

PART XIV

CROSS-BORDER AND INTERNATIONAL DIMENSIONS

CHAPTER 1

INTRODUCTION

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<https://www.cplj.org/publications/14-1-introduction>

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1 INTRODUCTION: SCOPE AND OBJECTIVE OF PART 14

- 1 Cross-border litigation is different from *normal* proceedings in that it involves a foreign element, usually a foreign party or the need to conduct parts of the proceedings in a foreign country (eg, service of the proceedings, the taking of evidence, the securing of the assets of the debtor, the enforcement of the judgment abroad).¹ The foreign element may even demand the application of foreign procedural law. However, as a rule, the fact that a dispute is cross-border does not trigger the application of a specific procedure. Still, it is usually acknowledged that an adaptation of the common procedural norms may be needed to duly take into account the foreign factor: factual and legal impediments such as language, distances, borders, or the application of foreign procedural and substantive law unfamiliar to (at least one of) the parties, and, possibly, the judge.
- 2 This Part considers the cross-border dimensions of disputes in civil and commercial matters in the sense of *contractual and non-contractual* matters, leaving out family and succession disputes, as well as insolvency. Existing international or regional instruments of relevance are considered throughout. However, proceedings before national courts are mainly addressed, thus excluding those before supranational or international courts (although how the case law of these courts affects the development of cross-border litigation before national courts is considered, where relevant).
- 3 Following this introduction, this Part contains seven additional chapters. Chapter two seeks to identify drivers (actors, factors and debates) of the historical evolution in the field. Chapters three, four and five examine jurisdictional issues relating to disputes involving foreign parties. Chapter six considers the challenges of obtaining evidence abroad and determining foreign applicable law. The enforcement of foreign judgments is discussed in Chapter seven. The particular challenges of provisional measures and parallel proceedings are the subject of Chapter eight, which also includes the role of judicial cooperation to address these.
- 4 This Part strives to consider the issues canvassed from a diversity of jurisdictions, building upon the expertise of the contributing authors² and those of other members of the CPLJ project, where possible. It assesses some major results of the research found in Part 14.

¹ The foreign element may be weak when domestic litigants agree on the jurisdiction of a foreign court, cf *Inkreal s.r.o. v Dúha reality s.r.o.*, Case C-566/22 (CJEU), Judgment 8 February 2024 [ECLI:EU:C:2024:123] (jurisdiction clause under Article 25 of the Brussels *Ibis* Regulation).

² Representative countries are Canada, France, Germany, Luxemburg, Poland, Spain and the United States, and the EU as a regional source.

2 OVERVIEW OF THE CHAPTERS

2.1 Chapter 2: History and Evolution (Actors, Factors and Debates) (Burkhard Hess)

- 5 This chapter describes the drivers and historical milestones in the evolution of procedural law in the last decades as a response to the presence of a foreign element. It explains as well the changes in the perception of such an element over time in academia, the judiciary and at the legislative level.
- 6 Looking back to developments in the law and practice of cross-border civil litigation during the past decades reveals and assists in understanding the basic approaches to cross-border litigation in the systems under examination, their evolution and the drivers of this evolution. It also permits to discover convergences and their genesis: for instance, international drivers like the Hague Conference and International Institute for the Unification of Private Law (UNIDROIT) at the global level, or the European Union and the Organization for the Harmonization of Business Law in Africa (OHADA) at the regional level, that have influenced them.
- 7 Chapter two identifies several salient features and developments over the past 50 years. Of obvious overarching importance is the increase in cross-border mobility and trade, which carries with it greater potential for cross-border disputes. In parallel, the increasing role of non-discrimination as a key element of procedural justice and the rule of law has obvious implications for the treatment of foreigners in civil litigation, whether as a claimant or defendant. Similarly, the protection of weaker parties in domestic law has consequences for cross-border disputes, as does the growing scope for party autonomy. Another development relates to emerging competition between states for international dispute resolution services even though new approaches to judicial cooperation in cross-border disputes may act as a counterweight. Finally, the digital revolution, though undoubtedly disruptive, holds the promise of facilitating rather than inhibiting international judicial dispute resolution.
- 8 Looking to the future, this Chapter underscores the importance of continued effort towards the formal and informal harmonization of international civil procedure. Indeed, without a robust coordination of judicial systems and a recognition of the specific challenges facing foreign parties, global interchange faces numerous obstacles. In this regard, international civil procedure must be better understood to operate as a facilitator of global exchanges in the modern world.

2.2 Chapter 3: Access to Justice for Foreign Plaintiffs (Geneviève Saumier)

- 9 This chapter addresses issues that may impede access to justice in cross-border disputes, typically by creating obstacles to access by foreign claimants or plaintiffs, either in terms of their capacity to sue individually or to participate in collective redress mechanisms, or due to economic factors, namely security for costs.
- 10 On the issue of the capacity to initiate legal proceedings, the Chapter discusses how the modern approach entails recognizing the legal standing of foreigners. As such, they are subject to the same conditions applicable to domestic litigants.³ In this regard, constitutional and human rights standards (non-discrimination, access to justice and fair trial) play a considerable role. Similar considerations apply to the question of security for costs, although several legal systems continue to impose these on claimants on the sole basis of their foreignness.
- 11 Regarding collective redress or proceedings, the Chapter notes the wide variety of existing procedural approaches, including well-established models in the United States and Canada and emerging models in the European Union and in Latin America. The focus is on the extent to which these procedural mechanisms are adapted to cross-border disputes and accessible to foreign claimants. Answers to these questions remain uncertain even in those jurisdictions with long-standing experience with such procedures, suggesting that more efforts are required to the promise of collective redress to be more readily accessible in cross-border or international disputes in civil matters.

2.3 Chapter 4: Access to Courts (International Jurisdiction) (Gilles Cuniberti)

- 12 This chapter is concerned with the availability of courts to litigants in international disputes. While the majority view is that there are no rules of customary international law allocating jurisdiction between the courts of different states, this Chapter examines some contrasting views, including in particular in relation to sovereign immunity that is governed by customary international law.⁴

³ However, it should be noted, that the legal existence and personality of moral persons (such as trusts, charities and associations) is a major issue in cross-border cases, especially in shareholder proceedings involving parties coming from remote (and tax friendly) jurisdictions like the Cayman Islands, Liechtenstein, or Monaco, cf G Saumier, 'Access to Justice for Foreign Plaintiffs' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024) Part XIV Chapter 3, para 6 <https://www.cplj.org/publications/14-3-access-to-justice> accessed 4 December 2024.

⁴ It should be noted that the doctrine of restrictive immunity recently has gained momentum as China adopted this approach since 1 January 2024. Under this doctrine, commercial activities of states and state

- 13 As a general rule, states define the jurisdiction of their courts unilaterally and may not grant (or deny) jurisdiction to the courts of foreign states. This does not entail the absence of constraints on the definition of court jurisdiction over cross-border disputes in domestic law, as constitutional or other sources of fundamental rights might impose conditions of their own, as may regional or multilateral agreements.
- 14 Two basic paradigms of jurisdiction to adjudicate are critically examined in this Chapter, ie, rule-based and discretion-based, typically reflective of the civil and common law traditions respectively. The values and objectives underpinning each approach are discussed and illustrated with examples drawn from numerous jurisdictions around the globe.

2.4 Chapter 5: Fundamental Principles of Procedural Fairness – Notice and the Right to Be Heard (Geert van Calster and Felipe de Andrade)

- 15 This Chapter examines domestic and international norms enacted to protect defendants that, in view of their foreign status, may face difficulties in being notified of, appearing in or being represented in proceedings. Those difficulties may relate to language barriers, physical distance and national borders, limitations of international cooperation between judicial authorities, and differences between applicable procedural and substantive laws to disputes.
- 16 As examined in this Chapter, procedural rights are largely derived from domestic law, including constitutional law, but may also arise from supranational norms on fundamental rights or from international agreements. Of particular relevance to cross-border disputes are rules on service of process abroad, which assure the key principle of notice to defendants, itself a prerequisite to the right to be heard. For foreign defendants, the right to be notified and heard may be complicated by language barriers and the availability of translation of written and oral procedural elements of proceedings that challenge the ability to understand the nature of the claim made against them and the manner of responding to it in another jurisdiction.
- 17 Failure to receive notice or to appreciate its significance may result in default judgments, which are often to the detriment of an absent foreign defendant. Simplified procedural mechanisms such as orders for payment raise similar risks in the cross-border context.

entities are no longer exempted from the jurisdiction of civil courts and tribunals. Yet, there are many inconsistencies when it comes to the definition of the exceptions to immunity.

- 18 Technological advances are likely to assist parties to cross-border proceedings by increasing service options and reducing language barriers, both of which should contribute to protecting fundamental procedural guarantees for foreign defendants.

2.5 Chapter 6: Determination of the Dispute – Evidence and Applicable Law Issues (Louise Ellen Teitz)

- 19 This Chapter considers the additional procedural challenges associated with determining claims in cross-border litigation, namely where relevant evidence is located abroad or where foreign law must be ascertained to resolve a substantive question. The first issue may require the cooperation of foreign authorities, whether judicial or administrative, to enable the obtention of documents, other material evidence or statements from parties or witnesses. Differences in evidentiary and procedural law can give rise to diverging party expectations as well as state concerns over sovereignty. However, as the Chapter shows, there is an emerging trend allowing parties access to information in cross-border cases. Again, information technology is a key factor in these legal developments.
- 20 The determination of the content of foreign law follows different paths across legal systems, often dependant on whether the issue is considered to be one of law or of fact. This in turn is often linked to whether the determination is left to each party within an adversarial context or rather to the judge, although there are hybrid processes as well.
- 21 On both questions, domestic procedural law coexists with multilateral or regional conventions as well as soft law instruments. As with other Chapters in this Part, emerging technologies have already affected how foreign evidence and foreign law may be obtained, potentially promising less obstacles for the resolution of cross-border disputes in the near future.

2.6 Chapter 7: Enforcement of Foreign Judgments (Marta Requejo Isidro)

- 22 As a rule, a judgment delivered by one state's courts has no binding force in another state. Still, public international law does not oblige states to recognize foreign judgments. Most states do, however, accept to give some recognition to foreign judgments and allow access to execution procedures in their jurisdiction, but under specific conditions. The Chapter first elaborates on the different doctrinal approaches in this field. It also highlights that reciprocity often considered as an out-dated, state-centred doctrine, plays an important role in practice. Still, there remains a considerable fragmentation of regimes depending on the origin of the judgment, and whether multilateral (or bilateral, as the case may be) agreements are in place.

- 23 The openness of a legal system to foreign judgments is typically premised on a number of conditions: the legitimacy of the foreign court's assertion of jurisdiction over the case; respect of due process with regard to the defendant; absence of fraud or other violations of public policy. Uniform rules can eliminate many such conditions – as is the case in the European Union under the Brussels regime – or seek to reduce them to facilitate the circulation of judgments – as occurs under the 2019 Foreign Judgments Convention of the Hague Convention of Private International Law. However, the practical application of the regimes may differ considerably in the different jurisdiction unless there exists a uniform review mechanism as in the European Union.

2.7 Chapter 8: Judicial Cooperation and Coordination (Maciej Szpunar and Krzysztof Pacula)

- 24 By its nature, cross-border dispute resolution is connected to more than one jurisdiction. This raises the possible involvement of courts in more than one jurisdiction where parallel, overlapping or incompatible proceedings are instituted by various parties to the underlying dispute. This Chapter examines the diverse ways in which legal systems deal with these challenges and the current absence of consensus on the preferred solutions. The Chapter focuses first on provisional measures, understood as ancillary procedural mechanisms to preserve rights during the litigation process, including injunctive relief or freezing of assets. It then moves on to examine tools to manage parallel proceedings, such as *lis pendens* and *forum non conveniens*. Finally, it considers the increasing role of judicial communication as a coordination mechanism for addressing the procedural challenges arising from cross-border litigation. This is a new and promising perspective of judicial cooperation.

3 OVERALL ASSESSMENT

- 25 Looking at the developments in cross-border litigation, one must start by assessing a fundamental change of perception: Before World War II, cross-border litigation was a rare exception. Therefore, the national procedural codes only provided for sparse legal provisions addressing the specific needs in specific constellations, such as the security for litigation costs imposed on the foreign party, or (exorbitant) jurisdictional rules aimed at protecting domestic litigants. Recognition and enforcement of foreign judgments were either not foreseen or strictly based on reciprocity. In some countries, however, bilateral agreements facilitated cross-border proceedings. The Hague Conference of Private International Law had not really started addressing cross-border procedural assistance in international conventions.⁵ The guiding principles at that time were the protection of the

⁵ However, the 1905 Hague Convention on Civil Procedure already addressed rogatory letters, judicial assistance of foreign parties and the security for costs in cross-border civil disputes,

domestic party in cross-border situations, and state sovereignty⁶ was the leitmotif and limitation of cross-border exchange. Yet, it could also be used for the conclusion of bilateral or multilateral conventions in the field.⁷

- 26 In the present world, the situation has changed profoundly. The current situation can be explained by three different developments.⁸ Since 1945, but especially since the 1990s, the world is witnessing a huge increase of cross-border commerce and economic exchange.⁹ The advent of the Internet has also transformed cross-border interchanges fundamentally. At the global level and, more importantly, at regional levels, there is a need for legal certainty, for a reliable and stable framework for judicial cooperation and even for legal harmonization.¹⁰ Therefore, since the millennium, the number of international and regional instruments has been growing steadily. More and more cross-border cases are litigated in civil courts – although they still are only a small percentage of the case law in many countries.
- 27 Developments in constitutional and human rights law also significantly impact international civil procedural law. Access to justice, procedural fairness, the right to be heard and to have a day in court have transformed the old framework; equality of the parties and effective judicial protection have become guiding principles in the field.¹¹ But there are also adverse

<https://www.hcch.net/en/instruments/the-old-conventions/1905-civil-procedure-convention> accessed 4 December 2024.

⁶ A typical example was the service of documents via diplomatic channels.

⁷ Some of the old paradigms are still applied in some parts of the world. This is especially true for reciprocity, cf M Requejo Isidro, 'Recognition and Enforcement of Judgments' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024) Part XIV Chapter 7, para 31 ff <https://www.cplj.org/publications/14-7-recognition-and-enforcement-of-judgments> accessed 4 December 2024.

⁸ Cf L E Teitz, 'Determination of the Dispute – Evidence and Applicable Law Issues' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024), Part XIV Chapter 6, para 3 ff <https://www.cplj.org/publications/14-6-determination-of-the-dispute---evidence-and-applicable-law-issues> accessed 4 December 2024 referring to 'the increase in cross-border transactions, families crossing borders, and exporting of more products to more continents'; triggering increased judicial cooperation, and finally, 'the increased availability of foreign law content (and other information) through free online access and increased digitalization'.

⁹ It also entails increased cross-border movements of individuals/families and corresponding legislative developments in family and succession laws.

¹⁰ Procedural cooperation is often triggered by regional economic cooperation, the most prominent example in this regard is the European Union.

¹¹ F de Andrade and G van Calster, 'Due Process - Protecting the Right to Fair Trial of Foreign Defendants in Cross-Border Proceedings: Comparing Practices, Investigating Conflicting Principles, and Searching for Common Standards' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024), Part XIV Chapter 5, para 16 ff <https://www.cplj.org/publications/14-5-due-process-protecting-the-right-to-fair-trial-of-foreign-defendants-in-cross-border-proceedings-comparing-practices-investigating-conflicting-principles-and-searching-for-common-standards> accessed 4

developments as cross-border litigation is used as a means to prolong economic conflict in the present time.

- 28 Another development relates to the growing competition in cross-border commercial litigation. As the rise in specialized national courts to deal with international commercial disputes demonstrates, national and international lawmakers are aware of the economic impacts of a service-oriented, effective justice system. The rise of Singapore as a regional hub for dispute resolution in South Asia where no regional framework for dispute resolution exists appears to be telling in this regard.¹² The Uniform Patent Court is another example of a well-performing service provider in a high-value market for dispute resolution. However, the main competition in this field takes place between arbitration and litigation. Indeed, international commercial arbitration under the 1958 New York Convention¹³ continues to attract more disputes than cross-border litigation, although reliable figures are lacking.¹⁴ In addition, there is a growing legitimacy crisis in arbitration which might finally impact its leading position in dispute settlement.¹⁵
- 29 Finally, information technology is transforming judicial cooperation profoundly and might end up providing more and more technological uniformity as has already been demonstrated by the e-Codex program in the EU.¹⁶ Information technology is specifically suited to assist parties in cross-border litigation: automated translation tools like DeepL and others may bridge language gaps; standardized forms might be available in different languages and automatically translated, enabling the crossing of language barriers between parties and courts. The same applies to the direct communication among courts and to the communication via central authorities where secured communication methods are

December 2024, highlight the following elements of the right of the defence in cross-border proceedings: the right to be informed, the right to understand and the right to be heard.

¹² Not to forget the open competition between Hong Kong and Singapore in dispute settlement.

¹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York) (UN), 330 United Nations Treaty Series 2.

¹⁴ G Born, *International Law and Arbitration, Law and Practice* (vol I, 4th edn, 2023) XX ff.

¹⁵ B Hess, 'The Private-Public Divide in International Dispute Resolution' (2018) 388 *Revista de Direito Civil* 37, para 163 ff.

¹⁶ B Hess, 'History and Evolution (Actors, Factors and Debates)' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024), Part XIV Chapter 2, para 10 ff, 56 ff <https://www.cplj.org/publications/14-2-history-and-evolution-actors-factors-and-debates> accessed 4 December 2024; L E Teitz (n 8) para 7 ff; F de Andrade and G van Calster (n 11) para 29 ff (regarding electronic service); M Szpunar and K Pacula, 'Coordination and Cooperation in the Era of Globalization' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (ed), *Comparative Procedural Law and Justice* (2024), Part XIV Chapter 8, para 168 <https://www.cplj.org/publications/14-8-coordination-and-cooperation-in-the-era-of-globalization> accessed 4 December 2024 (communication technology can immensely facilitate judicial communication).

available.¹⁷ Video-conferencing and online courts are overcoming distances and crossing borders. However, there is a growing need for the preservation of fundamental (procedural) rights and fairness in cross-border settings that might involve individuals in foreign proceedings sitting in front of their domestic computers.

- 30 All in all, the international procedural law of today is facing new challenges that bring it back to its main objective of being a facilitator of global exchanges in a modern world by providing and guaranteeing procedural fairness to the parties involved in cross-border disputes.

¹⁷ M Szpunar and K Pacula (n 16) para 160 ff.

ABBREVIATIONS AND ACRONYMS

Art	Article/Articles
cf	<i>confer</i> (compare)
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
ECLI	European Case Law Identifier
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
etc	et cetera
EU	European Union
ff	following
fn	footnote (external, ie, in other chapters or in citations)
HCCH	<i>Conférence de La Haye de droit international privé</i> (Hague Conference on Private International Law)
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
OHADA	<i>Organisation pour l'harmonisation en Afrique du droit des affaires</i> (The Organization for the Harmonization of Business Law in Africa)
para	paragraph/paragraphs
pt	part
Sec	Section/Sections
supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
US / USA	United States of America
v	versus
vol	volume/volumes

LEGISLATION

International/Supranational

Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), No 1215/2012 of 12 December 2012 (EU).

Convention on the recognition and enforcement of foreign judgments in civil or commercial matters, 2 July 2019 (HCCH).

Convention du 17 juillet 1905 relative à la procédure civile (Hague Convention on Civil Procedure) 1905 (HCCH).

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York) (UN).

CASES

International/Supranational

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