available at: https://www.ebay.com/help/selling/seller-levels-performance-standards/seller-levels-performance-standards?id=4080

78 LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, pp. 105, 118; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214.

79 See also BROWN, J., PAWLOWSKI, M. How Many Contracts in an Auction Sale? *Nottingham Law Journal*. 2016, Vol. 25, p. 14.

auction may be stored in that place. There may also be a natural person who acts as an auctioneer and with whom the participants can communicate directly. In my view, in such a situation, it can be argued that the country where the electronic auction takes place can be identified, although the need to consider all the circumstances should be emphasised.

Nevertheless, it can be expected that such an auction is not typical in practice. The auction should be treated as an exception rather than as a rule. Consequently, the general scepticism regarding the possibility of identifying the country where the electronic auction takes place seems justified.[80] As a result, the discussed rule of Rome I Regulation usually does not apply to contracts concluded at an electronic auction. Consequently, some scholars consider the application of the supplementary rule to determine the law applicable to a contract concluded at an electronic auction.[81] This would in turn require identifying the law of the country with which the contract is most closely connected.[82] However, they also correctly discern the drawbacks of such a solution.[83] In my opinion, it is sufficient to refer to the principle *lex specialis derogat legi generali* and the previously discussed definition of the contract for the sale of goods (see section 3). The law applicable to these agreements is thus determined by the basic rule, i.e., they are governed by the law of the country where the seller has his or her habitual residence.

The question may however arise whether the autonomous interpretation of the term "the place of auction" should be adapted to the specificity of the digital environment. In particular, it could be considered whether the place of the auction should not be equated with the location of the servers where the auction platform is stored. Nevertheless, such identification

80 FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar.* München: C. H. Beck, 2018, p. 107; RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht.* Saarbrücken: Juris GmbH, 2015, p. 780; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3.* Köln: Dr. Otto Schmidt Verlag, 2016, p. 214.

81 TANG, Z. Law Applicable in the Absence of Choice – The New Article 4 of the Rome I Regulation. *Modern Law Review.* 2008, Vol. 71, no. 5, pp. 793–794.

82 Art. 4 para. 4 Rome I Regulation.

83 TANG, Z. Law Applicable in the Absence of Choice – The New Article 4 of the Rome I Regulation. *Modern Law Review.* 2008, Vol. 71, no. 5, p. 794.

is correctly rejected by scholars.[84] In my opinion, it should be noted that the location of the servers is usually unknown or even irrelevant to the parties. Moreover, the auction platform providers typically do not inform the users where the servers are located. In addition, an auction platform may require several servers situated in different areas of the globe for proper functioning. Referring to their location would only increase legal uncertainty related to the law applicable to the contract. Therefore, there is no justification for treating the law of the country where the servers are located as the law governing contracts concluded at an electronic auction.

It is also worth noting that this conclusion corresponds to the CUECIC. The Convention provides for that the location of the place of business cannot be identified merely with the place where the equipment and technology supporting an information system used by a party in connection with the formation of a contract are located or where the information system may be accessed by other parties.[85] The same rule applies with regard to the dispatch and receipt of electronic communications (e.g., an offer and its acceptance).[86] As pointed out in the Explanatory Note, this cautious approach to the role of servers as an indicator of the place of business was a deliberate decision of the legislator who drew up the CUECIC.[87]

The country where the auction takes place should also not be equated with the country where the auction platform provider has his or her habitual residence.[88] It should be emphasised that the auction platform provider is not a party to a contract concluded at an electronic auction. Accordingly, his

84 THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214. Similarly, in the general context of Internet contracts, FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 142. Similarly, in the general context of Internet transactions, LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 117.

85 Art. 6 para. 3 CUECIC.

86 Art. 10 para. 3 CUECIC.

87 United Nations Convention on the Use of Electronic Communications in International Contracts. *UNCITRAL* [online]. 2007, pp. 14–15, 64–65 [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf

88 THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214.

or her domicile should not generally affect the law governing the agreement between the users of the platform. In addition, the technical unity of the auction platform may not necessarily translate into a single habitual residence of the provider. For instance, *eBay.com* lists 6 national companies as parties to the contract for an electronic auction, depending on the user's domicile.[89] Therefore, there is a risk that the contract concluded at an electronic auction could be governed by random law as the result of equating the country where the auction takes place with the country where the auction platform provider has his or her habitual residence.

However, the significance of the provider's domicile should not be completely ignored. It should be noted that a contract concluded at an electronic auction frequently complies to some extent with the provisions stated in a contract for an electronic auction.[90] The latter in turn is normally governed by the law of the country where the auction platform provider has his or her habitual residence.[91] The parties may also be more aware of the law applicable to the contract for an electronic auction even if they are unsure which law governs the contract concluded at an electronic auction. Hence, it is rightly argued that these arguments, together with other factors, may justify the application of the corrective rule in a specific case.[92] As a result, the contract concluded at an electronic auction may sometimes be governed by the law of the country applicable to the contract for the electronic auction. Nevertheless, this requires careful consideration of all circumstances and should be done on a case by case basis.

6 Conclusion

Electronic auctions are a convenient way to conclude contracts. The use of electronic means of communication allows the users of auction platforms to overcome the limitations resulting from a geographical

89 User Agreement. *eBay* [online]. 11. 3. 2022, section 1 [cit. 24. 5. 2022]. Available at: https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259

90 See LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, pp. 118–119.

91 Art. 4 para. 1 letter b) Rome I Regulation.

92 LEIBLE, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 119.

distance. As a consequence, electronic auctions may facilitate the conclusions of contracts between parties located in different countries. This observation leads to the question regarding the law applicable to such agreements. The considerations carried out in this paper indicate that an electronic auction usually qualifies as an auction within the meaning of Rome I Regulation. However, it is typically not possible to indicate the country where the electronic auction takes place. This in turn precludes the application of a special rule provided for in Rome I Regulation which concerns a contract for the sale of goods by auction. It can therefore be assumed that a non-consumer contract concluded at an electronic auction is usually governed by the law of the country where the seller has his or her habitual residence.

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Contact – e-mail
krzysztof.zok@amu.edu.pl

ORCID
0000-0002-9407-5307

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Can Robot Judges Solve the So-Called "Hard Cases"?

Lea Pődör

Deák Ferenc Faculty of Law, Széchenyi István University, Hungary

Abstract

From the perspective of legal theory, there are two types of cases for judges to decide: "easy cases" and "hard cases". This line of thought relates to cases that are decided by humans. The last few years have seen rapid progress in the development of artificial intelligence, and an increasing number of ideas have been put forward that envisage the transfer of algorithmic task execution to the world of law. Legal theory and jurisprudence are interdependent, and a solution needs to be found to the question of how much algorithms can reduce the burden on the judiciary in the application of the law. This problem is not alien to legal theory, since the idea of law as an axiomatic system and the idea of judgment machines was already present in *Leibniz's* philosophy.

Keywords

Hard Cases; Leibniz; Mechanical Decision-Making; Robot Judges.

1 Introduction

The last few years have seen rapid progress in the development of artificial intelligence ("AI"), and an increasing number of ideas have been put forward that envisage the transfer of algorithmic task execution to the world of law. A proper solution needs to be found to the question of how much algorithms can reduce the burden on the judiciary in the application of the law. This problem is not alien to legal theory, since the idea of law as an axiomatic system and the idea of how we think about "robot-judges" are not new dilemmas. In this paper, therefore, I seek to answer the following

questions. To what extent does the legal theoretical tradition help to solve this judicial problem of our time? Application of which acts of law can be algorithmized? In solving "hard cases", what are the patterns of thought and ability where technology fails?

First of all, it should be noted that the topic is interdisciplinary; it is an interesting problem for law, philosophy, logic and technology as well. I would like to emphasise that there is no paradigm position at the moment, so I will mainly try to formulate my own ideas based on the relatively recent literature available.

2 On the Nature of Legal Cases

2.1 Types of Cases – The Easy Case-Hard Case Distinction

The study of judicial decision-making is a classic topic in legal theory. The pair of concepts in this paper, the "easy case-hard case" dichotomy, is a much debated pair of concepts. There are legal scholars and practitioners who do not identify with this viewpoint, which can be located in the common field of practice and theory, and of course there are many for whom it provides a valuable explanation. The pair of concepts under consideration does not distinguish according to the separation of legal fields, but is based on the nature of the cases, and is thus able to reveal deeper connections.

Legal professions are related to practical cases (legal cases) and this fact is more eye-catching when judges are coming into question because judges solve many cases day by day. Definitely, judges usually experience something important: some cases are clear and unambiguous, while others are the opposite and unfortunately, because of these kind of hard cases, judges "can not sleep quietly".[1] We can take a risk: judges among themselves do not say phrases like "I have easy cases / hard cases in my practice", because their practical perspective systematizes the cases according to legal fields (for example, there are criminal cases, civil law cases, employment disputes, etc.). Our two dilemmas, easy case and hard case are relevant from the viewpoint

1 BENCZE, M. *"Nincs füst, ahol nincsen tűz." Az ártatlanság vélelmének érvényesülése a magyar büntetőbíróságok gyakorlatában* ["There is no smoke where there is no fire." Validation of the presumption of innocence in the practice of Hungarian criminal courts]. Budapest: Gondolat Kiadó, 2016, pp. 39–42.

of legal dogmatics; of course, judges can meet them but they do not use the proper terminology to label these type of cases. Judicial work's natural characteristics is the obligation to decide every case – so, in judicial practice, category of easiness or hardness is not so essential, because judges concentrate on *solving* the cases. They must solve legal disputes because *non liquet* is not welcomed.

First of all, we should accept and should not challenge the distinction easy cases-hard cases. Whether it is proceeded from the terminus made by ancient Roman lawyers *"casus normalis"*, or from the most relevant theories (of *Hart* and *Dworkin*), one thing is clearly common: *easy case* means a situation where the judge can be sure in the conclusion thanks to a written rule – as this rule's content is unambiguous and unequivocal. The solution can be found in the field of *ius* which is articulated in an undisupted way. Furthermore, something is also needed: the factual situation and the written rule should match to and the judge simply "put" the rule to the case. From this viewpoint, easy case can be invoked as rule-based decision as well: the judge do not have to use discretion or do not have to find values and aims behind the written rule; the decision is simply born like a result of a mathematical problem comes to an end.

The question is much more complex in *hard cases* where written rules do not play a traditional role in decision-making. There are a lot of cases which prove that we can not solve every legal case with written rules. In addition to that, judicial application of law should not be restricted to a mechanical process! Hence, our task is to emphasize what does hard case mean – briefly, the problem has many interesting sides, and hardness of a case can come from various sources. Hardness can arise from the law itself and there are cases when factors over law come to the front. The adjective "hard" expresses that there are disputes which challenge the most prepared judges, and even theorists solve them in different ways – accordingly, hard cases have different solutions and all of them could be right even if these solutions are opposing. Accepting *Bix's* idea: *"Hard cases are those in which competently trained and thoughtful lawyers or judges might come to different conclusions about the result. In a sense, the difficulty or easiness of a case could be seen along a few variables: the extent to which all (competently trained) people would agree about the outcome, and, for*

any given evaluator, the quickness with which the conclusion is reached and the confidence or certainty with which the conclusion is maintained." [2]

The question of the origin of the easy case – hard case distinction deserves special attention. According to the so-called traditional reading, legal positivism has finalized the thesis, but if it is true, then a specific legal positivism concept and position is needed, as it does not matter at all who (which theorist) handles it and what does legal positivism mean.[3] In fact, the hard case-question is most vividly seen in the work of *Hart* and *Dworkin*, and in the debates between these two. The other two versions of origin go back much further. In agreement with *Szabó*, it can be said that there were already numerous difficult cases in Roman law, as Roman lawyers sought to ensure that the decision corresponded to the universal aim of law, *aequitas*.[4] The third answer is an intermediate stage between Roman law and legal positivism: *Leibniz*. He, as he also wrote his doctoral thesis on the problem of the *casus perplexus*, was innovative because he dealt with logical puzzles, hence a kind of variant of hard cases. He highlighted these cases from the pure logical-linguistic area and made them legally relevant, associating a legal solution with them. He thought that all cases can be solved, and this follows from his natural law-attitude. *Leibniz* was also a reformer in assuming that the subjects of law were not ordinary cases.[5]

Focusing on the "triumvirate" of the case-question, it is clear that Leibniz can be considered a somewhat special author compared to *Hart* and *Dworkin*. In *Leibniz's* system, all cases can be solved *ex mero jure*; regarding easy cases this is almost natural, and for hard cases it is reassuring. So there are no unsolvable, impossible cases, and he also considers hard cases to be puzzles – the response to these is aided by logic, which is rooted in natural law. For *Leibniz*, logic is also important for modeling, explanation, and understanding, and what he writes about the relationship between logic and law has remained a rather fruitful thought on the continent and in the

2 BIX, B. H. *A Dictionary of Legal Theory*. Oxford: Oxford University Press, 2009, pp. 81–82.
3 MARMOR, A. *Interpretation and Legal Theory*. Oxford: Hart Publishing, 2005, p. 95.
4 SZABÓ, M. *A jogdogmatika előkérdéseiről* [On the preliminary questions of legal dogmatics]. Miskolc: Bíbor Kiadó, 1996, pp. 40–41.
5 PAKSY, M. Leibniz, a jogász – Leibniz, a filozófus. Észrevételek az életmű jogtudományai vonatkozásairól [Leibniz the lawyer – Leibniz the philosopher. Reflections on the jurisprudential aspects of his life's work]. *Working Papers in Philosophy.* 2015, no. 5, p. 5.

Anglo-Saxon world. In his life, *Leibniz* tried to introduce rationality into the world of law through logic – a great accomplishment as he sought to bring order and system into the true "legal cacophony" that prevailed in his day.[6] His paradigmatically hard case, the *Protagoras-case*, is also special because he declared this puzzle to be legally relevant by associating a legal solution with it, thus making it fit to reinforce his commitment to logic, the close connection between law and logic. As Paksy writes: *"*[Leibniz …] *makes full use of the logical paradox potential inherent in the terms of contracts of an aleatoric nature, which is in fact the result of a combination of a contingent factual truth (i.e., the contractual term) and a perpetual reasoning (i.e., the obligation to keep the promise in the contract)."*[7] What we may have a sense of lack of, although *Leibniz* might have expected because of his genius, is an incomplete interpretation of the range of hard cases because of the focus on a particular type of hardness. It is likely that the concept of *Leibniz's* legal system and decision-making will once again be as important as it once was, and this is because the rapid development of technology again requires a legal system that works like a mathematical system, and the idea of *Leibniz's* judgment machine may become interesting again. It is therefore conceivable that AI will be able to relieve the burden of law enforcement by the fact that many so called mechanical actions, which do not necessarily require thinking, will be performed by machines, so they will "make decisions" – we will come back later to analyse this impact of the oeuvre.

6 In addition to these thoughts, *Brewer's* excellent study also points out that the famous *Leibniz* view that law is an axiomatic system is far from the common law world – as many have previously thought. Axiomatic certainties need to be known to provide a clear method for deciding whether a particular argument is justified according to the rules of the axiomatic system. The axiomatic system supports the exclusion of judicial arbitrariness and expects justified and reasoned decisions to be made. In *Leibniz*, axioms have two sources: on the one hand, rationality, reason, reasons as principles of natural law, and, on the other hand, specific judicial judgments given by judges under a particular law of a given state. (Of course, *Leibniz* was not the only one to idealize axiomatic systems, there are other authors, e.g., *Savigny*, *Austin*, or *Blackstone*, but it is different who sees what as the source of the axioms of law.) See BREWER, S. Law, Logic and Leibniz. A Contemporary Perspective. In: ARTOSI, A. et al. (eds.). *Leibniz: Logico-Philosophical Puzzles in the Law. Philosophical Questions and Perplexing Cases in the Law*. Dordrecht: Springer, 2013, pp. 199–226.

7 PAKSY, M. A jog barokk birodalma. A jogtudomány helye Leibniz életművébe [The baroque realm of law. The place of jurisprudence in Leibniz's oeuvre]. *Különbség*. 2017, no. 1, p. 271.

Regarding *Hart* and *Dworkin*, the very fortunate situation is that it is not particularly necessary to prove why their work is essentially relevant – there is a very strong consensus in jurisprudence because a large part of the legal theory-community acknowledges that they laid the groundwork for the case-problem. Many have already criticized *Hart* (e.g., he did not make good use of the Waissmann-Wittgenstein foundations and drew from them superficially), and we know his reformer thoughts, too (e.g., focus on the linguistic aspect, the duality of the core of meaning and the core of penumbra and their effect on the application of law). *Dworkin's* entire legacy is imbued with an interest in hard cases. He criticizes *Hart's* legal positivism and his colleague's case-explanations, but at the same time he reconsiders and revises his own views throughout his life. His greatest invention – to value the principles and strengthen their role in resolving hard cases. This should be complemented by the important statement that while emphasizing the contrasts of rules and principles are indeed very important, it is best to look at the principles as follows: late Dworkin has already clearly described them as having a direct connection with the morality that underpins the law, more precisely with the political morality of the given community. This is why we can say that the hard case of *Dworkin* completely leaves the path illuminated by *Leibniz* (logic) or *Hart* (linguistic issues, judicial discretion) and enters a new path where moral-political dilemmas lie.

2.2 Sources of Hardness in Cases

What makes a case hard? Over the centuries, legal scholars (such as *Leibniz*, *Hart*, *Dworkin*, *Raz*, *Shauer*, *MacCormick*, *Szabó*, *Bencze*, *Paksy*, etc.) have explored many sources of the hardness; generally speaking, there may be several, even conflicting, solutions to the hardness. More precisely, the characteristics of "hard cases" can be summarised as follows, based on the theoretical history of case-problem theory.[8] There are three main sources of hardness (from which additional subcategories can be developed): the hardness of establishing the facts (the evidence itself); the hardness of determining

8 See this theory in details PŐDÖR, L. The nature of "easy case-hard case" distinction in judicial decision-making – A legal theoretical approach. Doctoral thesis. Győr: Széchenyi István University Doctoral School of State and Law, 2021, 285 p. Available at: https://doktiskjog.sze.hu/downloadmanager/details/id/38839/m/3620 [cit. 1. 5. 2022].

(interpreting) the applicable law; or the moral rightness of the decision as a factor of hardness. The easy case-hard case dilemma is fundamentally determined by what concept of law we use, what we consider to be a source of law, and which phenomenon beyond positive law should be the element of law as well.

As it is not possible to fully analyze all the subcategories belonging to the main sources, I would like just to highlight the relevant aspects.

The decision based on principle is significant because it has been explicitly brought to the fore since *Dworkin*. There is a great tension between the rule and the principles, this was also clear from the normative examination. In the common law legal system, there was less promotion of the principles to a normative level, all the more so in continental law – but this does not mean that in Hungary, for example, all principles can be found in codes. The decision in the case of the lack of norms is a very divisive issue, and the theories do not even touch it, although it is a classic topic of legal theory. Legal theorists can also be divided into two groups, as many deny the existence of a legal loophole, while others acknowledge it. It is also difficult to give an example of a loophole, only because judges cannot deny their obligation to decide every single case even if there is a loophole, the phenomenon remains hidden. The difficulties centered around legal interpretation are widely known, as interpretation interweaves the entire decision-making process.

Hardness in the fact-finding process may be the most controversial question. Researchers usually look at the facts from two perspectives: general epistemological and sociological-psychological perspectives. The thing opens up more in the fact that in judicial decision-making the decision on the question of fact and law is closely intertwined. The nature of law is indeed linked to the obligation to choose the legally relevant facts and, in the same way, to the discretion of the judiciary. Both the establishment of the relevant facts and the difficult questions and dilemmas that require interpretation in relation to the classification of judicial discretion arise, so we regard it sustainable to consider the problems of fact-finding as one of the typical bases of the range of hard cases. Not only because the general wording of judicial discretion in many cases does not facilitate the

work of judges and therefore can lead to the formation of a hard case, but also because the legal inclusion of relevant facts requires the resolution of dogmatic conflicts and interpretations.

Moral difficulty can rightly be one of the hardest cases, as deciding legal cases and their moral justification is one of the most complex and controversial issue. This is because the relationship between law and morals is not clear either, there is no eternal answer that is valid everywhere and at all times. The problem is thus diverse, there are a lot of type of moral difficulty from a particular aspect through a specific legal case, where the moral principles of law are at the center in a case becoming a precedent. This is most often the case when human life and dignity as an absolute value are at stake.

Finally, we confirm that this typology, and the easy case-hard case types included in it, may be relevant to both the continental and common law legal systems. Obviously, there are legal system-specific applications of law-techniques and perspectives, but along many sub-issues, it emerges that they have an equivalent in the other legal system as well. Belonging to a legal culture has less impact on the judge on how to decide easy and hard cases, and in fact, representatives of legal systems do not have a specific strategy for solving these. It is more correct to say that the nature of the case determines how the case at hand should be decided. Moreover, presumably, almost the same cases are considered easy or hard by a continental and an Anglo-Saxon judge. In the common law and the continental legal system, the hard cases are similar, the only difference is in the reasoning.

3 The Process of Decision-Making

The process of judicial application of law is characterized from the point of view of practice as a decision in matters of facts and law. Above, we have seen what is the difference between easy and hard cases – we may add that this theory applies to cases decided by human judges. And what happens when a human decides a judicial case (whether the easy or the hard case)? Judgment refers to the very complex mental workings of the human mind. The judge builds a bridge between the facts of the case and the applicable rule. Legal methodology attempts to define more precisely what this intellectual process

is. Historically, law has developed three methods for decision-making: the deductive method (syllogism), the argumentative method and the case method. All of them involve the most difficult challenge in the application of the law: the constant interplay between the *general* (which is the legal norm itself) and the *specific* (which means the case itself). However, it should be known that human thinking is a real "black box"; it has never been written down, nor can it be described today, how human beings (judges) think, and consequently we cannot have an accurate knowledge of the real processes of law enforcement. Now, I also would like to concentrate on the two most important methods – syllogism and case method.

It is a general finding that the application of law on the continent can best be described by legal syllogism (deduction), while in the Anglo-Saxon legal system it can be described by the case method. It is wrong, however, that if this differentiation is strictly justified. Legal systems and legal cultures are far from separable, they have a lot in common, and a lot of institutions have their own special version in the other legal system as well. The third method, argumentation has an important benefit; it calls attention to the importance of reasoning and warns that a decision is never made, but must be found. Just to refer to some of the components that are relevant in both main methods: the role of previous court judgments in the application of law, *verba* vs. *ratio*, the formalism-problem, usage of analogy, the nature of universalism and particularism, the search for the idea of law, casuistry or the Roman legal roots of the two dominant legal systems.

(Legal) syllogism is synonymous with the deductive method. This refers to the idea of legal reasoning as a logical conclusion. The syllogistic character of legal reasoning is not a descriptive statement but a prescriptive statement.[9] Thus, syllogism is in practice a deductive form of deduction, consisting of two premises: *premissa maior* (upper proposition) and *premissa minor* (lower proposition). In the process, the lower proposition must be subordinated to the upper proposition (sub-summation), which creates (deduces) the conclusion. In terms of the application of the law, this works as follows: the legal norm applied is the upper item, and in addition there is the assertion that a fact of the

9 SZABÓ, M. *Rendszeres jogelmélet* [Systematic legal theory]. Miskolc: Bíbor Kiadó, 2014, p. 169.

case has occurred. From all this we infer the conclusion of the application of the law, so the lower proposition is subordinated to the upper proposition.[10]

Some emphasise that in the operation of syllogism, the judge is dealing with classes: the rule refers to a typical class of facts, which in turn point towards a particular conclusion. The judge's task is to decide whether or not the client's particular situation, the historical facts, fall within the class defined by the rule. The general difficulty with the deductive process is that legal reasoning can create a great deal of uncertainty; the judge cannot reach a firm conclusion if he or she simply focuses on the linguistic correspondence between the rule and the facts. The complexity of the linguistic aspect lies in the use of general terminology: it is often the case that the litigants' situation can be described by several different factual situations, so that more than two possible alternatives emerge as premissa minor. The final conclusion will depend on which premissa minor is finally chosen by the practitioner. And the concepts (classes) contained in the rule are highly generalised, but ultimately this is a requirement of legislation – which is also the cause of many difficulties in the application of the law.[11]

In the context of the case method, reference should be made to the following. Methodologically, it is not the literal "model" of the application of the law, as already discussed in the syllogism, but reasoning from case to case. The judge looks for similarities, or analogies, between individual, concrete cases.[12] The system of precedent requires the court to give a genuinely identical judgment in cases with identical facts. The rule of stare decisis (or "maintenance of the decision") requires subsequent courts to adapt their decisions to the pattern of decisions laid down in earlier decisions on similar facts by higher or equivalent courts.[13] In this method of applying the law,

10 WRÓBLEWSKI, J. A jogi szillogizmus és a bírói döntés racionalitása [Legal syllogism and the rationality of judicial decisions]. In: BÓDIG, M. and M. SZABÓ (eds.). *Logikai olvasókönyv joghallgatók számára*. Miskolc: Bíbor Kiadó, 1996, p. 209.

11 VANDEVELDE, K. J. *Thinking Like a Lawyer. An Introduction to Legal Reasoning*. Boulder, Colorado: Westview Press, 2011, pp. 95–96.

12 EÖRSI, Gy. *Összehasonlító polgári jog. Jogtípusok, jogcsoportok és a jogfejlődés útjai* [Comparative civil law. Types of law, groups of law and paths of legal development]. Budapest: Akadémiai Kiadó, 1975, p. 472.

13 SZABÓ, M. Mi a "precedens"? Előadások a precedensek szerepéről a magyar joggyakorlatban [What is "precedent"? Lectures on the role of precedents in Hungarian jurisprudence]. *Jogesetek Magyarázata*. 2012, no. 2, p. 74.

judges engage in inductive reasoning (cf. *Bacon* and inductive inference). The inductive chain of reasoning is also echoed in the works of traditional Anglo-Saxon legal theorists. However, these authors polemicise over the question of how inductive reasoning can be properly defined in case law. One possible direction is to define it as the opposite of the deductive chain of inference, i.e., the judge must discover the general rule from individual cases. The most striking difference between these two methods is what is taken to be the source of the upper theorem: in deductive reasoning it is taken as a given, whereas in inductive reasoning it is produced by specific examples. The past case is actually an example of the rule – hence why induction is referred to as the inverse of deduction. Moreover, it should be remembered that precedent is reasoning by example, case by case: the judge therefore decides the case before him in the same way as he decides a past case, provided that this past case is sufficiently reminiscent of the present case in the relevant respects.[14]

4 Leibniz Back in the Spotlight – What Is Leibniz's Ingenuity? Some Thoughts on Law, Language, and Mathematics

Having clarified the preliminary questions, we must now turn to the next question: why is *Leibniz's* work so relevant to the technological revolution of the 21st century? What can be drawn from *Leibniz's* views in relation to the modern challenges of decision-making?

Hart was the first who drew attention to the vagueness of language and consequently, for him, this problem was also the dividing line between easy and hard cases. As for legal language, it can be considered part of everyday language. Until the Age of Enlightment, there was no suggestion that law had anything to do with logic or mathematics – *Leibniz* was the first to approach the legal system mathematically, so he could see there is a connection between language, mathematics, and law.

Leibniz is known as the founder of modern legal thinking. He was a truly reformer thanks to his philosophical, legal, and scientific views, moreover,

14 HART, H. L. A. A jogi érvelés problémái [The problems of legal reasoning]. *Jogesetek Magyarázata*. 2010, no. 3, p. 88.

in the 21st century, his theory should be appreciated again – of course with special emphasis. His oeuvre is so alive in the era of AI, because his legacy has a significant effect on characterizing the legal system and on understanding the nature of the judicial decision-making process. The rapid development of technology requires a legal system that works like a mathematical system, and the idea of *Leibniz's* "judgment-machine" may become interesting again.

To understand *Leibniz's* eternal and always current views on legal system and judicial decision-making, we need to know his life and work, as well as the particular historical epoch when he lived. *Leibniz* was a genius, some refer to him directly as the "last polyhistor"[15], as he was also proficient in mathematics, theology, law, history, and medicine. *Leibniz's* ideas are characterized by impressive intellectual independence and originality, and this was true of him even in his young years. In terms of cultural history, *Leibniz* was a scholar of the Baroque era, which, with its monumentality, emphasized its ambitious goals similarly, a peculiar Baroque imprint of *Leibniz's* oeuvre is polyhistory rooted in versatility.[16] As far as the conception of law is concerned, this period can correspond to an advanced period of natural law; in a sense, this already means modern natural law.[17] During this time, the German territories also showed specific administrative and legal features; we are well ahead of the great codifications, but key figures in history had already made great strides in the world of science, and these steps were excellent for the creation of unification and codified law. The "Holy Roman Empire" consisted of more than 300 ecclesiastical and secular states of all sizes, and such a vast and fragmented empire did not have a unified legal system. Due to fragmentation, various written and unwritten imperial laws, local and regional customs and treaties were considered the "constitution" of the empire. This situation favored the judiciary, and the judges were greatly strengthened. In the fragmented German territories, Roman law continued to be the "common law", mainly in the court practice. *Leibniz* perceived the

15 LENDVAI, F. *A gondolkodás története* [The history of thinking]. Budapest: Móra Könyvkiadó, 1983, pp. 105–107.

16 FRIEDELL, E. *Az újkori kultúra története I. Az európai lélek válsága a fekete pestistől az I. világháborúig. Bevezetés, reneszánsz és rokokó* [History of culture. I. The crisis of the European soul from the black plague to World War I. Introduction, renaissance and rococo]. Budapest: Holnap Kiadó, 1998, p. 624.

17 ARMGARDT, M. Leibniz as legal scholar. *Fundamina*. 2014, Vol. 20, no. 1, pp. 32–33.

potential of Roman law and saw it not only as a redundant substance, but as a basis of law. In contrast to Roman law, contemporary German laws were the result of "barbarism" rather than the "fruits" of nice work. *Leibniz* believed that if Roman law was the basis of law, its corpus should have been restricted to a few general rules. In fact, throughout his life he dreamed of the culmination of this program, and for the rest of his life he admired Roman jurists and the quasi-geometric subtlety of their reasoning.[18]

There are three important facts in connection with *Leibniz's* theory of law. Firstly, the analysis of legal (mainly law enforcement) dilemmas requires a multidisciplinary dialogue, i.e., a dialogue between law and other sciences such as philosophy, logic, mathematics, physics and theology. *Leibniz* thought that there is a great deal of harmony between law and mathematics and physics, and this is because of the Roman legal foundations; Roman law operates with solutions that coincide with the functioning of nature. Philosophy is also an essential discipline, because without it, the law is an inexplicable maze; if philosophy helps law, then unsolvable cases (e.g., paradoxes[19]) will also be solvable. Secondly, law also requires a dialogue between its own schools, incidentally, natural law and positive law (which one includes Roman law and the law of the various Germanic states). And last but not least, understanding the law requires a multitude of different ways of reasoning and cognition that can be chosen on a pragmatic basis.[20]

Leibniz discovered that mathematics (and its field, combinatorics) and logic help to settle the legal system and to solve legal problems as well. Jurisprudence is very similar to geometry, because both are made up of elements and there are cases in law and in geometry as well. The concept of "case" first had appeared in geometry and it means the arrangement of lines, planes, and bodies by which mechanicians demonstrate certain issues (such as quantity, relation or similarity). Lawyers actually do the same thing, that is, they

18 ARTOSI, A., PIERI, B., SARTOR, G. Introduction. In: ARTOSI, A. et al. (eds.). *Leibniz: Logico-Philosophical Puzzles in the Law. Philosophical Questions and Perplexing Cases in the Law*. Dordrecht: Springer, 2013, pp. XVI–XX.

19 One of his famous paradoxes is called Protagoras-case which is a *perplexing case*. See it in details: GELLIUS, A. *Attikai éjszakák* [Attic Nights]. Budapest: Franklin Társulat, 1905, pp. 363–365.

20 ARTOSI, A., SARTOR, G. Leibniz as jurist. In: ANTOGNAZZA, M. R. (ed.). *The Oxford Handbook of Leibniz*. Oxford: Oxford University Press, 2018, pp. 644–645.

demonstrate legal situations with the help of facts.[21] In *Leibniz*, the concept of case *"… in general is the antecedent of a hypothetical proposition; as applied to jurisprudence, this antecedent is called the fact, the consequent the legal position, and a case will be defined as a fact in relation to a legal position."*[22]

The relationship between law and geometry is not new in itself, as it has been formulated since ancient times. *Leibniz's* innovation lies in the fact that he explains that combinatorics also appears in law, and with the help of which the possible cases and also the applicable rules can be calculated. This means that both law and geometry deal with cases, and cases can be formed by combining elements (based on the order of demonstration).[23] The usual elements of geometry are various shapes (e.g., triangles), and in jurisprudence an element can be an act, a promise, an alienation, and so on. Elements of law can be read from the *Corpus Iuris*, but law also includes more complicated cases.[24]

When he was 20, he wrote *De Arte Combinatoria*; the dissertation has a very thoughtful logical content, so his theory in it anticipates *"modern ideas of proof system and algorithm"*[25]; through these views, Leibniz anticipates some really modern ideas.[26] He created the following idea: *Characteristica Universalis* (i.e., *Universal Mathematics*) which was just a symbolic method, but its greatest advantage is as follows: results could be achieved in all sciences – the same way as mathematics produces its results.[27] This method is strange in a way because it can eliminate human thinking with the help and use of some formal rules. But what about controversies? *Leibniz* writes: *"If controversies*

21 LEIBNIZ, G. W. Inaugural Dissertation on Perplexing Cases in the Law. In: ARTOSI, A. et al. (eds.). *Leibniz: Logico-Philosophical Puzzles in the Law. Philosophical Questions and Perplexing Cases in the Law*. Dordrecht: Springer, 2013, p. 72.

22 Ibid.

23 VARGA, Cs. Leibniz és a jogi rendszerképzés kérdése [Leibniz and the Question of Legal System-Formation]. *Jogtudományi Közlöny*. 1973, no. 11, p. 603.

24 SZABÓ, M. Ars casus formandi. In: SZIGETI, P. (ed.). *Ordo et connexio idearum. Ünnepi tanulmányok Takács Péter 65. születésnapjára* [Ordo et connexio idearum. Celebratory Studies for Péter Takács' 65th birthday]. Budapest, Győr: Gondolat Kiadó, Széchenyi István Egyetem Deák Ferenc Állam- és Jogtudományi Kara, 2020, p. 173.

25 MARTIN, J. N. Leibniz's De arte combinatoria. *University of Cincinnati* [online]. 2003, 17 p. [cit. 1. 5. 2022]. Available at: https://homepages.uc.edu/~martinj/Rationalism/Leibniz/Leibniz%20-%20Art%20of%20Combinations%201666.pdf

26 Ibid.

27 CAIRNS, H. *Legal philosophy from Plato to Hegel*. Baltimore, Maryland: The John Hopkins Press, 1949, p. 300.

were to arise, there would be no more need of disputation between two philosophers than between two accountants. For it would suffice to take their pencils in their hands, to sit down to their slates, and to say to each other (with a friend as witness, if they liked): Let us calculate."[28] These phrases sound really modernized, no doubt, these can be the very early articulation of expressions-as-data idea. And why is it so precious and important? Because *"it eventually led to mathematical logic, stored program computers, artificial intelligence, and meta-programming."*[29] According to *Leibniz*, *Characteristica Universalis* is very similar to syllogism and he emphasised that it is a kind of universal mathematics, a great human invention.[30]

Leibniz also wanted to create a "universal language" which works with several important basic terms[31] (as mentioned above). Combinating these basic terms, every dilemma could have a solution, or we can say: every true judgment could be expressed by these (if we exclude the false ones).[32] This thought came to an interesting conclusion: a so-called "judgment-machine" could be the key, i.e., the mission of these machines could be invention *(ars inveniendi)*. The philosopher-jurist believed that judicial judgments could be mechanized, too, which means that a special machine has the judgments in advance as judgments are *"programmed into it"*.[33] The law strives for completeness and predictability in the spirit of rationalism – and this desire can only be provided by such a machinery[34]. The consequence

28 Otherwise, the work's much-quoted keyword is this famous *calculemus*-idea. Cited by RUSSEL, B. *A Critical Exposition of the Philosophy of Leibniz*. London: Routledge, 1992, p. 201.

29 PEARCE, J. *Programming and Meta-Programming in Scheme*. New York: Springer, 1998, p. 293.

30 Unfortunately, syllogism is not perfect. As *Russel* writes: *"But* […] *it had the formalist defect which results from a belief in analytic propositions, and which led Spinoza to employ a geometrical method.* […] *The Universal Characteristic, therefore, though in mathematics it was an idea of the highest importance, showed, in philosophy, a radical misconception, encouraged by the syllogism, and based upon the belief in the analytic nature of necessary truths."* RUSSEL, B. *A Critical Exposition of the Philosophy of Leibniz*. London: Routledge, 1992, pp. 201–202.

31 SZABÓ, M. *Logica Magna. Utazások a logika birodalmában* [Logica Magna. Journeys in the empire of logic]. Miskolc: Bíbor Kiadó, 2014, p. 29.

32 VARGA, Cs. *A jogi gondolkodás paradigmái* [Paradigms of Legal Thoughts]. Budapest: Szent István Társulat, 2006, p. 345.

33 BERKOWITZ, R. *The Gift of Science. Leibniz and the Modern Legal Tradition*. Cambridge, Massachusetts: Harvard University Press, 2005, pp. 60–72.

34 VARGA, Cs. *Politikum* és *logikum a jogban. A jog társadalomelmélete felé* [Politics and logic in law. Towards a social theory of law]. Budapest: Magvető Kiadó, 1987, p. 46.

is simply fantastic: every case can be solved *ex mero jure*. This undertaking was a particular success *"in a wider endeavour of axiomatisation and rationalisation of law."*[35]

The jurist-philospher considered that it was not a correct statement in his time to perceive that there were cases that could not be decided under civil law or that in such a situation judges would have to make an arbitrary decision.[36] To prove this, he argued for the axiomatizable legal system that we have already discussed above. According to *Leibniz*, there is no difficulty in applying the law in "routine cases", where judges use *syllogism* (a quasi mathematical method) to decide the case; difficulty only occurs in more complex cases – at him, this situation is called *casus perplexus* (perplexing case). As researchers emphasise, this view correlates with *Leibniz's* attitude that there is a similarity between law and geometry; and of course, the legal system is a complete whole in which all the answers can be found. In this idea, law-making is kind of an economic method because there are only a few laws and these are enough to cover countless cases – because (as combinatorics claims) countless combinations can be made.[37]

As we have seen above, the legal system should be axiomatized. Axiomatic certainties need to be known to provide a clear method for deciding whether a particular argument is justified according to the rules of the axiomatic system. The axiomatic system supports the exclusion of judicial arbitrariness and expects justified and reasoned decisions to be made. In *Leibniz*, axioms have two sources: on the one hand, rationality, reason, reasons as principles of natural law, and, on the other hand, specific judicial judgments given by judges under a particular law of a given state. Of course, Leibniz was not the only one to idealize axiomatic systems, there are other authors, e.g., *Savigny*, *Austin*, or *Blackstone*, but it is different who sees what as the

35 BOUCHER, P. What Kind of Legal Rationalism? In: DASCAL, M. (ed.). *Leibniz: What Kind of Rationalist?* Dordrecht: Springer, 2008, p. 232.

36 ANTOGNAZZA, M. R. *Leibniz. An Intellectual Biography*. Cambridge: Cambridge University Press, 2009, p. 66.

37 DASCAL, M. (ed.). *G. W. Leibniz: The Art of Controversies*. Dordrecht: Springer, 2006, p. 88.

source of the axioms of law.[38] In Leibniz's system, all cases can be solved *ex mero jure*; regarding "routine" or "easy cases" this is almost a natural feature, and for "hard cases", it is reassuring. So there are no unsolvable, impossible cases, and he also considers "hard cases" to be "puzzles" – the response to these is aided by logic, which is rooted in natural law. For *Leibniz*, logic is also important for modeling, explanation, and understanding, and what he wrote about the relationship between logic and law has remained a seriously fruitful thought on the continent and in the Anglo-Saxon world. Throughout his life, *Leibniz* tried to introduce rationality into the world of law through logic – a great accomplishment as he sought to bring order and system into the true "legal cacophony" that prevailed in his time. His paradigmatically "hard case", the Protagoras-case, is also special because he declared this puzzle to be legally relevant by associating a legal solution with it, thus making it fit to reinforce his commitment to logic, the close connection between law and logic.

5 Judicial Decision-Making by Humans or by Machines?

A vision of "judgment-maschines" is becoming a reality. Algorithms can definitely solve some type of cases (especially easy cases) in advance. This is why several methods do not need thinking – these could be solved automatically by machines, because syllosigm, in a sense, can be done mechanically (as we have seen it in this paper, in chapter 3). We point out that there are a number of rules that do not need a robot or even a human judge to enforce them; people are often lucky enough to behave in a law-abiding way. This trend is likely to continue under AI. Of course, there are many arguments in favour of machine decision making, such as: quasi-formalised perfection, the possibility of testing, quickness of the procedure, the pursuit of norm fidelity, the exclusion of arbitrariness, the elimination of subconscious factors from the decision, etc. But it must not be forgotten that legal disputes, thus the application of law, take place in a discursive space, language may raise some problems.

38 BREWER, S. Law, Logic and Leibniz. A Contemporary Perspective. In: ARTOSI, A. et al. (eds.). *Leibniz: Logico-Philosophical Puzzles in the Law. Philosophical Questions and Perplexing Cases in the Law*. Dordrecht: Springer, 2013, pp. 201–205.

As with so many other phenomena, globalisation is leaving its mark on digitalisation. It is hard to find a rule that is supposedly nation-specific. For a very long time in the history of law – and even in *Leibniz's* time – Roman law was a kind of common set of solutions, so Roman law had a certain globalising power, bringing the different legal systems closer together. Nowadays and in the future, an interesting question will be the following one: which instrumental system can fill the role in law that Roman law once played – perhaps the new body of rules on AI will become such a universal body of law? Furthermore, what is new is that law is becoming increasingly proactive. This means that its function is changing: it no longer seeks primarily to react to past breaches of the law, but rather to promote a desirable state of affairs – perhaps this is the role that regulatory algorithms will play? These dilemmas suggest that we are on the threshold of a new world, and perhaps we have already entered it. Let us look at what lies ahead for law enforcers in this new area.[39]

Firstly, we know very well that technology can help everyday life in a lot of way, and some type of machines ("judgment-machines") may also facilitate the work of lawyers. It seems *Leibniz's* vision of "judgment-machines" is becoming a reality. Algorithms can solve some type of cases (especially "easy cases") in advance, so they take the burden off the lawyers' shoulders.[40] But it must not be forgotten that legal disputes, and thus the application of law, take place in a discursive space. The poles of the space of natural language are constantly moving – and this is done by the participants of the legal procedure (judge, plaintiff, defendant, etc.). Two things can create a connection between the world of man and the machine: the *sign* and the *rule*, but both are radically different in these two worlds.[41] *"Man finds meaning*

39 ZŐDI, Zs. A digitalizáció hatása a jogászi szakmára [The impact of digitalisation on the legal profession]. *Gazdaság és jog*. 2018, no. 12, pp. 3–4.

40 An excellent example of this phenomenon is the VÉDA system in Hungary, which deals with infringement procedures. See RITÓ, E., CZÉKMANN, Z. Okos megoldás a közlekedésszervezésben – avagy az automatikus döntéshozatali eljárás egy példán keresztül [Clever solution in transport organization – or the automatic decision-making procedure as an example across]. *Miskolci Jogi Szemle*. 2018, no. 2, pp. 104–118.

41 ZŐDI, Zs. Gépek a jogban. Jogelméleti gondolatok a számítógépek jogalkalmazásáról [Machines in law. Legal Theoretical Thoughts on the Application of Law by Computers] [online]. *Jogelméleti Szemle*. 2013, Vol. 2 [cit. 22. 3. 2022]. Available at: http://jesz.ajk.elte.hu/zodi54.pdf

in natural events, the machine, on the other hand, assigns a rule to any 'sign', physical phenomenon, so that information and then 'action' is not filtered through meaning, but directly through causal relationships; these causal relationships are very complex and many times conditional."[42] The machine can create the illusion that it is a sensible, thinking creature like human beings – but we know this thought is a total illusion.

In the context of the coordination of the "judgment machines" of the future, some complex dilemmas need to be referred to. AI-based systems are not governed by rules, but by codes – the human judge, on the other hand, is, of course, rule-based, as explained above. The connection between computers and rules is not new; in practice, computers work according to the same logic as law ("if … then …"). So far, AI cannot enforce the rules to which we humans adjust our behaviour. The AI needs these rules to be translated into codes so that the software can interpret and process them. All of this being said, translating rules into codes could in practice become a new legal profession, since it requires a new kind of specialised expertise. It is not simply a question of "translation", but of AI requiring procedures to be developed for them.[43] As *Zsődi* writes: *"… all operations that consist of serving information will be fully automated in a very short time. This is also the case in law: here, too, it is often only necessary to find and recall the text of one or more specific rules in order to find a solution. The text recognition, analysis and summarisation algorithms, some of which are available to the general public through the major internet search engines, are becoming more and more advanced and will soon be able to provide meaningful and useful answers to questions in natural language."*[44]

Furthermore, there is an other problem. *Leibniz* also saw that the legal cacophony that prevailed at his time could be put in order by narrowing the legal system to certain general rules – the ideal for him was shown by Roman

42 ZŐDI, Zs. Gépek a jogban. Jogelméleti gondolatok a számítógépek jogalkalmazásáról [Machines in law. Legal Theoretical Thoughts on the Application of Law by Computers] [online]. *Jogelméleti Szemle*. 2013, Vol. 2 [cit. 22. 3. 2022]. Available at: http://jesz.ajk.elte.hu/zodi54.pdf

43 ZŐDI, Zs. A robottanácsadók jogi problémái: hogyan szabályozzuk a robotokat? [Legal problems for robot advisors: how to regulate robots?]. Állam- és *Jogtudomány*, 2020, no. 4, pp. 125–127.

44 ZŐDI, Zs. A digitalizáció hatása a jogászi szakmára [The impact of digitalisation on the legal profession]. *Gazdaság* és *jog*, 2018, no. 12, pp. 7–8.

law. The transfer of mathematical and logical solutions to the world of law served to eliminate linguistic uncertainty. *Leibniz,* and many others, have noticed that law cannot be made perfectly predictable and mathematizable, because natural language involves uncertainties. Language should be more exact, but for lawyers (and for machines!), this is a hard task. Of course there are fields of law where efforts have been made to algorithmize the language, but these fields has resisted. The situation is even more complicated if we include in this formula the observation made above, i.e., the translation of rules into codes. In fact, there are multiple translations to be done, since first the natural language has to be translated into the language of law and then the resulting rules have to be transformed into codes. This level of legislation, which stops here, unlike the human judge, who is constantly referring from facts to norms, and vice versa – all of which it does countless times in the course of deciding a case.

There are complex relations where language cannot be made predictable, so it remains incessantly obscure. The meanings of the words show their faces in unique situations which cannot be fixed in advance.[45] Let just think of some special types of "hard cases" which were not examined by *Leibniz,* for example here are some types of hardness: hardness of interpreting the applicable law; hardness in the fact-finding process (it may be the most controversial question, but judicial discretion or legally relevant facts are often the typical bases of the range of hard cases – as we have discussed); or moral rightness or wrongness of the decision as a factor of hardness. It is safe to say that decision-making dilemmas cannot be solved on an algorithmic basis or with the help of so-called "judgment-machines". All in all, instead of machines, we need to have real human beings, more precisely judges, who can solve these hard cases – creativity, thinking, considering or exercising discretion are things that only could be feasible by humans, not machines. So in a way, regarding the greatest dilemmas of judging, *Leibniz,* algorithms and AI technology cannot be satisfying enough.

45 ZŐDI, Zs. Hogyan változtatja meg a jog nyelvezetét a számítógép? A logika és a tekhné a jogban [How Does Computers Change the Language of Law? Logic and practical knowledge in law]. *Glossa Iuridica*, 2014, no. 2, p. 119.

6 Conclusion

In this paper we have attempted to explore some of the current and future dilemmas affecting the application of law. The ideas expressed here have answered the research hypotheses, but now, by way of conclusion, we summarise the results.

Using the jurisprudential tradition, we have defined the cases to be decided as easy and hard cases, as this distinction draws attention to the intellectual challenges inherent in judicial decision-making. In the traditional view, the process of applying the law can be described by the deductive or case method, while the former seems to be adaptable to the world of AI – since it is an idea inherently related to the field of mathematical logic. To a certain extent, therefore, machines, "robot judges" could, in principle, relieve judges of their workload, if they derive decisions on a mathematical principle similar to deduction. This statement, however, would only hold true for the so-called easy cases, which are mostly described as quasi-mathematical examples (routine cases) by legal philosophers. The most complex tasks of theory and practice, the decision of hard cases, most certainly require and will continue to require human thinking and creativity, i.e., the decision of difficult cases will remain a decision situation that requires human review. Because AI, at least in the present circumstances, is less effective at supporting human reasoning in difficult cases. Judging means deciding about human lives; from this point of view, it is also important to note that the formulation of the conclusion is perhaps better left in human hands. Of course, the impartiality and speed of the machines can be seen as positive aspects, and there is no doubt that technology can be involved in the lower court process, but the adjudication of appeals without a human judge is unthinkable.[46] This study concentrated mainly on the shortcomings of the technology in terms of language; the precise foundations that would prepare machines for learning and problem solving cannot be created, since the possibility of translating questions of fact and law into the language of machines is already doubtful. The linguistic translation from the natural

46 LŐRINCZ, Gy. A mesterséges intelligencia alkalmazásával hozott döntés jogi megítélésének egyes kérdései [Some questions on the legal assessment of a decision using artificial intelligence]. *Gazdaság és Jog*. 2019, no. 4, pp. 1–7.

to the language of law, and then from the language of law to the "codes" of machines – we argue that this raises the need for a specific new skill set to create robot judges, which would probably even be the outline of a new legal profession. Linguistic doubts are not resolved even if a "normal" judge decides the case in the absence of a robot judge, since most of the hard cases revolve around linguistic aspects – think, for example, of the judicial dilemmas on the ascertainability (interpretation) of the law, which several legal scholars (led by *Hart)* have argued are present. In such a situation, the suitability of a robo-judge to decide cases may therefore be understandably questionable.

From what is described in this study, we can conclude that algorithms are more likely to be more effective in ordering the future than the past. Judicial work, on the other hand, is typically a legal profession where there is a strong emphasis on exploring the past, as it is always necessary to reconstruct events in the past and formulate the appropriate legal response. The nature of legal disputes presents a number of challenges to which machines, however well "prepared", cannot respond in the same way as the human mind. It has also been shown in the outline of legal techniques that the typical task is one of decision making tailored for thinking human beings, not machines. Moreover, the complexity and resolution of difficult cases in practice also calls for human reasoning – this was also evident in the outlining of the dilemmas.

Of course, we can accept that our near future's legal system is quite similar to *Leibniz's* vision: it is a system which will have a well-known ideal, *mathematics*. This was law's ideal when *Leibniz* lived, but later, an other ideal, *argumentation* overcame it. But, as we see, *Lebniz's* theory is topical again, law is becoming something special like mathematics. This view is supported with strong arguments, but cannot face a serious dilemma: solving hard cases of the legal systems. Machines and algorithms will, in a sense, ease the problems of the legal system, but they will not be able to solve the eternal and most burning issues of law, such as hard cases.

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Contact – e-mail
podor.lea@ga.sze.hu

ORCID
0000-0003-1628-2033

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Current Challenges of Cross-Border Disputes in Slovakia – Is Slovak Law Anchored in the 21st century?

Martina Filipová, Veronika Barková

Faculty of Law, Comenius University, Slovak Republic

Abstract

This contribution analyses the systematics and wording of the current Slovak Private International Law Act, which was adopted in 1963 and, with some changes, remains in force. For instance, the linguistic interpretation of the Act raises several problems in practice, to which case law responds with an *ad hoc* approach rather than on a systematic basis. This paper seeks to analyse the current changes the legislative process is bringing to streamline legislation, and draws attention to other shortcomings that need to be addressed. The paper considers the necessary comprehensive recodification of the Slovak Private International Law Act.

Keywords

Act No 97/1963, on International Private and Procedural Law; International Private Law; Recodification; Habitual Residence; Nationality; Jurisdiction; Applicable Law.

1 Introduction

We cannot deny the fact that, due to the considerable growth in the number of civil and commercial cross-border transactions, family relations involving citizens from other states, and procedural relations including a foreign element, the significance of private international law and the rules of procedure in day-to-day legal practice has also proportionally increased. Therefore, incorporating this field of law into legislation is not only a logical, but also a necessary step forward. While, to make legislation more

effective while taking into consideration social evolution and meeting the fair expectations of parties to private relations including a foreign element, the development of private international law within the European Union and in neighbouring countries has been accelerating, Slovak legislation has been significantly lagging behind and is generally regarded as rather obsolete, with a purpose that is not only outdated but, what is more, contrary to the modern trends of the 21st century.

2 National Regulation of the Slovak Private International Law Act

2.1 Necessity for a Comprehensive Recodification of the Slovak Enactment Dating From the Mid-1960s

Private international law is a rather complex legal field, the main sources of which consist of European law, on the one hand, and international treaties (multilateral and bilateral) on the other, whereas national law[1] is only applied in cases not covered by these sources and in accordance with these preferentially applicable norms.[2] For this reason, the national legal regulation should also be properly considered.

The Slovak legal regulation of private international law is governed by Act No 97/1963, on international private and procedural law of 4 December 1963 ("Private International Law Act") which entered into effect on 1 April 1964 and, partially amended,[3] remains applicable today. Although the Private International Law Act was originally regarded as a modern, progressive codification,[4] today it has diverted from modern trends generally applicable to private international law.

1 "National law" in private international law can be referred to as the *"ultima ratio"* standard.

2 PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o medzinárodním právu soukromém. Komentář.* Praha: Wolters Kluwer, 2013, p. LIII.

3 Since coming into effect, it has been amended several times through Acts No 158/1969, 234/1992, 264/1992, 48/1996, 510/2002, 589/2003, 382/2004, 36/2005, 336/2005, 273/2007, 384/2008, 388/2011, 102/2014, 267/2015, 125/2016 and, most recently, Act No 108/2022.

4 PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o medzinárodním právu soukromém. Komentář.* Praha: Wolters Kluwer, 2013, p. LXIX.

The Slovak Private International Law Act has lately been beset by a series of difficulties, making any comparison with neighbouring states infeasible (e.g., the recodification and adoption of new legislation in the Czech Republic through Act No 91/2012, on private international law).[5] It is therefore striking that at a time when the Czech Republic, bearing in mind the need to modernise private international law legislation,[6] carried out recodification back in 2012 and adopted a new law substituting the previous Private International Law Act,[7] Slovak lawmakers still hesitate about the thorough recodification of the respective law applicable in Slovakia even a decade later. In addition, it is noticeable that the Slovak lawmakers, when coming across *ad hoc* legal loopholes in the Slovak enactment, simply literally (and non-systematically) copy the corresponding part from the Czech Act No 91/2012.[8]

We would like to point out that the main aim of the changes to private international law as enacted in the Czech Republic back in 2012 was to reflect new trends in international private and procedural law around the world and in Europe since the adoption of the Private International Law Act in 1963. Besides this, they also had to consider the private international law applicable in the European Union that has been developing at an extremely high pace and slowly, but clearly, limiting the applicability of EU Member States' national enactments of private international law.[9]

One of the first modern trends significantly demonstrated in the legislation covering private international law in the Czech Republic was

5 SLAŠŤAN, M. et al. *Aktuálne otázky európskeho medzinárodného práva súkromného*. Pezinok: Justičná akadémia Slovenskej republiky, 2018, p. 9.

6 It was necessary to react to developments in private international law since the mid-1960s when the currently applicable legislation was adopted. The legislation needed the modification and amendment of some applicable solutions while considering the developments and tendencies in the field of private international law as demonstrated in other states' legislation and to ensure its compatibility with EU law. See Důvodová zpráva k zákonu č. 91/2012 Sb., o mezinárodním právu soukromém (obecná část). *Ministerstvo spravedlnosti ČR* [online]. Pp. 41–46 [cit. 30. 5. 2022]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-k-ZMPS.pdf

7 Note that the Private International Law Act was adopted when the Czech and Slovak Republics formed their federation.

8 See PEKÁR, B., SLAŠŤAN, M. Zisťovanie a používanie cudzieho práva v Slovenskej republike. In: ROZEHNALOVÁ, N., DRLIČKOVÁ, K., VALDHANS, J. (eds.). *Dny práva 2015 – Days of Law 2015. Část IV. Kodifikace obecné části kolizního práva – cesta či omyl?* Brno: Masarykova univerzita, 2016, pp. 177 ff.

9 PAUKNEROVÁ, M., RŮŽIČKA, K. et al. *Rekodifikované mezinárodní právo soukromé*. Praha: Univerzita Karlova, Právnická fakulta, 2014, p. 33.

the implementation of the new internal and systematic dispositions of the newly adopted law to clarify the previous legislation applicable to private international law. This, unfortunately, does not exist in the Slovak conditions.

The Slovak Private International Law Act is split into two parts, and these are subdivided into sections. The first part, named "Provisions concerning conflict of laws and the legal status of aliens", contains several conflict of law principles and governs the question of the legal status of foreigners in terms of personal and ownership rights. The second part, named "International procedural law" regulates matters such as the jurisdiction of Slovak judicial authorities, the status of foreigners in proceedings, legal aid involving foreign countries, and the recognition and enforcement of foreign decisions. The national systemic disposition of norms within the Slovak Private International Law Act as enacted in the last century needs to be profoundly modified as the current regulation seems quite vague and does not reflect the existence of new legal institutes.

The above may be demonstrated by the fact that Czech legislation, after the mentioned recodification and adoption of the new law, abstains from modifying conflict of law rules and procedural norms in two separate parts of the law, and when determining norms for particular types of private legal relations, this law has joined procedural norms – i.e., on determining the jurisdiction of Czech courts for the given types of relations and recognising foreign decisions in connection with these relations – with corresponding conflict of law rules.

The new structure of the legal enactment enables courts to understand how to proceed in cases including a foreign element, and what questions need to be addressed when deciding on the respective subject matters.[10] In other words, the new systematic disposition of private international law regulations as enacted in the Czech Republic facilitate the application of the law in cases including a foreign element. It is also noteworthy that the legislative and technical disposition of the newly adopted Czech regulation on private international law is based on the legal practice determining that, when deciding

10 See Důvodová zpráva k zákonu č. 91/2012 Sb., o mezinárodním právu soukromém (obecná část). *Ministerstvo spravedlnosti ČR* [online]. Pp. 41–46 [cit. 30. 5. 2022]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-k-ZMPS.pdf

on the above subject matters, the international procedural issues, the question of jurisdiction in relation to a foreign country needs addressing first. This is followed by finding a normative basis for deciding about the subject matter to be applied, unless unified legislation including conflict of law rules is used to determine the governing law.[11] This structure corresponds with solutions contained within some modern national regulations on private international law, some EU directives, and other international treaties.[12]

The opacity of the Slovak Private International Law Act that necessitates a new structure of legal enactments is not the only burning issue relating to Slovak legislation concerning private international law.

The Slovak Private International Law Act, due to its obsoleteness, is not properly reacting to changes brought about by social evolution. Essential facts include, for instance, that the connecting factor of habitual residence shall be preferred to the nationality factor to reflect EU norms and the corresponding international obligations of the Slovak Republic.

When it comes to the applicable recodification of private international law in the Czech Republic, *Pauknerová* states that the main change compared to the previous legal enactment is the substitution of nationality of the natural person as a connecting factor with habitual residence. This may relate to subject matters concerning some personal and family relations, and succession among natural persons. It can also be noted that nationality maintains its status where this seems rational and practical. The Act is based on the assumptions and experience that the sphere of private law is dominated by real life relations connecting a specific person with specific residence and state over apparently formal relations to another state. By means of their habitual residence in a specific state, a natural person becomes part of the social and economic environment of that state and takes part in its economy. Being subordinated to a certain extent to the legal order of that state facilitates their position and the establishing of their legal relations with entities in the given state, which eventually contributes to increasing their legal certainty.[13]

11 PAUKNEROVÁ, M., RŮŽIČKA, K. et al. *Rekodifikované mezinárodní právo soukromé*. Praha: Univerzita Karlova, Právnická fakulta, 2014, p. 18.
12 Ibid., p. 35.
13 Ibid., p. 22.

In light of the above, in personal matters, especially when it comes to the personal status of natural persons, the Czech Republic, following other similar enactments, refrained from the connecting factor of *lex patriae* and instead defined habitual residence,[14] where the obsolete provision of Section 3 para. 1 of the Private International Law Act, which is unfortunately still valid in the Slovak enactment and pursuant to which *"legal capacity of a person shall be governed, if not otherwise stated, by the legal order of the state of which he/she is a national"*, was replaced with Section 29 para. 1 of the Private International Law Act determining that *"legal status and legal capacity shall be governed, if not otherwise stated, by the legal order of the state where the person has their habitual residence."* For the avoidance of doubt, we might also point out that the connecting factor of habitual residence is less stable than nationality and, therefore, it might be assumed that the high international mobility of people will sooner or later cause, due to its application, more frequent changes of personal status. Even though the basic conflict of law norm lacks the enshrinement of an *expressis verbis* time settlement, it is always necessary to consider the habitual residence of a natural person within the applicable period (e.g., at the time of legal proceedings).[15]

The applicable trend of modern legal enactments, where the connecting factor of nationality is replaced with the factor of habitual residence (the centre of the person's main interests), or the factor of habitual residence is overruled by the factor of nationality, is present in the subject matter

14 The same enactment has been adopted by Switzerland, Estonia and Sweden. The term "habitual residence" is sufficiently interpreted by the practice of courts. This term has already been interpreted by the Court of Justice (e.g., Judgment of the European Court of Justice of 17 February 1977, *Silvana di Paolo vs. Office national de l'emploi*, Case 76-76; Judgment of the European Court of Justice of 8 July 1992, *Doris Knoch vs. Bundersanstalt für Arbeit*, Case C-102/91). As presented by the Court, habitual residence is defined as the place the given person defined due to its permanent character, and is regarded as the permanent and habitual centre of their interests. Within this concept, we should in particular take into consideration the family situation of an employed person, the reasons motivating a person to move, the duration and continuity of their residence, whether they have stable employment at the place, and their intentions under all circumstances. For more details, see Důvodová zpráva k zákonu č. 91/2012 Sb., o mezinárodním právu soukromém (zvláštní část). *Ministerstvo spravedlnosti ČR* [online]. Pp. 47–70 [cit. 30. 5. 2022]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-k-ZMPS.pdf

15 PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: Wolters Kluwer, 2013, p. 223.

of family relations. Slovak legislation again is not keeping up with the above trends, as demonstrated below:

In the field of family relations, we can refer in particular to the subject matter of personal relations between spouses[16] and the property relations[17] of spouses, as governed by Section 21 of the Slovak Private International Law Act. Pursuant to Section 21 para. 1 of the Slovak Private International Law Act, it is understood that: *"The personal and property relations of spouses shall be governed by the law of the state of their common nationality. If the spouses have different nationalities, such relations shall be governed by Slovak law."* This is to say that the personal and property relations of spouses, which are jointly governed for the two fields of spousal relations by one conflicts of law rule, will be assessed on the basis of the legal order of the state of which these spouses are nationals *(lex patriae)*. The detailed application of the said connecting factor is possible only if the two spouses are nationals of the same state. Otherwise, their personal and property relations will be governed by Slovak law. In personal and property matters, the Slovak Private International Law Act acknowledges only *lex patriae* and *lex fori*.

On the contrary, after the recodification of private international law in the Czech Republic, Czech legislation governs personal and property relations through individual conflicts of law rules. The conflicts of law rule governing personal relations between spouses sets forth the following: *"Personal relations of spouses shall be governed by the legal order of the state of which the two are nationals. If they are nationals of different states, the relations shall be governed by the legal order of the state where the two spouses have their habitual residence, otherwise by Czech law."*[18] The conflicts of law rule governing the property relations between spouses states the following: *"Property relations of spouses shall be governed by the legal order of the state where the spouses have their habitual residence; otherwise by the legal order of the state of which the spouses are nationals; otherwise by Czech law."*[19]

16 Note: Personal relations of spouses are referred to as the obligation of spouses to be loyal to each other, to live together, to help each other, and to handle things together. For more details, see LYSINA, P., ŠTEFANKOVÁ, N., ĎURIŠ, M., ŠTEVČEK, M. *Zákon o medzinárodnom práve súkromnom a procesnom. Komentár.* Praha: C. H. Beck, 2012, p. 118.

17 Note: Property relations between spouses refer to arrangements related to the property regime between spouses. Under Slovak legislation, this mainly relates to the institute of the community property of spouses. For more details, see ibid.

18 § 49 para. 1 of the Czech Private International Law Act.

19 § 49 para. 3 of the Czech Private International Law Act.

In contrast to Slovak legislation, the Czech legal enactment, in terms of the personal and property relations of spouses, also allows the application of the law of the state where the spouses have their habitual residence. It is understood that connecting factors will be gradually applied through the cascading clauses of the respective provision. When it comes to connecting factors in the conflicts of law rules for the personal relations of spouses, the quoted interpretation of Section 49 para. 1 of the Czech Private International Law Act stipulates that these are set in a cascading manner in the following order:

- the joint nationality of spouses; if absent then
- the joint habitual residence of spouses; if also absent then
- *lex fori*.

When it comes to limiting criteria in the conflicts of law rule for the property relations of spouses, the following cascading clauses will apply:

- the joint habitual residence of spouses; if absent then
- the joint nationality of spouses; if also absent then
- *lex fori*.

At this point, it is crucial to emphasize that in contrast to the personal relations of spouses, the assessment of their property relations always prioritizes the joint habitual residence of the spouses, which is very reasonable as the legal enactment of property relations does not only affect the spouses themselves, but also third parties and therefore should be connected to the place where the spouses live and where most property transactions are expected to take place. This is to say that the condition of the joint habitual residence of spouses is deemed met if, during the applicable period, the two spouses have their habitual residence in a single state, which does not necessarily need to refer to living in the same household. On the contrary, cases involving property disputes between spouses and disputes related to the settlement of property disputes after divorce more and more frequently involve cases of spouses living separately.[20]

Modern legal enactments tend to apply the prevailing trend of habitual residence over the nationality factor in succession matters. Nevertheless,

20 PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: Wolters Kluwer, 2013, p. 338.

its application is absent in the obsolete Slovak legislation, e.g., when Section 17 of the Slovak Private International Law Act determines: *"Any relationships arising out of succession shall be governed by the law of the state of which the deceased was a national at the time of their death."* The more reasonable Czech lawmakers, having adopted the aforementioned recodification a decade ago, have replaced the connecting factor of the deceased's nationality with the connecting factor of the place of habitual residence of Section 76, first sentence of the Czech Private International Law Act, determining: *"Any relationships arising out of succession shall be governed by the body of laws of the state in which the deceased had their habitual residence at the time of their death."*

It is obvious that private law relations should take into account the facticity of personal relations overruling more formal ties, while the shift of the criterion from nationality to habitual residence takes this fact into consideration and should reflect it, not just practically ignore it as the Slovak lawmakers did.

We have mentioned that social evolution required not only a more significant change with regard to elevating the connecting factor of habitual residence over the nationality factor, as clarified above, while stating the examples of some provisions from the Czech Private International Law Act which properly reacted to this development, in contrast to the provisions of the Slovak Private International Law Act, which are deemed obsolete and do not meet the standards of the 21st century, but also highlighted the will of parties to determine the governing law beyond the field of the laws of obligation. The Czech enactment has reacted to this development, while Slovak lawmakers could seek inspiration from this and eventually move the border of private international law into the 21st century in terms of its national application.

Finally, it can be said that habitual residence, in the manner defined by the settled case law of the Court of Justice of the European Union,[21] has not been sufficiently demonstrated in the practice of Slovak courts, especially in the field of international abductions of children.

21 See also SLAŠŤAN, M. Výhody a nevýhody "ustálenej judikatúry" Súdneho dvora Európskej únie. In: LENGYELOVÁ, D. (ed.). *Právny pluralizmus a pojem práva*. Bratislava: Slovak Academic Press, 2017, pp. 150–156.

One of the fields giving more emphasis to the demonstration of the will of the parties as the decisive factor for determining governing law is represented by the choice of law when arranging property relations as enacted by Section 49 para. 4[22] of the Czech Private International Law Act. It is "surprising" that similar regulations are absent in the Slovak Private International Law Act. It should be noted that the choice of law in this field is limited in both material and formal ways. The material limitation is demonstrated by the enumerative description of the connecting factors:

- the nationality of at least one of the spouses,
- the habitual residence of at least one of the spouses,
- the location of the immovable property, if any,
- *lex fori*.

The formal limitation is linked to the signing of the corresponding agreement or contract between spouses, which must be notarized.[23]

It is evident that abstract legal norms cannot foresee or cover all exceptional situations that might occur in private international relations in terms of their social situation or life events. The application of a particular law according to conflicts of law rules could contradict the legitimate expectations of the parties.[24]

For such an event, modern legal enactments[25] incorporate a provision providing the parties with a fair solution when determining and using the applicable law. The Czech Republic, for instance, was inspired by the Swiss Federal Act on Private International Law. More precisely, it refers

22 *"The contractual regulation of the spousal property rights is subject to the body of laws which was applicable for the spouses' property relations as of the moment when the contractual agreement was concluded. Otherwise, spouses may also decide that their property relations will either be subject to the body of laws of the state of which one of the spouses is a citizen or in which one of the spouses has his or her habitual place of residence or to the body of laws of the state in which any real restate is located, provided this involves real estate, or to Czech law. Any such agreement must be the subject of a notary record or of a similar document, if the agreement is concluded abroad."*

23 For more details, see PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: Wolters Kluwer, 2013, p. 339.

24 See Důvodová zpráva k zákonu č. 91/2012 Sb., o mezinárodním právu soukromém (obecná část). *Ministerstvo spravedlnosti ČR* [online]. Pp. 41–46 [cit. 30. 5. 2022]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-k-ZMPS.pdf

25 E.g., Art. 15 of the Swiss Federal Act on Private International Law, Art. 19 of the Belgian Private International Law Act, and Art. 8 of the Dutch Private International Law Act.

to Section 24[26] of the Czech Private International Law Act named "The exception and subsidiary designation of the applicable law" incorporated into Czech legislation through the aforementioned recodification. This provision, one of the most significant recodification changes to private international law,[27] enacted, *inter alia*, so-called general escape clauses. Under specific circumstances, such clauses enable the non-application of a law the conflicts of law rule under this Act had previously determined the governing law. Unfortunately, our obsolete legislation lacks the rules that could possibly handle the exceptional situations this legal enactment formally affects but, due to their specific or exceptional nature, are not deemed *in concreto* appropriate.

Still, there are certain cases requiring that the competent authority be enabled to take a rather flexible approach. The main justification for being able to divert from the law will be the circumstance that applying the given governing law, as prescribed by the conflicts of law rule, would certainly contravene the picture of a prudent and fair arrangement of parties' relations and their legitimate expectations. Limitations justifying this exceptional approach include adequacy, conflicts of law justice (the principle of a reasonable and fair arrangement when determining governing law, considering the summary of all relevant circumstances and the protection of third parties' rights).[28]

Not only is Slovak legislation in international private and procedural law extremely opaque, ossified, and failing to respond to the evolution of social relations, but even the wording and diction of some of the currently applicable provisions of the Slovak Private International Law Act could cause various practical problems that would need to be addressed by *ad hoc* courts.

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26 § 24 para. 1 of the Czech Private International Law Act: *"It is possible not to use the body of laws which should be used in accordance with the provisions of this Act in exceptional cases, where their use would appear to be inconsistent and at odds with the reasonable and just organisation of the relationship between the participants upon due consideration of all the circumstances pertaining to the matter and especially given the justified expectations of the participants with regard to the use of another body of laws. The body of laws which best corresponds to this situation is used under these conditions, provided the rights of any other parties remain unaffected."*

27 PAUKNEROVÁ, M., RŮŽIČKA, K. et al. *Rekodifikované mezinárodní právo soukromé*. Praha: Univerzita Karlova, Právnická fakulta, 2014, p. 49.

28 For more details, see PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer, 2013, p. 175.

The Slovak Private International Law Act tends to use terms such as "public records" (Section 7) or does not contain adequate terms or institutes at all, e.g., unjust enrichment, temporary custody, etc. The Slovak Private International Law Act needs to be first unified in terms of its linguistics and content with the Brussels I bis Regulation[29], Brussels II bis Regulation[30], Regulation on maintenance[31], and Regulation on succession[32]. All the linguistic errors in the Slovak interpretation of relevant EU legislation will also need to be specifically addressed. We understand that the unification, lexicological modification and codification of European private international law is crucial for any further development of the Slovak Private International Law Act.[33]

Let's take Section 37 of the Slovak Private International Law Act as an example: *"Unless the subsequent Articles provide otherwise, Slovak courts shall have jurisdiction if the defendant has his residence or seat in the Slovak Republic or, provided property rights are involved, if he has property there."* Here it needs to be clarified to what "property rights" and "property" really refer. Legal regulations do not contain an exact definition of these terms. When interpreting the given terms, legal doctrine and case law need to be applied.

- Property rights include any rights arising out of material, liability or succession rights, and property rights related to objects of intellectual property.[34]

29 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

30 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

31 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

32 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

33 See SLAŠŤAN, M. Plusy a mínusy európskeho medzinárodného práva súkromného. In: ROZEHNALOVÁ, N., DRLIČKOVÁ, K., VALDHANS, J. (eds.). *Dny práva 2017 – Days of Law 2017. Část IV. Aktuální otázky evropského mezinárodního práva soukromého*. Brno: Masarykova univerzita, 2018, pp. 118–133.

34 LYSINA, P., ŠTEFANKOVÁ, N., DURIŠ, M., ŠTEVČEK, M. *Zákon o medzinárodnom práve súkromnom a procesnom. Komentár.* Praha: C. H. Beck, 2012, p. 190.

- *"It is incontestable that the said shares of the joint-stock company S., with its seat in the Slovak Republic, represent the rights of the defendant to secondarily participate, in accordance with the applicable legislation, in the company management, company profit and liquidation balance pursuant to Section 155(1) of the Civil Code. Under Section 2(1) of the Securities Act, a share is a type of security representing material consideration in a pecuniary form. A share is a movable item under Section 9(2) of this Act."*[35]
- *"The proceedings on settling community property are deemed a material subject matter."*[36]
- *"A property dispute as set forth in Section 37 of Act No 97/1963 needs to be understood not only as a dispute on property consideration,* i.e.*, pecuniary consideration, but also,* e.g.*, a claim on determining the existence or non-existence of the right to such consideration."*[37]
- *"Property rights and property consideration cannot be interchangeable, as the property consideration also refers to monetary consideration mitigating non-material damage when protecting general moral rights or moral rights linked to creative mental work, even though property rights can hardly be addressed here."*[38]
- The term "property" may include all tangible and intangible items subject to private legal relations and the value of which can be expressed in monetary terms.[39]

2.2 The Slovak Private International Law Act Amended by Act No 108/2022

It is true that Slovak lawmakers have adopted Act No 108/2022 of 16 March 2022 amending, supplementing and modifying the Slovak Private International Law Act ("Act No 108/2022") for the purposes of reacting

35 Resolution of the Supreme Court of Slovakia (Najvyšší súd Slovenskej republiky), Slovakia, of 22 October 2008, Case 5 Obo 91/2008.

36 Resolution of the Supreme Court of Slovakia (Najvyšší súd Slovenskej republiky), Slovakia, of 18 March 2010, Case 3 Cdo 141/2008.

37 Resolution of the High Court in Prague (Vrchní soud v Praze), Czech Republic, of 15 November 1995, Case 10 Cmo 414/95.

38 LYSINA, P., ŠTEFANKOVÁ, N., ĎURIŠ, M., ŠTEVČEK, M. *Zákon o medzinárodnom práve súkromnom a procesnom. Komentár*. Praha: C. H. Beck, 2012, p. 190.

39 Ibid.

to newly adopted European legislation,[40] removing problems arising from application practice, and modernising some obsolete provisions contained in the Slovak Private International Law Act,[41] even though Act No 108/2022 governs only some partial areas, for instance part II of the Slovak Private International Law Act named "International procedural law", and these are as follows:

- *expanding the jurisdiction of Slovak courts:* a Slovak court can act where the interest of a minor is in question even though the child has no habitual residence in the Slovak Republic. Section 39 para. 1[42] of the Slovak Private International Law Act will only be applied if it relates to a Slovak citizen in a country with which the Slovak Republic is not bound by any treaty and where this procedure is in the best interests of the minor. A Slovak court can also act in exceptional situations where a foreign court that would otherwise have jurisdiction in the given subject matter cannot exercise this jurisdiction[43] and where the exercise of this jurisdiction has sufficient connection with the Slovak Republic[44]. This will also apply in cases where a foreign decision was not recognised in the Slovak Republic and new proceedings cannot be initiated due to a *res iudicata* obstacle.[45]
- *taking over jurisdiction by Slovak courts:* in the matter of the custody of a minor, this can follow the request of another court or a claim by a party to the proceedings where the foreign court interrupted the proceedings or invited the participant to file a claim to take over such jurisdiction.[46]

40 Contained in Regulation of the Council (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matter and the matters of the parental responsibility, and on international child abduction; Regulation of the European Parliament and of the Council (EU) 2020/1784 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents); and Regulation of the European Parliament and of the Council (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters.

41 See Dôvodová správa k zákonu č. 108/2022 Z.z. *Najpravo.sk* [online]. 24. 5. 2022 [cit. 30. 5. 2022]. Available at: https://www.najpravo.sk/dovodove-spravy/rok-2022/dovodova-sprava-k-zakonu-c-108-2022-z-z.html

42 *"Slovak courts have jurisdiction in matters of custody of minors where the minor has their habitual residence in the Slovak Republic, their residence cannot be determined, or where they are a Slovak citizen."*

43 E.g., due to diplomatic immunity of the participant or civil war in the country.

44 E.g., the nationality of one of the parties, property interests in the Slovak Republic.

45 See § 47a of the Slovak Private International Law Act.

46 See § 39a the Slovak Private International Law Act.

- *international lis pendens obstacle:* the new Section 48a of the Slovak Private International Law Act enables one of the parties to the proceedings to file a claim to interrupt the proceedings where parallel proceedings are pending at a different court in a foreign state. The court will consider whether the issued decision might be recognised in the Slovak Republic.[47]
- *modifying the serving of correspondence:* Section 58 of the Slovak Private International Law Act governs the manner of serving correspondence in accordance with generally binding procedural principles in cases where the correspondence is being served in the Slovak language or a language the addressee can understand with regard to all the facts of the case. The newly applicable Section 58a deals with cases where a foreign authority asks for personal serving which is not governed by Slovak legislation but exists in foreign legislation.[48]
- *direct taking of evidence by a foreign authority:* the direct taking of evidence by a foreign authority in the Slovak Republic for the purpose of proceedings taking place abroad is subject to consent from the Ministry of Justice. The Ministry of Justice will forward such request to the competent judicial authority where its assistance in the taking of evidence is required.[49]
- *authorisation of the prosecutor to file a claim for non-recognition of a foreign decision:* the prosecutor is enabled by Section 68 para. 1 of the Slovak Private International Law Act to file a claim for non-recognition of a foreign decision. However, this authorisation is limited to the protection of public policy.

It is therefore obvious that unfortunately the adoption of Act No 108/2022 has left part I of the Slovak Private International Law Act named "Provisions concerning conflict of laws and the legal status of aliens" untouched. The need for comprehensive recodification of international private and procedural

47 See Dôvodová správa k zákonu č. 108/2022 Z.z. *Najpravo.sk* [online]. 24. 5. 2022 [cit. 30. 5. 2022]. Available at: https://www.najpravo.sk/dovodove-spravy/rok-2022/dovodova-sprava-k-zakonu-c-108-2022-z-z.html

48 The requesting authority may therefore ask for personal serving and, in this case, the correspondence will be delivered directly to the person to guarantee that it has been received by the authorised person. As registered delivery does not guarantee that correspondence is received by the authorised person, the institute of serving by means of a court employee or a judicial officer will be used; alternatively, the addressee will be summoned for the purpose of such serving.

49 See § 58d of the Slovak Private International Law Act.

law following the example of modern legal enactments in this field and starting with the internal systematic disposition until it reflects the changes that social evolution has brought, and which we have been trying to address in this paper, has been completely omitted by the Slovak lawmakers.

3 Conclusion

In this paper, we sought to specify the need for the comprehensive "renewal" of national legislation purporting to private international law enacted in the Slovak legal environment as the Private International Law Act.

We have drawn your attention to recodified and newly adopted legislation in the Czech Republic through the Private International Law Act No 91/2012 that replaced the previously valid "federal" Private International Law Act from the 1960s which, however, remains applicable in Slovakia.

Referring to Czech legislation that, in contrast to the Slovak one, reflects modern trends in international private and procedural law around the world as well as in Europe, we highlighted the opacity of the national disposition of norms applicable in the Slovak Private International Law Act that will certainly require a completely new structure and recodification. We also referred to the fact that, in contrast to our Czech peers, Slovak legislators have failed to react to changes brought by social evolution, e.g., considering the facticity of personal relations that prevail over relations of a more formal nature; instituting the will of parties in determining the governing law beyond liabilities and obligations; and anchoring the rules on how to avoid using the definite law according to conflicts of law rules that would definitely contravene the parties' legitimate expectations.

Finally, the paper focused on Act No 108/2022 amending and complementing the existing Slovak Private International Law Act. Unfortunately, the said law only modifies some partial areas in part II of the Slovak Private International Law Act named "International procedural law" while part I of the Slovak Private International Law Act named "Provisions concerning conflict of laws and the legal status of aliens" was left unchanged. It must be noted that the need for comprehensive recodification of international private and procedural law following the example of modern legal enactments in this

field, starting with the internal systematic disposition until it reflects the changes social evolution has brought, and which we have sought to address in this paper, has been completely omitted by the Slovak lawmakers.

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Contact – e-mail
filipova48@uniba.sk, barkova8@uniba.sk

ORCID
0000-0002-4058-3226, 0000-0003-4689-8867

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