

PART XIV

CROSS-BORDER AND INTERNATIONAL DIMENSIONS

CHAPTER 6

DETERMINATION OF THE DISPUTE – EVIDENCE AND APPLICABLE LAW ISSUES

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<https://www.cplj.org/publications/14-6-determination-of-the-dispute---evidence-and-applicable-law-issues>

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1 INTRODUCTION

- 1 This chapter is focused on the cross-border and international dimensions of (1) obtaining evidence and (2) the procedural aspects of determining applicable law. With the increasing number of lawsuits that involve cross-border issues, the role of obtaining foreign evidence and the use of foreign law in domestic courts (as opposed to international courts) has increased.¹
- 2 Much has been written about both aspects of determining a cross-border dispute—getting the evidence² and determining the content and application of foreign law.³ We have looked at many of the same problems in domestic litigation from a comparative perspective, especially in Part 8. In this chapter, we are looking at similar procedures but considering how and why these procedures may differ in the cross-border context. We still find the general differences between civil and common-law systems in their approach to the actual litigation process and the assignment of roles to judges and parties. Differences in focus on orality and written evidence also are seen in the cross-border context.

1.1 Increased Need

- 3 There are three trends that are observable when looking at the topic of obtaining evidence and determining the applicable law which will be examined in more detail below. First, there is a growing need for foreign law in more cases. This no doubt reflects the increase in cross-border transactions, families crossing borders, and exporting of more products to more continents. Perhaps there is also more willingness in domestic courts to address cases with external elements, including most recently those dealing with climate and human rights. In some legal systems, determinations of applicable law require consideration of the content

¹ There has been an increase in the use of commercial arbitration in cross-border disputes [see Chapter X on the problems of recognition and enforcement of foreign judgments] and a corresponding increase in trying to obtain evidence for these proceedings. See below para 30-31 and the example of the US provisions for obtaining evidence for foreign ‘tribunals’, 28 USC § 1782 (1996) (USA).

² See generally Bibliography on Hague Conference website <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=1&cid=82>; G P Hendrix, ‘The Hague Evidence Convention: How is it Really Working?’ 2 CILE Studies 275; B Ristau, ‘International Judicial Assistance (Civil and Commercial)’ (1990) 1 International Law Institute 279; D Bowker and D Stewart, *Ristau's International Judicial Assistance: A Practitioner's Guide to International Civil and Commercial Litigation* (2nd edn, Oxford University Press 2021).

³ See generally, M Requejo Isidro, ‘Application of Foreign Law’ in P Beaumont and J Holliday (ed), *A Guide to Global Private International Law* 133 (Hart Publishing 2022); Y Nishitani (ed), *Treatment of Foreign Law-Dynamics towards Convergence? (Ius Comparatum - Global Studies in Comparative Law)* (Springer 2017) / IACL; L E Teitz, ‘The Challenge of Accommodating Foreign Law in Domestic Courts’ in F Ferrari and D Fernandez Arroyo (ed), *The Continuing Relevance of Private International Law and its Challenges* (Elgar 2019).

of the potential foreign law.⁴ To paraphrase Lord Denning, ‘as the moth is drawn to the light’, more parties are looking to sue either in foreign courts or use foreign law in their domestic court.⁵ The universal nature of the European Rome I Regulation⁶ is just one example of why courts need to know the content of foreign laws. In domestic US law, several states utilize choice of law theories that require comparison of different substantive law to determine which law is the ‘better law’⁷ or if applied would result in less impairment.⁸

1.2 Increased Judicial Cooperation⁹

- 4 The second trend one can observe is one toward increased judicial cooperation in obtaining evidence and content of foreign law in cross-border cases. This cooperation includes direct judicial communication among judges or communications with administrative units and may be connected with a hardlaw instrument, and even mandated, or may result in one-on-one memorandum of understanding between judicial systems or courts.¹⁰ As discussed in more detail below, the Hague Conference’s work reflects a bit of both. There is a provision in the 1980 Hague Parental Abduction Convention¹¹ (‘Hague Abduction Convention’) which provides for Central Authorities to help obtain legal determinations of the wrongfulness of a removal or retention.¹² In administering the same convention, the Hague Conference has

⁴ The need for foreign law is illustrated in the national reports for the IACL Vienna Conference in Treatment of Foreign Law- Dynamics towards Convergence? (Nishitani (ed) n 3).

⁵ Lord Denning was describing the attraction in the 1970’s and onward of litigants to US courts. ‘As a moth is drawn to the light, so is a litigant drawn to the United States’. *Smith Kline & French Laboratories Ltd v Bloch* (Court of Appeal, England and Wales) [1982] EWCA Civ J0513-1.

⁶ Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), 593/2008 of 17 June 2008 (EU).

⁷ Robert Lefflar promoted a theory of choice of law, known as Better Law, which is used in tort conflict cases in 5 US states and 2 for contracts. See S C Symeonides and W C Purdue, *Conflict of Laws: American, Comparative, International Cases and Materials* (5th edn, West Academic Publishing 2024) 370-72.

⁸ Comparative impairment was a choice of law theory developed by Professor Baxter as a variation on Professor Currie’s ‘governmental interest analysis’ and used in California. See S C Symeonides and W C Purdue (n 7) 290-94.

⁹ The focus of judicial cooperation and communications in this chapter is in relation to obtaining evidence and applying foreign law. See Chapter 8 M Szpunar and K Pacula, ‘Coordination and Cooperation in the Era of Globalisation’, covers the broader context, especially at Part 3, and addresses many interrelated issues.

¹⁰ The agreements between the courts of New South Wales, Australia with the courts of New York state and Singapore. See Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law (20 December 2010) http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_internationaljudicialcooperation/SCO2_agreement_newyork.html.

¹¹ Hague Convention on the Civil Aspects of International Child Abduction, 670 of 25 October 1980 (HCCH).

¹² Ibid Art 15.

developed Principles for Direct Judicial Communication¹³ that operate along with the Hague Network Judges,¹⁴ discussed in more detail below. This network and principles have also been urged for cooperation in the administration of the 1996 Child Protection Convention.¹⁵ This concept of direct judicial communication is clearly connected with obtaining and applying foreign law. In the recent draft of the Hague Parallel Proceedings Convention being considered currently there is a provision being urged for direct judicial cooperation.¹⁶

- 5 Regional efforts at judicial cooperation and communication are present in the EU with its European Judicial Network,¹⁷ which can help provide a country with legal information. Other networks exist, such as those found within a country with multiple legal systems. Often these networks are focused on underlying substantive law, but they help with correct application and administration of existing regulations in cross-border cases.
- 6 There are also less structured and independent efforts to obtain foreign law. One interesting example is the memorandum of understanding providing cooperation between the courts in New South Wales, Australia and New York state courts.¹⁸ The agreement was initiated by the Australian Judge, Judge Spiegelman, who also entered into an agreement with the courts of Singapore.¹⁹ The process is similar to one used domestically in several US state courts and federal courts where the state has adopted the uniform certification law.²⁰ Under this process, a federal court considering a matter of state law on which there is no clear

¹³ Direct Judicial Communications - Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges of 2013 (HCCH).

¹⁴ 'The International Hague Network of Judges' <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj>.

¹⁵ Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996 (HCCH), 35 I L M 1391.

¹⁶ Council on General Affairs and Policy, Working Group on Jurisdiction: Report 2024, of 2 February 2024, Art 15.

¹⁷ 'Judicial Cooperation in civil and commercial matters' European Judicial Network https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do.

¹⁸ Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law (20 December 2010) http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_internationaljudicialcooperation/CO2_agreement_newyork.html; J J Spiegelman, 'Proof of Foreign Law by Reference to the Foreign Court' (2011) 127 Law Quarterly Review 208, 216 (discussing an innovative mechanism that has been adopted in New South Wales, whereby a question of foreign law may be referred to a foreign court for determination). The MOU has not been used often if at all. See also Teitz (n 3).

¹⁹ Supreme Court of Judicature Act 2014 (Rules of Court) [Rule 29(1)(a)-(b)] (Singapore).

²⁰ Uniform Certification of Questions of Law Act 9, 10 [Rule] (1995) (Uniform Law Commission) (USA) (describing the procedures by which the Supreme Court of a state will certify questions of law). The National Conference is now known as the Uniform Law Commission (ULC).

decision may certify a specific question of law with specified facts to the state's highest court and then when the answer is returned to the federal court, the federal court uses it in their ultimate decision.²¹

1.3 Increased Access and Digitalization

- 7 The third trend that one can observe is the increased availability of foreign law content through free online access and increased digitalization. Two decades ago, obtaining the content of foreign law was difficult and expensive.²² Today it is available but there are still language barriers and costs of technology even if access is available online. In the European Union, the e-justice portal and the judicial atlas provide for a multitude of information about the judicial systems of EU Member States and substantive law.²³ These webpages provide information in several languages and forms that translate information automatically. However, the information about the procedural systems of the European Union Member States is still in need of improvement.²⁴
- 8 The EU continues to lead the efforts in the area of information and communication technologies of legal sources and has instituted a Regulation requiring digitalization²⁵—so there is increased access to foreign law, often in primary source. The Hague Conference's hope for a broader portal to foreign law was never pursued but their website now provides extensive sources of foreign law and law applicable to the operation of existing conventions and projects.
- 9 In situations where there is not a common legal tradition or connection, providing the content of the foreign law is only half of the solution to applying foreign law. There is the possibility of taking the electronic information out of context so as to result in an improper or inaccurate determination of the foreign law. The concept of networks clearinghouses or

²¹ One well-known example is the case involving choice of law for statute of limitations in connection with a multistate defamation case involving *Hustler Magazine*. See *Keeton v Hustler Magazine* in connection with certifying the statute of limitations choice of law issue to the Supreme Court of New Hampshire. *Keeton v Hustler Magazine* (First Circuit Court, US), Judgment 11 January 1987 [1987 1st Cir].

²² L E Teitz, 'From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts' (2003) 34 *Journal Maritime Law & Commerce* 97.

²³ 'Welcome to the European e-Justice Portal!' e-justice.europa.eu/home?action=home accessed 2 July 2024. The European e-Justice Portal is conceived as a future electronic one-stop shop in the area of justice. As a first step it strives to make your life easier by providing information on justice systems and improving access to justice throughout the EU, in 23 languages.

²⁴ It should be noted that the responsibility for providing and updating this information lies with the EU Member States.

²⁵ Regulation 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, 2023/2844 of 13 December 2023 (EU).

networks of experts may help place the foreign law in the proper context. Nonetheless, the increased availability of information technologies does provide greater access to foreign law.

1.4 Obtaining Evidence from Abroad

- 10 One obvious difference between purely domestic litigation and cross-border litigation is the element of sovereignty, especially in relation to the collection/obtaining of foreign evidence. In some jurisdictions deposing witnesses and proceeding with extra-judicial proceedings may violate domestic civil and criminal law. Because of the role of sovereignty in the process, cross-border disputes have led to efforts at harmonization of the area, through hard-law instruments in the international arena with the Hague Evidence Convention,²⁶ and in the regional areas such as the Inter-American Convention on the Taking of Evidence²⁷ and the EU Regulation on taking of evidence (recast)²⁸ just recently revised.
- 11 In addition to treaties and regional regulations, this is also an area where there has been a longstanding effort to harmonize and obtain cooperation through soft-law instruments. The best known is the American Law Institute's (ALI) work on a set of transnational rules of procedure,²⁹ begun in 1997 under the then Director and Reporter, Geoffrey Hazard, and with the inclusion of foreign legal experts. The ALI subsequently partnered with UNIDROIT and produced the ALI / UNIDROIT Principles of Transnational Civil Procedure³⁰ with co-reporters, Rolf Stürner (Reporter, UNIDROIT), Michele Taruffo (Reporter, ALI), and Antonio Gidi (Associate Reporter, ALI). Of relevance are: Principle 16 Access to Information and Evidence,³¹ Principle 22 Responsibility for Determinations of Fact and Law,³² and Principle 31 International Judicial Cooperation.³³ Subsequently, the European Law Institute partnered

²⁶ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 18 March 1970 (HCCH).

²⁷ Inter-American Convention on the Taking of Evidence Abroad 13 January 1975 (OAS), Art XXIII, 3; see D McClean, *International Co-Operation in Civil and Criminal Matters* (3d edn, Oxford University Press 2012).

²⁸ Regulation of the European Parliament and of the Council on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), 2020/1783 of 25 November 2020 (EU). This Regulation, replacing that from 2001, entered into force on 1 July 2022. As discussed elsewhere, the Regulation illustrates the trend of providing specific forms for use to help systematize and facilitate the cross-border transactions. The Council of Europe's London Convention while a regional instrument is more focused on the second topic in this chapter, that of obtaining the content of the foreign law.

²⁹ Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT); S Goldstein, 'The Proposed ALI/UNIDROIT Principles and Rules of Civil Procedure: The Utility of Such a Harmonization Project' (2001) 4 Uniform Law Review 789, 789.

³⁰ Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT).

³¹ Ibid 24.

³² Ibid 28.

³³ Ibid 33.

with UNIDROIT to produce ELI-UNIDROIT Model European Rules of Civil Procedure³⁴ that were finished in 2020.³⁵ As discussed in earlier chapters, efforts at harmonization have led to convergence in some domestic procedural systems.

- 12 Although this chapter does not focus on arbitration, it is worth noting that the issue of producing evidence receives attention in many of the arbitral institutions and the International Bar Association produced revised Rules for Taking of Evidence in 2010 that were modified again in 2020.³⁶ These rules tend to overcome differences between the continental and the common law systems by enlarging the obligations of parties to produce means of evidence that are in the control of the adversary.

1.5 Obtaining the Content of Foreign Law

- 13 In the second area covered in this chapter, that of obtaining the content of foreign law for proceedings, there are well-known unsuccessful efforts at the Hague Conference on Private International Law at creating an instrument for more than a decade before being removed from the work agenda.³⁷ The proposed work at the Hague Conference spanned a range of potential work-products, including a hard-law instrument, perhaps looking to the earlier Council of Europe's London Convention,³⁸ which had focused on obtaining the content of the foreign law which many have seen as ineffective and unknown.³⁹ Other possibilities

³⁴ Model European Rules of Civil Procedure 2021 (ELI / UNIDROIT).

³⁵ See generally E Silvestri, 'The ELI/UNIDROIT Project: A General Introduction' in F Gascón Inchausti and B Hess (ed), *The Future of the European Law of Civil Procedure* (1st edn, Intersentia 2020); M Stürner, 'The ELI/UNIDROIT European Rules of Civil Procedure: Access to Information and Evidence' in F Gascón Inchausti and B Hess (ed), *The Future of the European Law of Civil Procedure* (Cambridge: Intersentia 2020); but also R Marcus, 'Reflections From an Outlier: An American Reaction to The EU Rules on Evidence' (2011) 11 International Journal of Procedural Law 106-22.

³⁶ IBA Rules on the Taking of Evidence in International Arbitration of 17 December 2020 (IBA Council Resolution).

³⁷ Council on General Affairs and Policy of the Conference, Conclusions & Recommendations, of 24-26 March 2015 (HCCH). No 11, 'The Council decided to remove from the Agenda of the Hague Conference the topic of accessing the content of foreign law, with the understanding that this issue may be revisited at a later stage'.

³⁸ 'Enhancing Access to Foreign Law and Case Law - Presentation of Solutions by the EU' Preliminary Document No 14 of April 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference (April 2014), <https://assets.hcch.net/docs/1469a7ab-5b31-4d86-a912-48758211fec3.pdf>.

³⁹ See B Rodger and J Van Doorn, 'Proof of Foreign Law: The Impact of the London Convention' (1997) 46 International & Comparative Law Quarterly 151. Practically, it appears that the procedures under the Convention are fairly time-consuming and costly, both in having to involve experts and with the formulation of questions/answers and translations. Linked to this is the question of language difficulties. Ibid 165. The difficulties and possibilities of errors in translation were noted by M Stürner. M Stürner and F Krauss, 'Ausländisches Recht in deutschen Zivilverfahren. Eine rechtstatsächliche Untersuchung, Internationales und europäisches Privat- und Verfahrensrecht' (2018) 22 Nomos 45, para 44.

considered at the Hague Conference focused on access to foreign law through online portals but without an application to a particular issue, and the use of informal or soft-law networks to provide determination of foreign law issues. As will be discussed in more detail, this range of possibilities reflected the problem of obtaining the necessary consensus to devote further resources to the work at the Hague Conference and in particular to any hard-law instrument.⁴⁰

1.6 Judicial Cooperation

- 14 As we will see, there have been a range of efforts to provide for judicial cooperation, from soft-law agreements to formal instruments, as a mechanism to obtain the content and proper application of foreign law. The Hague Conference and its convention and post-convention tools have led the way and as will be discussed served as models for further collaboration. One also sees the efforts within the EU through required interaction under structures such as the European Judicial Network and the Digitalization Regulation ⁴¹ as discussed later in this chapter.

2 OBTAINING AND USING EVIDENCE FROM ABROAD

2.1 Diplomatic and Judicial Channels

- 15 Accessing evidence abroad has been traditionally considered as a problem of sovereignty as courts are not permitted to take evidence on foreign soil. In these instances, they may obtain assistance (cooperation) of a foreign court through letters of request or 'letters rogatory'.⁴² The first question to be answered is whether the jurisdictions under examination respond to such requests only when obliged by a convention, or also in the absence of a convention, and in this case, whether assistance is subject to reciprocity.
- 16 A foreign country's willingness to execute a letter of request is not based on any enforceable treaty but solely on comity, and perhaps an expectation of reciprocity. The court issuing the letter of request sends the request either directly to the foreign court, or through

⁴⁰ The Hague Conference worked with the EU on a conference and subsequent documents but there was not support among members. 'Enhancing Access to Foreign Law and Case Law - Presentation of Solutions by the EU', Preliminary Document No 14 of April 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference (April 2014) <https://assets.hcch.net/docs/1469a7ab-5b31-4d86-a912-48758211fec3.pdf>.

⁴¹ Regulation 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, 2023/2844 of 13 December 2023 (EU).

⁴² Cf Hague Convention on Civil Procedure, of 1 March 1954 (HCCH) Art 8–16.

governmental authorities for transmittal through diplomatic channels.⁴³ The executing judicial authority in the foreign country generally employs its local procedures to obtain the evidence or testimony of a person or entity over whom the foreign court has jurisdiction. The letter of request is then returned through the same route, thus often taking significant time to complete.⁴⁴

- 17 Given the complexity and variety of circumstances involved with seeking evidence from abroad, the initial analysis requires determining: (1) from whom the evidence is being sought; (2) whether the request is voluntary or compulsory; (3) whether the information being sought is documentary or testimonial; and (4) whether the person or information is subject to any foreign laws restricting disclosure or access, often referred to as blocking statutes.⁴⁵ When corporate entities are involved, additional questions may arise about actual location and ‘control’ of evidence.⁴⁶ Although the distinction between civil and criminal proceedings also may have an impact on obtaining evidence from abroad, criminal proceedings are beyond the scope of this chapter and often controlled by bilateral

⁴³ See eg, 28 USC § 1781 (1964) (USA) – Transmittal of letter rogatory or request:

(a) The Department of State has power, directly, or through suitable channels—

(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

(b) This section does not preclude—

(1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner. 28 USC Sec 1781 (1964) (USA).

⁴⁴ One major expert looking at the process from the American perspective in 1990 wrote: ‘Experience teaches that Letters of Request travel slowly, and that a prompt response is the exception rather than the rule. Delays of upwards of one year are commonplace’. Ristau (n 2) para 3-3-3. B Ristau’s treatise was a multivolume work that was authoritative but dated. The new edition, edited by D Stewart and D Bowker, is a one-volume format, that covers choice of law, choice of forum, proof of foreign law, service, taking evidence, recognition and enforcement, and legalization. D Bowker and D Stewart, *Ristau’s International Judicial Assistance: A Practitioner’s Guide to International Civil and Commercial Litigation* (2d edn, Oxford University Press 2021).

⁴⁵ For a discussion of cross-border evidence taking and issues of legal privilege, with a focus on the legal systems of US, England, France, Germany, and The Netherlands, see R Jansen, *Legal Privilege and Transnational Evidence-Taking* (1st edn, Intersentia 2022).

⁴⁶ For a discussion of international judicial assistance, especially within the United Kingdom and including assistance in criminal matters, see McClean (n 27); see P Friedman and C Wilson, ‘Representing Foreign Clients in Civil Discovery and Grand Jury Proceedings’ (1986) 26 *Virginia Journal of International Law* 327, 345.

memoranda of understanding. The presence of a government as a party also affects the process.

- 18 This is one area where the civil and common law divide is noticeable, especially in connection with what evidence is obtainable.⁴⁷ This difference is impacted by the role of the judge and the role of oral and written testimony.⁴⁸ Many civil law countries refuse to execute letters of request that seek pretrial discovery or contain broad categories of documents, as is true as well under the Hague Evidence Convention and Article 23.⁴⁹ In addition, when the foreign country has a blocking or nondisclosure law, it will generally not honor a letter of request that would violate the foreign laws. For example, in the United States evidence is obtainable both by the parties, rather than the court, and for pretrial use, that is prior to trial. The ALI/UNIDROIT Rules and the ELI/UNIDROIT Rules both reflect some convergence in their attempts to meld civil and common law procedures.
- 19 Since the letter of request is executed through the assistance of foreign judicial authorities, use of local counsel is almost essential. ‘Without the assistance of foreign counsel, resort to Letters of Request is likely to turn into a time-consuming and expensive effort in futility’.⁵⁰ Because a letter of request should be translated into the language of the receiving country and since local counsel must be employed, this form is obviously not the preferred means for obtaining evidence or testimony. In addition, even when a country is willing to execute a letter of request,⁵¹ its local procedures may not allow verbatim transcription or other formalities such as taking testimony under oath. Thus, the potential problems and the need for lengthy and costly procedures highlight the desirability of an international or regional treaty ensuring cooperation and adopting similar procedures and mechanisms that provide faster results. In addition, these instruments increasingly have forms and guides that help countries cooperate in the process.⁵²

⁴⁷ As French and Luxembourg court almost never hear witnesses in civil and commercial cases, and rarely require the production of documents, the cross-border taking of evidence is primarily concerned with the issue of the power of judicial experts to conduct investigations abroad. *Prorail BV v Xpedys NV*, Case C-332/11 (CJEU), Judgment 21 February 2013 [EU:C:2013:87].

⁴⁸ See Marcus (n 35) 106-22; McClean (n 27) 3-5.

⁴⁹ See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Table Reflecting the Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH 1970 Evidence Convention of 18 March 1970 (HCCH).

⁵⁰ Ristau (n 2) para 3-3-5.

⁵¹ It is generally considered that courts lack power to appoint judicial experts for that purpose [conducting investigations abroad], but it seems that French first instance courts often do it in emergency proceedings - where issues of private international law are neglected. *Prorail BV v Xpedys NV* (n 47).

⁵² See eg, the multiple tools available for utilizing the Hague Evidence Convention, including the Practical Handbook (2020), Guide to Good Practice on the Use of Video-Link under the Evidence Convention, a recommended model form for a Letter of Request, and country profiles to help when making a request to

2.2 International Treaties and Regional Agreements

- 20 The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters⁵³ is in force in 66 jurisdictions⁵⁴. However, there have been studies showing its limited use, especially in countries that do not require its use, such as the US as established in 1987 by a major Supreme Court opinion.⁵⁵ In addition, its use in common law countries with discovery allowed after filing but before the final hearing on the merits (pre-trial) is limited through the ability of a contracting state to exclude pre-trial discovery from coverage.
- 21 The Evidence Convention has provided a link between different legal systems through letters of requests and diplomatic officers, consular agents, and commissioners. One of the particularly positive aspects is that the convention language used is not restricted to certain technology that would be dated after almost 55 years which unfortunately is the case with the Hague Service Convention and the use of ‘mail’.⁵⁶ The Evidence Convention has grown with the new technology and at the periodic ‘Special Commissions’ to consider the practical operation of the convention⁵⁷, new tools and technology have been approved, including a Guide to Good Practice on the Use of the Video-Link.⁵⁸ One major question has been whether it has application to arbitration proceedings, which is also an issue for discovery outside of the convention.⁵⁹ Finally, the development of model forms has helped encourage

a country. Hague Guide to Good Practice: The Use of Video-Link, 1970 Evidence Convention <https://www.hcch.net/en/publications-and-studies/details4/?pid=7072&dtid=3>.

⁵³ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (HCCH).

⁵⁴ V Richard and B Hess, ‘The 1965 Service and 1970 Evidence Conventions as crucial bridges between legal traditions?’ in T John, R Gulati and B Koehler (ed), *The Elgar Companion to the Hague Conference on Private International Law* (Edward Elgar Publishing 2020) 286.

⁵⁵ *Societe Nationale Industrielle Aerospatiale v United States District Court* (Supreme Court, US) Judgment 15 June 1987 [1987 SCUS]; see generally G Born and P Rutledge, *International Civil Litigation in United States Courts* (7th edn, Aspen Casebook Series 2022); L E Teitz, *Transnational Litigation* (1st edn, Charlottesville, Virginia: Michie, 1996 & Lexis Law Publishing Supplement 1999); see M Gardner, ‘Parochial Procedure’ (2017) 69 Stanford Law Review 941, 970–72.

⁵⁶ Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, of 15 November 1965 (HCCH), Art 10; see eg, L E Teitz, ‘Is the Service Convention Ready for Early Retirement at Age Fifty-Five? Or Can It Be “Serviceable” in a World Without Borders?’ in *Hague Conference on Private International Law (HCCH)* (a|Bridged edn, HCCH 2020).

⁵⁷ ‘Hague Conference on Private International Law Conférence de La Haye de droit international privé’ Special Commission Meetings <https://www.hcch.net/en/home>.

⁵⁸ Hague Guide to Good Practice: The Use of Video-Link, 1970 Evidence Convention <https://www.hcch.net/en/publications-and-studies/details4/?pid=7072&dtid=3>.

⁵⁹ These statistics are included in Prel Doc No 4 of April 2024, a summary of responses to the 2022 Evidence Questionnaire to countries in preparation for the July 2024 Special Commission. Not all countries have replied. ‘Hague Conference on Private International Law Conférence de La Haye de droit international privé’ Special Commission Meetings <https://assets.hcch.net/docs/7a143dec-290e-4f0c-8a73-fdf22f1902f7.pdf>.

more efficient use of the convention in the multiple legal systems and languages involved in requests for taking evidence abroad. In fact, data from 2022 forward from the HCCH in connection with the 2024 Special Commission shows that requests have grown from at least 2224 in 2017 to at least 3470 in 2022,⁶⁰ with the largest incoming requests (under Chapter I) directed at UK, United States, Germany, France, Netherlands, and Argentina.

2.2.1 General Provisions.

- 22 The Hague Evidence Convention basically provides two procedures for taking evidence, either by letter of request as outlined in Chapter I, or by diplomatic officers, consular agents, and commissioners as set out in Chapter II. The letter of request mechanism is the primary method in many countries that have limited the use of commissioners and diplomatic channels. The letter of request procedure, limited to obtaining evidence ‘intended for use in judicial proceedings, commenced or contemplated’, utilizes a Central Authority, similar to the mechanism established under the earlier Hague Service Convention. A letter of request is a request by one judicial authority of another ‘to obtain evidence, or perform some other judicial act.’ The letter is sent to the Central Authority of the executing state. The letter of request basically describes the testimony or documents sought, preferably as specifically as possible, as well as any method requested for obtaining the evidence, such as verbatim transcription. Under the Convention, the executing judicial authority will apply its own procedures unless a special method is requested, in which case it will use that method if not contrary to the executing state's internal law or if not impractical. In fact, this provision permits the executing state to refuse to provide verbatim transcription or in civil law countries not to allow cross-examination. The letter of request must be in the language of the executing country or include a translation. However, a letter of request in English or French must be accepted, unless the executing country has made a reservation under Article 33 and refuses to accept English or French. Several countries have refused to accept one or the other language and some accept only in their own language. The Convention specifies that the translation of a letter of request must be certified by a diplomatic officer, consular agent, sworn translator, ‘or by any other person authorized in either State.’ Under US law, diplomatic officers and consular agents are not authorized to act for the United States for these purposes.
- 23 A receiving state is obligated to execute a proper letter of request ‘expeditiously’ and to apply ‘appropriate measures of compulsion’ followed by the internal law of that country. The state may not refuse the letter unless it does not fall within the ‘functions of the judiciary’ or it considers ‘its sovereignty or security would be prejudiced.’ Although not specified as a basis for refusal under Article 12 of the Convention, a letter or request may be refused if the executing country has made a declaration under Article 23 that it will not

⁶⁰ Ibid.

execute a letter of request ‘issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries’. As a practical matter, of the 66 countries party to the convention as of June 2017, all but 15 countries have entered some form of declaration to Article 23, thus reducing the effectiveness of the Convention for purposes of pretrial discovery, of particular significance to those litigating in the United States with its emphasis and use on pre-trial discovery.⁶¹

- 24 Chapter II of the Hague Evidence Convention governs the alternative procedure of obtaining evidence by use of diplomatic officers, consular agents and commissioners. Thus, no judicial action is necessary in the executing country, although permission from the foreign state may be needed, both for depositions of the requesting country's nationals and those of the foreign country or of a third country. In general, this form of discovery is less effective, since it contains no means to compel equivalent to Article 10 for a letter of request but does provide for applying for assistance in compulsion, a process requiring additional time to obtain compliance. Article 33 allows a country to exclude part or all of Chapter II's procedures.
- 25 Under either procedure of the Hague Evidence Convention, the witness may refuse to give evidence that is privileged or that he has a ‘duty to refuse to give’ under either the law of the executing country or the requesting country or if the executing country has chosen, of any other country. The problem of foreign privileges may restrict the scope of the obtainable evidence where the executing country has broader privileges than those of the requesting country.⁶²
- 26 In general, the Hague Evidence Convention has limitations that make its effectiveness questionable even for those contracting states. First the question of sovereignty remains and of course there is an explicit exclusion.⁶³ Second, the declarations under Article 23 excluding pre-trial discovery, mentioned above, has a significant impact in situations where the legal system allows party-initiated pre-trial discovery, the US being the most significant example. Third, even in countries party to the convention, the convention may not be given a mandatory application, as is the case in US courts. Although the Convention has served as a model for other instruments, such as the European Regulation on the Taking of Evidence,⁶⁴ the Convention has not yet created convergence in the field. In fact, some of the changes in

⁶¹ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Table Reflecting the Applicability of Articles 15, 16, 17, 18 and 23 of the HCCH 1970 Evidence Convention of 18 March 1970 (HCCH).

⁶² Ibid.

⁶³ See Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, 1206/2001 of 28 May 2001 (EC), Art 12.

⁶⁴ Ibid.

the EU Regulation have in fact impacted suggested practices for the operation of the Hague Convention.

2.2.2 Regional Efforts

- 27 At the regional (EU) level, the situation has not been much different but with the new IT regime, the situation has already changed. In 2001, an Evidence Regulation was adopted along the lines of the Hague Convention⁶⁵ to improve judicial cooperation between EU member states, especially when not all EU member states were also contracting states to the Hague Evidence Convention. It has been ignored by most courts and lawyers.⁶⁶ The CJEU has ruled that the Evidence Regulation is optional and does not need to be followed by the courts of Member States if their national procedures are more efficient.⁶⁷ Following several studies of the practical operation of the 2001 Regulation, a new regulation, a recast, was adopted abrogating the previous one and most of it entered into force on 1 July 2022.⁶⁸ It encourages the use of IT tools in the cross-border taking of evidence and facilitates videoconferencing. All communications and document exchanges are to be carried out through an IT system such as e-CODEX. The e-CODEX Regulation entered into force in June 2022⁶⁹ and seeks to ensure ‘the effective access of citizens and businesses to justice and facilitating judicial cooperation in civil, including commercial, and criminal matters between the Member States’.⁷⁰ The Recast also provides a broader definition of ‘court’ and other authorities competent under national law to take evidence and allows for delegation of these tasks to notaries and court clerks. The videoconferencing should offer an advantage which has become more evident since the COVID experience. The actual use and advantages for parties and courts remains to be seen. But the ability to have cross-border hearings within the EU offers a model where the actual prior concerns with sovereignty and formalism of entering into a foreign country appear to be erased in cyberspace.⁷¹

⁶⁵ Ibid.

⁶⁶ R Jansen, ‘Explaining the methods for taking evidence abroad within the EU and some first observations on the proposal for the Evidence Regulation (recast)’ (2019) 4 *Nederlands International Privaatrecht* 753-70.

⁶⁷ *Prorail BV v Xpedys NV* (n 47).

⁶⁸ Regulation of the European Parliament and of the Council on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), 2020/1783 of 25 November 2020 (EU).

⁶⁹ Regulation of the European Parliament and of the Council on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), 2022/850 of 30 May 2022 (EU).

⁷⁰ Ibid.

⁷¹ B Hess, *Europäisches Zivilprozessrecht* (2nd edn, IUS Communitatis 2021), Ch 3 IV, para 3.69. The implications for judicial cooperation through digitalization and technology is discussed in B Hess, ‘Digital Judicial Cooperation in the Area of Freedom, Security and Justice: The judicial cooperation in civil matters’,

2.2.3 Inter-American Convention on the Taking of Evidence

- 28 The OAS Inter-American Convention on Taking of Evidence was adopted on January 13, 1975, in Panama City. There are fifteen contracting states to the Convention.⁷² The Convention provides a method for taking evidence in one member-state and using it in another member-state's proceeding.⁷³ The Additional Protocol to the Inter-American Convention on Taking of Evidence Abroad of 1984⁷⁴ supplements the Convention and the Inter-American Convention on Letters Rogatory administers the procedure for service of process.⁷⁵ Each member state must designate a central authority that would carry out the protocols associated with the convention and letters rogatory for the taking of evidence.⁷⁶ The central authority receives, executes, and processes the letter rogatory for communication between member states in the taking of evidence.⁷⁷ The letter rogatory must specify the evidence, clearly describing the type of information being requested and it should be executed in accordance with the laws and procedural rules of the state of destination.⁷⁸ One problem with the convention is that it is dated, but two scholars recently have urged the use of information and communication technologies to help improve international cooperation with these conventions.⁷⁹

2.3 Individual and Multilateral Efforts

- 29 The Nordic States have in place multiple mechanisms for cooperation through the Nordic Council of Ministers and the Nordic Council which provide official co-operation among

3 April 2023 (unpublished manuscript). The author provides detailed examples of the German procedural law and video conferencing across borders. See also B Hess, 'Digitalization of Civil Procedure and AI: the European Perspective' in S Amrani-Mekki and T Clay (ed), *Liber amicorum Loïc Cadet* (2023).

⁷² Inter-American Convention on the Taking of Evidence Abroad 13 January 1975 (OAS), Art XXIII, para 3.

⁷³ Ibid Art II, para 1.

⁷⁴ Only a limited number of the parties to the 1975 Convention have also signed the Protocol which requires the designation of a Central Authority. McClean (n 27) 111-14.

⁷⁵ J Silkenat, 'Inter-American Convention on the Taking of Evidence Abroad' (1990) 24 International Law 880, 880-81.

⁷⁶ Silkenat (n 75) 884; Inter-American Convention on the Taking of Evidence Abroad 13 January 1975 (OAS), Art XI, para 1, Art XIII, para 1.

⁷⁷ Inter-American Convention on the Taking of Evidence Abroad 13 January 1975 (OAS), Art XIII, para 1; Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, 24 May 1984 (OAS), Art III, para 1-2; Silkenat (n 75) 884.

⁷⁸ Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, 24 May 1984 (OAS), Art XII, para 1.

⁷⁹ M M Albornoz and S Paredes, 'No turning back: information and communication technologies in international cooperation between authorities' (2021) 17(2) Journal of Private International Law 224-54.

Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland and Åland.⁸⁰ While these countries have varying degrees of digitalization in their courts, we are aware of no agreements for judicial cooperation between States of the type found in the European Union.

- 30 Although many common law jurisdictions especially have procedures outside of the international treaties for judicial cooperation in taking of evidence, perhaps the best known and most frequently used mechanism is the United States discovery in aid of foreign proceedings (28 USC Section 1782). This has become a much-used instrument to permit foreign parties to use US-style (electronic) discovery for proceedings abroad.⁸¹ Indeed, in some countries, the mechanism is used to avoid the Article 23 Declaration not to include pre-trial discovery under the Hague Evidence Convention.⁸² Under Section 1782, a US federal district court (federal trial courts) can order any person who 'resides or is found' in the judicial district to provide discovery 'for use in a proceeding in a foreign or international tribunal'.⁸³ The statute requires that the person from whom discovery is sought resides or is found in the district which has led to litigation about what is sufficient to be 'found' and if 'tag jurisdiction' (through personal service in the jurisdiction) is sufficient. In addition, there has been significant litigation on what types of 'proceeding before a foreign or international tribunal' are included, particularly in connection with commercial arbitration. The US Supreme Court resolved that recently in the *ZF Automotive Group*⁸⁴ where it held that the provision could not be used in foreign private arbitration.
- 31 In an earlier 2004 US Supreme Court case, *Intel Corporation v Advanced Micro Devices, Inc*⁸⁵, the court set certain factors to guide a district court in deciding in its discretion whether to grant the request.⁸⁶ The court also stressed that Section 1782 was meant not only to

⁸⁰ *Nordic Cooperation*, Ministry of Justice Finland <https://oikeusministerio.fi/en/nordic-cooperation> accessed 26 June 2024; D Helenius, 'Nordic and European Judicial Cooperation in Criminal Matters' in L Ervo, P Letto-Vanamo and A Nylund (ed), *Rethinking Nordic Courts, Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2021) 133.

⁸¹ See also S Collins, 'The Death Knell and the Wild West: Two Dangers of Domestic Discovery in Foreign Adjudications' (2023) 122 Michigan Law Review 127; D Rubinstein, 'Judicial Assistance as Intended: Reconciling Sec. 1782's Present Practice with its Past' (2023) 123 Columbia Law Review 513. For a recent study of crossborder discovery in US federal courts, see M Baylson and S Gensler, 'Should the Federal Rules of Civil Procedure Be Amended to Address Cross-Border Discovery?' (2023) 107 Judicature 19.

⁸² L Collins, 'The Use and Abuse of 28 USC § 1782 Litigation in England' (2023) 56 New York University Journal of International Law & Politics 151.

⁸³ 28 USC § 1782 (1996) (US).

⁸⁴ *ZF Automotive Group v Luxshare, Ltd* (Supreme Court, US) Judgment 13 June 2022 [SCUS 2022].

⁸⁵ *Intel Corporation v Advanced Micro Devices, Inc* (Supreme Court, US) Judgment 21 June 2004 [2004 SCUS].

⁸⁶ *Ibid.* These factors include: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding in which case the foreign court could itself order the discovery; (2) the receptivity of the foreign court to US judicial assistance; (3) whether the discovery request seeks to circumvent foreign restrictions on discovery; and (4) whether the request is unduly intrusive or burdensome.

facilitate fact-finding in litigation in foreign tribunals but also ‘to encourage foreign countries by example to provide similar means of assistance to our courts’.⁸⁷ In keeping with the spirit of Section 1782, one survey found that the requests were granted in 90% of the cases, and often in *ex parte* decisions.⁸⁸ The hope for reciprocal treatment in foreign courts has not met with as much success, leading to criticisms from US parties of the unequal playing field in foreign litigation.

- 32 In addition to specific country legislation, one finds that there are significant bilateral and multilateral informal agreements between countries both in connection with civil and criminal matters, sometimes limited to specific areas of cases, such as competition law, collective actions, and intellectual property.
- 33 At the EU level, the procedural harmonization in intellectual property litigation, cartel law and consumer protection affects evidence in the respective areas of law, which often apply in cross-border cases: parties must disclose to the opponent information and means of evidence in their control; courts may order provisional measures to preserve evidence, which is under the control of the other party or third parties, including competition authorities. These developments have changed the national approaches regarding the disclosure of evidence, at the domestic and cross-border level (within the EU), especially as seen in the cartel and competition law areas.⁸⁹

2.4 Softlaw Efforts at Harmonization and Cooperation for Taking of Evidence⁹⁰

2.4.1 ALI/UNIDROIT Rules

- 34 The best known soft-law effort at harmonization in the area of cooperation is the work on a set of transnational rules of procedure which the American Law Institute began in 1997⁹¹ under the then Director and Reporter, Geoffrey Hazard, and with the inclusion of foreign legal experts.⁹² The project subsequently partnered with UNIDROIT in 2000 and produced

⁸⁷ *Intel Corporation v Advanced Micro Devices, Inc* (n 85) 252.

⁸⁸ See generally S Collins (n 81) 127.

⁸⁹ Cf B Hess, *Europäisches Zivilprozessrecht* (2nd edn, IUS Communitatis 2021), Ch 3 IV, para 3.69. Of particular interest is Directive 2014/14 on Cartel Damages where the CJEU has given several rulings in the context of the truck cartel (litigation is ongoing in almost all EU Member States). See also E Vallines García, ‘Harmonising Access to Information and Evidence: The Directives on Intellectual Property and Competition Damages’ in F Gascón Inchausti and B Hess (ed), *The Future of the European Law of Civil Procedure* (Intersentia 2020).

⁹⁰ The topic of softlaw efforts at cooperation and direct judicial cooperation are covered in the second half of this Chapter, para 49-63, in connection with the cooperation in obtaining the content of foreign law where these efforts have been most successful.

⁹¹ Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT); see Goldstein (n 29) 789.

⁹² Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT).

the ALI/ UNIDROIT Principles of Transnational Civil Procedure⁹³ and Rules, with co-reporters, Rolf Stürner (Reporter, UNIDROIT), Michele Taruffo (Reporter, ALI), and Antonio Gidi (Associate Reporter, ALI). Of relevance are: Principle 16. Access to Information and Evidence,⁹⁴ Principle 22. Responsibility for Determinations of Fact and Law,⁹⁵ and Principle 31. International Judicial Cooperation.⁹⁶

⁹³ Ibid 2.

⁹⁴ Ibid 24.

16. Access to Information and Evidence

16.1 Generally, the court and each party should have access to relevant and nonprivileged evidence, including testimony of parties and witnesses, expert testimony, documents, and evidence derived from inspection of things, entry upon land, or, under appropriate circumstances, from physical or mental examination of a person. The parties should have the right to submit statements that are accorded evidentiary effect.

16.2 Upon timely request of a party, the court should order disclosure of relevant, nonprivileged, and reasonably identified evidence in the possession or control of another party or, if necessary and on just terms, of a nonparty. It is not a basis of objection to such disclosure that the evidence may be adverse to the party or person making the disclosure.

16.3 To facilitate access to information, a lawyer for a party may conduct a voluntary interview with a potential nonparty witness.

16.4 Eliciting testimony of parties, witnesses, and experts should proceed as customary in the forum. A party should have the right to conduct supplemental questioning directly to another party, witness, or expert who has first been questioned by the judge or by another party.

16.5 A person who produces evidence, whether or not a party, has the right to a court order protecting against improper exposure of confidential information.

16.6 The court should make free evaluation of the evidence and attach no unjustified significance to evidence according to its type or source.

⁹⁵ Ibid 28.

22. Responsibility for Determinations of Fact and Law

22.1 The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law.

22.2 The court may, while affording the parties opportunity to respond:

22.2.1 Permit or invite a party to amend its contentions of law or fact and to offer additional legal argument and evidence accordingly;

22.2.2 Order the taking of evidence not previously suggested by a party; or

22.2.3 Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party.

22.3 The court ordinarily should hear all evidence directly, but when necessary may assign to a suitable delegate the taking and preserving of evidence for consideration by the court at the final hearing.

22.4 The court may appoint an expert to give evidence on any relevant issue for which expert testimony is appropriate, including foreign law.

22.4.1 If the parties agree upon an expert the court ordinarily should appoint that expert.

22.4.2 A party has a right to present expert testimony through an expert selected by that party on any relevant issue for which expert testimony is appropriate.

22.4.3 An expert, whether appointed by the court or by a party, owes a duty to the court to present a full and objective assessment of the issue addressed.

⁹⁶ Ibid 33.

31. International Judicial Cooperation

- 35 The accompanying ALI/UNIDROIT Model Rules of Civil Procedure, provide rules that can be adopted or modified by jurisdictions (or arbitral centers⁹⁷). The rules stress their use for fair procedures for litigants to resolve disputes related to transnational commercial transactions and promote judicial cooperation among courts of various legal systems.⁹⁸ Rules 21-28 govern procedures pertaining to discovery and evidence.⁹⁹ Rule 21 and Rule 22 focus specifically on the disclosure and exchange of evidence between parties and the protocols for various stages of hearings.¹⁰⁰ Rules 23-28 concentrate on how to obtain certain types of evidence, like depositions, expert evidence, and privileged evidence and also include means for determining how evidence is relevant or admissible, and the effect to be given to the evidence.¹⁰¹

2.4.2 ELI/UNIDROIT Model European Rules of Civil Procedure

- 36 The ELI UNIDROIT Model European Rules of Civil Procedure expand on the existing ALI/UNIDROIT Principles of Transnational Civil Procedure by providing more detailed rules that are aimed at assisting the European Union with its current legal developments and traditions, while also providing a framework for other legislators and policymakers.¹⁰² The project began in Vienna in October 2013, and the rules were approved by the ELI Council and membership in 2020, and UNIDROIT also approved the work product in 2020.¹⁰³ The ELI UNIDROIT Rules were developed by various Rapporteurs in the Steering Committee and Working Groups.¹⁰⁴ Discovery and evidence are governed by ELI Rules 87-129.¹⁰⁵ Specifically, Rule 128 concerns taking evidence within cross-border member states of the European Union through proceedings occurring in that member state or for ordering production of evidence from a foreign court.¹⁰⁶ Under Rule 128, the parties may choose to

The courts of a state that has adopted these Principles should provide assistance to the courts of any other state that is conducting a proceeding consistent with these Principles, including the grant of protective or provisional relief and assistance in the identification, preservation, and production of evidence.

⁹⁷ Ibid 2.

⁹⁸ Ibid 13.

⁹⁹ Ibid 52-62.

¹⁰⁰ Ibid 52-53.

¹⁰¹ Ibid 53-62.

¹⁰² Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT), Foreword.

¹⁰³ Ibid.

¹⁰⁴ Ibid Introduction and Participants in the Project.

¹⁰⁵ Ibid Foreword.

¹⁰⁶ Ibid Rule 128.

Rule 128. Cross-border Evidence-Taking within the EU.

rely on Council Regulation (EC) No 1206/2001 of 28 May 2001 for cooperation between member states.¹⁰⁷ The Rules were finalized in September 2020, prior to the official date of the new Evidence Regulation (recast), but the reference to the 2001 Regulation is intended to include the Recast.¹⁰⁸ Without relying on the 2001 Evidence Regulation, Rule 128 also permits the courts to summon witnesses from member states, appoint experts from member states, require production of documents and evidence located in a member state, or order access to evidence from potential parties or non-parties in a member state.¹⁰⁹ Rule 129 concerns taking evidence in non-member states and requires the proceedings to rely on the Hague Evidence Convention or other relevant conventions for proper procedure.¹¹⁰

2.4.3 International Bar Association Rules of Evidence

- 37 The International Bar Association (IBA) has produced the IBA Rules on the Taking of Evidence in International Arbitration which are soft-law rules designed to be used in international commercial arbitration. The IBA Rules offer an example of the harmonization of different legal systems and traditions for cross-border dispute resolution which may suggest ways to

(1) When evidence has to be taken in another EU Member State and when access is needed to evidence located in another Member State, the court and the parties may rely on the provisions of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

(2) Without prejudice to the application of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,

(a) the court may directly summon a witness residing in another Member State;

(b) the court may appoint an expert to submit a report, the preparation of which requires the undertaking of activities (inspection of persons or premises located) in another Member State;

(c) a party or non-party, to whom an order for access to evidence is addressed, and who is residing or domiciled in the Member State of the court, is under a duty to produce the required documents and evidence, even if they are located in a Member State different to the one of the court issuing the order;

(d) a court may address an order for access to evidence to prospective parties and to non-parties domiciled in another Member State.

¹⁰⁷ Ibid Rule 128.

¹⁰⁸ These rules were approved by the ELI Council and Membership in Summer 2020 and approved by UNIDROIT's Governing Council in September 2020, prior to the recast of Regulation (EU) 2020/1783 European Parliament and of the Council on November 25, 2020. Ibid Foreword; Regulation of the European Parliament and of the Council on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), 2020/1783 of 25 November 2020 (EU).

¹⁰⁹ Model European Rules of Civil Procedure 2021 (ELI / UNIDROIT) at Rule 128.

¹¹⁰ Ibid Rule 129.

Rule 129. Cross-border Evidence-Taking of outside the EU.

When evidence needs to be taken outside the EU or when the addressee of an order for access to evidence has no domicile or habitual residence within the EU, the court and the parties may rely on the provisions of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention of 18 March 1970) or of other relevant international conventions.

harmonize these areas in litigation, especially in the growing number of international commercial courts.

- 38 Earlier versions were available from 1983, but major changes occurred in the 2010 version. That was updated by the current 2020 edition which also incorporates some of the information and technology advantages.¹¹¹ The Rules have been successful in serving as a model soft-law instrument because of its constant development to reflect technological advances and flexibility to accommodate various institutional structures.¹¹² The IBA Rules also incorporate input from the arbitration public.¹¹³ The IBA amended Rule 1.3, for example, to address conflicts between the general institutional or ad hoc rules governing the arbitration, the General Rules,¹¹⁴ and the IBA Rules of Evidence by requiring the Arbitration Tribunal to ‘apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish, to the extent possible, the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.’¹¹⁵ By recognizing the conflicts between the IBA Rules of Evidence and the institutional rules underlying the arbitration, the Rules offer the flexibility to be used in multiple institutional settings.¹¹⁶ The IBA also amended Rule 8.2 to include remote hearings¹¹⁷ and added Rule 2.2(e) to include cybersecurity and data protection for the most ‘efficient, economical, fair procedure.’¹¹⁸

2.5 Conclusion

- 39 There may be an emerging trend to allow parties access to information in cross-border cases, as seen in international treaties and regional instruments, as well as in the individual legal systems. This trend is evident in significant soft-law efforts, discussed above. In addition, the increasing use of new technologies, such as video links, electronic mechanisms as illustrated by the EU Evidence Regulation (recast) and eCODEX have made the possibility of cooperation more of a reality. The impact of the COVID pandemic accelerated the

¹¹¹ J Neuhaus, ‘The Guide to Evidence in International Arbitration - The 2020 IBA Rules on the Taking of Evidence in International Arbitration: A History and Discussion of the 2020 Revisions’ (2024) *Global Arbitration Review* 6.

¹¹² IBA Rules on the Taking of Evidence in International Arbitration of 17 December 2020 (IBA Council Resolution); Neuhaus (n 111) 3-4.

¹¹³ Neuhaus (n 111) 4.

¹¹⁴ The ‘General Rules’ are the institutional, ad hoc or other rules that apply to the conduct of the arbitration. IBA Rules on the Taking of Evidence in International Arbitration of 17 December 2020 (IBA Council Resolution), 9; Neuhaus (n 111) 12.

¹¹⁵ IBA Rules on the Taking of Evidence in International Arbitration of 17 December 2020 (IBA Council Resolution), Art 1.3; Neuhaus (n 111) 12.

¹¹⁶ *Ibid.*

¹¹⁷ IBA Rules on the Taking of Evidence in International Arbitration of 17 December 2020 (IBA Council Resolution), Art 8.2; Neuhaus (n 111) 6.

¹¹⁸ IBA Rules on the Taking of Evidence in International Arbitration of 17 December 2020 (IBA Council Resolution), Art 2.2(e); Neuhaus (n 111) 7.

increase in use of electronic means to handle distance, as well as having provided a laboratory for some of the issues that arise with the new technology.

- 40 There are of course questions of authentication, security, and language/translation that were noted with the increased use of the technology but have also been addressed with developments in the electronic medium. Although there have been many advances, there is still an issue of limited resources for this technology. Also, there is the need to bridge civil and common law systems with different views on pre-trial discovery, oral versus written evidence, and the role of judges and parties in the respective litigation process. We may see changes as they occur in specialized areas such as intellectual property, consumer protection, competition, and administrative law areas.¹¹⁹ We also may find more harmonization as international commercial courts gain momentum and develop to handle cross-border disputes.

3 DETERMINING AND APPLYING FOREIGN LAW TO THE MERITS¹²⁰

3.1 Introduction

- 41 The determination of a cross-border dispute increasingly may require the application of foreign law. Nor is this need limited to dispute resolution but also is important for transactional planning by individuals and corporations and administrative work of governmental agencies. There are two aspects of the problem, applying the foreign law and determining the content of the foreign law. In some legal systems, the need is more pronounced as to determining the content because the rules for applying foreign law may require comparative analysis of the content of the potential laws to be applied.¹²¹ In other legal systems, especially with codified choice of law regimes or those that do not allow foreign law to be applied, the comparative analysis may be less relevant.
- 42 The content of the foreign law may also be necessary for more than just determining the substantive legal issues but may also be important to certain procedural mechanisms. For example, in those systems that use a *forum non conveniens* approach, the need to apply foreign law may be a factor in the analysis, complicating even the decision if and where the

¹¹⁹ See eg, E García (n 89).

¹²⁰ For an excellent source discussing applying foreign law and covering much of the material in this section, see J Requejo Isidro (n 3).

¹²¹ This is more needed in common-law systems. In the US, all the modern theories require consideration of the content of the different law being considered as well as the policies underlying them. Some of the theories used by US states for choice of law require more explicit comparison of the actual content of the law, such as with 'better law' and 'comparative impairment'. See S C Symeonides and W C Purdue (n 7) 370-72.

litigation should proceed.¹²² Also in some systems where there is no bilateral or multilateral instrument concerning judgment recognition in effect, courts considering enforcing foreign orders and judgments may apply the doctrine of reciprocity and that requires a determination of the law of the foreign jurisdiction. Thus, from transactional planning to dispute resolution, applying foreign law may be an issue when the transaction or dispute contains any non-domestic element.

- 43 The difficulties of determining and applying foreign law are not a trivial matter.¹²³ They may increase costs, lead to the unjust determination of a case; to the failure of legitimate expectations of the parties; even further, to the violation of a fundamental right.¹²⁴ These problems of applying foreign law have been noted in detail in the efforts at creating a European private international law and the academic attempts to address the issue as in the Madrid Principles of 2010.¹²⁵ Too often courts either fail to apply the foreign law or misapply it.¹²⁶
- 44 The possibility of harmonization in applying foreign law, as discussed in more detail below, was considered for a decade at the Hague Conference on Private International Law but is unlikely because of the major theoretical differences in the treatment of foreign law. This creates difficulties for individual jurisdictions, depending on the nature of their private

¹²² See eg, L E Teitz, 'Determining and Applying Foreign Law: The Increasing Need for Cross Border Cooperation' (2013) 45 New York University Journal International Law & Politics 1081.

¹²³ See generally, Nishitani (ed) (n 3); Teitz (n 3); Teitz (n 122) 1081.

¹²⁴ See *Karalyos and Huber v Hungary and Greece*, Case 75116/01 (ECtHR), Judgment of 6 April 2004.

¹²⁵ Carlos Esplugues has commented in an article including the Madrid Principles on these difficulties in more detail. Furthermore, the absence of this common system may foster 'forum shopping' by the parties and enhance parochialism and resource to the *lex fori* by national authorities, thus affecting the proper operation of the different EU Regulations on PIL. Moreover, the current situation makes the application of the prospective competent foreign law susceptible of a certain degree of manipulation by parties and legal actors. Although the above issue is important, even more relevant are the consequences forced upon the parties involved in prospective disputes in Europe. For example, the lack of a common set of rules regarding the application of foreign law may result in the imposition of some unjustifiably burdensome laws. As the Commission itself acknowledges, this issue may increase legal risks associated with cross-border litigation and expand both costs and the duration of the proceedings, all of which impair the parties' legal expectations. C Esplugues Mota, 'Application of Foreign Law - Harmonization of Private International Law In Europe and Application of Foreign Law: The "Madrid Principles" of 2010' (2011) 13 Yearbook of Private International Law 273-97 (footnotes omitted).

¹²⁶ This possibility of misapplication was noted by a federal appellate judge in the US Court of Appeals for the Seventh Circuit in a case concerning the application of French law and in what way the judges should determine the content of the French law. Judge Wood comments on the ability of US judges to consider the context of a law within a system: Exercises in comparative law are notoriously difficult, because the US reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors US law when it does not. As the French might put it more generally, apparently similar phrases might be *faux amis*. *Bodum USA Inc v La Cafetiere, Inc* (7th Cir, US) Judgment 2 September 2010 [2010 7th Cir] (J Wood, concurring).

international law rules. However, mechanisms for cross-border cooperation can help in the application of foreign law, ranging from use of judicial communication to networks of experts, some of which will be discussed as potential models. Along with mechanisms for cooperation, there is a need to make domestic legal materials and case law publicly available as part of the application of foreign law. The role of cooperation then is essential for determining the content of foreign law (the evidentiary aspect) and the second step of deciding what law to apply.

3.2 Applying a Foreign Law to the Merits

- 45 The need to apply foreign law is increasingly a global problem. For example, in the European Union the universal application of the Rome I and II regulations¹²⁷ means that courts there must determine not only the law of other Member States but also now increasingly the law of third countries, non-E.U. members.¹²⁸ Courts and administrative agencies¹²⁹ around the world need to find reliable and cost-effective means to ascertain the content of foreign law.¹³⁰ The prevailing mechanisms are insufficient, unreliable, or both,¹³¹ and often fail to meet the need for quick responses. In addition, there is a problem of obtaining accurate interpretation of the foreign law through the appropriate comparative law lens.
- 46 Although there are examples of regional instruments, such as the London Convention¹³² and the Montevideo Convention,¹³³ these conventions have not been widely used and are at

¹²⁷ Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), 593/2008 of 17 June 2008 (EU); Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (Rome II), 864/2007 of 11 July 2007 (EU).

¹²⁸ The European Commission and the Hague Conference on Private International Law held a joint conference on 'Access to Foreign Law in Civil and Commercial Matters' from 15-17 February 2012. Council on General Affairs and Policy of the Conference, Conclusions & Recommendations, of 24-26 March 2015 (HCCH).

¹²⁹ Although this chapter focuses on courts, the content of foreign law is necessary for other forms of 'tribunals'. For a consideration of the need for foreign law in arbitration, see G Kaufmann-Kohler, 'Globalization of Arbitral Procedure' (2021) 36 *Vanderbilt Law Review* 1313; Rio de Janeiro Conference: Ascertaining the Contents of the Applicable Law in International Commercial Arbitration 2008 (International Law Association).

¹³⁰ As mentioned earlier, the problem is two-fold-gaining access to the foreign law and determining the content of the appropriate foreign law, the latter being the portion that requires legal analysis.

¹³¹ Summary of the Responses to the Questionnaire of August 2008 Relating to the Apostille Convention, with Analytical Comments January 2009 (HCCH).

¹³² See European Convention on Information on Foreign Law, 62 of 6 June 1968 (EC).

¹³³ Inter-American Convention on Proof of Information on Foreign Law, 8 May 1979 (OAS). For a more recent example of a regional instrument, see Minsk Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Cases, 263 of 22 January 1993, as amended on 28 March 1997 (CIS).

least 45 years old.¹³⁴ The London Convention of 1968 is applicable to civil and commercial law, civil and commercial procedure and judicial organization. A Protocol from 1978 extended the Convention to criminal matters. The Council of Europe, recognizing the limited use of the convention, launched a study with questionnaires in 2022 to determine why the Convention was not used more ('not enjoyed greater success') and how more could be done.¹³⁵ The Report provides several ways in which the Convention could be improved, recognizing that one major problem is the lack of knowledge about the Convention, especially by legal practitioners. Some countries rely on bilateral agreements which are often limited in scope (restricted, for example, to civil and commercial matters or to certain subject areas such as competition law).

- 47 The burgeoning need to determine the content of foreign law in all types of cross-border cases - from commercial to family to criminal - and the absence of efficient and workable mechanisms has resulted in increased interest in developing models for cross-border cooperation. The Hague Conference, as discussed in more detail below, worked on the issue of foreign law for almost a decade, receiving strong support from the European Union. Its work on access to foreign law included both being able to find the content of the foreign law and being able to apply it to the problem - creating a portal to the information and a uniform means of access, and then addressing the cooperative exchange to determine the law to be applied.
- 48 In general, common-law countries have been more reluctant than civil law countries to consider the possibility of an instrument to provide for determining the content of foreign law, perhaps because for common-law lawyers, the question of foreign law is more focused on how the law applies to certain facts, and there is a reluctance to view law in isolation. One can compare the approaches to the question of whether there is personal or adjudicative jurisdiction. For example, under US law the determination is both constitutional and factual, including a balance of fairness factors as part of the analysis. In contrast, in the European Union, the Brussels Regulation provides for jurisdiction based on the nature of the claim and its relationship to forum, and this is done by code. If you asked a common-law

¹³⁴ See 'Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007', prepared by the Permanent Bureau, Prel Doc No 21 A of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, Part I - Status of Implementation and Operation of Treaties on Proof of or Information on Foreign Law (Questions 1-8) (examining data on the number of states and state efforts to engage in bilateral treaties on proof of or information on foreign law). An earlier study of the London Convention was done in 1997. See Rodger and Van Doorn (n 39) 151.

¹³⁵ European Convention on Information on Foreign Law (ETS No 62) and its Additional Protocol (ETS No 97) 2023 (CDCJ) <https://rm.coe.int/european-convention-on-information-on-foreign-law-ets-no-62-and-its-ad/1680ac1179>.

judge whether there is personal jurisdiction, it would not necessarily be clearcut or determinative.¹³⁶

3.3 Attempts at Harmonization

- 49 The studies in the last 20 years¹³⁷ on applying foreign law which were frequently related to potential mechanisms to harmonize the area confirmed the existence of a well-known theoretical divide between systems considering foreign law as law (thus to be applied *ex officio* and subject to the *iura novit curia* principle), and systems where it is characterized as a fact (thus to be pleaded by the interested party). But as a major study of the treatment of foreign law by the International Academy of Comparative Law concluded, ‘the two-tier characterization of foreign law as ‘law’ or ‘fact’ no longer yields fruitful or conclusive results. ... Although the starting point on how foreign law is treated differs in civil law and common law jurisdictions, the practical outcome comes closer than would appear at the outset.’¹³⁸ For example, Germany belongs to the first block, Canada to the second. In Germany, Section 293 ZPO requires that the court investigate the content of the foreign law. Usually, the court requests an expert opinion from a university institute specializing in private international and comparative law.¹³⁹ Conversely, foreign law is analogous to fact in Canadian courts. Where the applicable choice-of-law rule designates a foreign law, the party seeking its application must invoke it for the court to use it in determining the merits. Courts in Canada will not raise a choice-of-law question *proprio motu*; the party invoking foreign law must prove it, typically through the use of its own expert(s).¹⁴⁰ Quebec law has relaxed the rule, allowing the judge to seek evidence.

¹³⁶ There is some clarity on the limited area of general jurisdiction, in light of two United States Supreme Court cases, *Goodyear* and *Daimler*, both of which made clear that for corporations, general jurisdiction was limited to where the corporation had such continuous or systematic contacts as to be essentially at home, with the paradigm being the corporate headquarters and the state of incorporation. *Goodyear Dunlop Tires Operations, SA v Brown* (Supreme Court, US), Judgment 27 June 2011 [2011 SCUS]; *Daimler AG v Bauman* (Supreme Court, US), Judgment 14 January 2014 [2014 SCUS].

¹³⁷ The International Academy of Comparative Law undertook a study on the treatment of foreign law for the 2014 Vienna Conference which looked at the nature of foreign law, its application, and how it was ascertained and obtained (access). Professor Nishitani’s General Report Nishitani highlights the findings. Nishitani (ed) (n 3); see also Requejo Isidro (n 3) 137. Another major study was conducted by the Swiss Institute of Comparative Law, ‘The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future’ (JLS/2009/JCIV/PR/0005/E4) (2011). See also S Lalani, ‘Establishing the Context of Foreign Law: A Comparative Study’ (2013) 20(1) *Maastricht Journal European & Comparative Law* 75.

¹³⁸ Nishitani (ed) (n 3) 59.

¹³⁹ *Zivilprozessordnung* 2022 (Code of Civil Procedure) (Germany) § 293; A Critchley, ‘The Application of Foreign Law in the British and German Courts’ (1st edn, Hart Publishing 2022).

¹⁴⁰ See Civil Code of Quebec 1991 (Canada), Art 2809.

- 50 In the United States, federal courts in the US since 1966 have moved to treating foreign law as a question of law and subject to appellate review *de novo*, but the different circuits are inconsistent in their willingness to determine the content of the foreign law themselves. Some see it as the court's responsibility—with the help of the parties and their experts; others treat the failure to provide the content as a form of waiver of the foreign law being applied or an acceptance of forum law.¹⁴¹ State courts within the US have generally followed the federal rule that makes the issue one of law and therefore not subject to a burden of proof, although some courts still treat the need to establish the content of foreign law as not receiving judicial notice and with an evidentiary burden imposed on a party seeking to use the foreign law.¹⁴²
- 51 In Spain, under the International Legal Cooperation Act, where foreign law is a procedural fact, *lex fori* applies in any instance of a party failing to prove foreign law. However, even if a party fails to do so, the court can step in, 'cooperating in the accreditation of said content.' The courts have discretion in determining the value of proof of the foreign law. Spanish courts will look to reports on foreign law although these reports are not binding.¹⁴³
- 52 It is commonly acknowledged, though, that no jurisdiction brings the theoretical approach to its final consequences in practice.¹⁴⁴ France provides a good example, with the French *Cour de cassation* adopting a mixed system with respect to foreign law under doctrinal influence.¹⁴⁵ Starting in 1991, Quebec also has progressively embraced a mixed approach in order to overcome the challenges of ascertaining the contents of foreign law.¹⁴⁶

¹⁴¹ See generally Teitz (n 3); S Alsaden, 'Proof of Foreign Law: A Guide for Judges' (2022) Federal Judicial Center; V Grosswald Curran, 'US Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis' (2017) 8 Akron Law Review 857.

¹⁴² Teitz (n 122) 1092-93.

¹⁴³ A Ortega Gimenez, 'The Allegation and Proof of Foreign Law in Spain after the New International Legal Cooperation Act' (2018) 4 Italian Law Journal 367. The article also addresses Italian law.

¹⁴⁴ In practice, this may entail the absence of a clear frame for the application of a foreign law. Taking the example of the EU, scholars speak of a 'significant level of inconsistency [...] in Europe between the theoretical position embraced by States and the role assigned to the parties'. Esplugues Mota (n 125) 281. Whether the panorama is similar in jurisdictions outside the EU is a point to be checked.

¹⁴⁵ Cass Civ 1ère 97-16684 (Court of Cassation, Civil Chamber, France) Judgment 26 May 1999.

¹⁴⁶ See Civil Code of Quebec 1991 (Canada). Professor Geneviève Saumier has stated that 'the rules governing the application of foreign law to international litigation are significantly more flexible and generous in Quebec than elsewhere in Canada'.

3.4 Attempts at the Hague and in the EU

- 53 Attempts to address the difficulties associated with the application of foreign law through harmonized rules have been made in international circles, such as the Hague Conference,¹⁴⁷ and in regional organizations such as the EU, from about 2008 on. However, the Hague Conference project was removed from the Agenda in 2015 as there was not sufficient consensus to pursue an instrument, reflecting also some of the differences in the civil and common-law worlds mentioned above.¹⁴⁸ Normative solutions have not been endorsed either in the privileged legal environment of the EU, where a more modest legislative intervention helps avoid the problem by minimizing the occasions where the application of foreign law is required.
- 54 Some international and regional hard law instruments, such as Hague Conference conventions or regional or national codifications of private international law, do minimize the problem of determining what law to apply in cross-border matters where they unify the conflict of law rules. And there are soft-law instruments that attempt to provide uniform rules for the choice of law and thus minimize the variations in what law is applied, such as the Hague Principles on Choice of Law in International Commercial Contracts.¹⁴⁹ That still leaves the difficulty of ascertaining the content of the foreign law that would be applied. It is to that problem which the Hague Conference turned in 2007 after it quickly realized that a project for a convention on the harmonization or unification of rules on the treatment of foreign law was not likely to gain consensus of member states or be feasible. As mentioned, the project was removed from the active work in 2015.¹⁵⁰ Yet the work at the Hague Conference, which coincided with an increased period of globalization and cross-border trade, spotlighted the lack of uniformity in applying foreign law and the need for easy,

¹⁴⁷ Hague Conference of Private International Law, 'Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007', prepared by the Permanent Bureau, Prel Doc No 21 A of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference.

¹⁴⁸ Council on General Affairs and Policy of the Conference, Conclusions & Recommendations, of 24-26 March 2015 (HCCH), No 11: 'The Council decided to remove from the Agenda of the Hague Conference the topic of accessing the content of foreign law, with the understanding that this issue may be revisited at a later stage'. Active work ended around 2011/12, although there were a few joint conferences with the European Commission after that.

¹⁴⁹ Hague Principles on Choice of Law in International Commercial Contracts 2015 (HCCH); see generally M Pertegás, 'The Provenance of the Hague Principles' in D Girsberger, T Kadner Graziano and J Neels (ed), *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague* (Oxford University Press 2021); D Girsberger et al, 'General Comparative Report: Global Perspectives on the Hague Principles' in D Girsberger, T Kadner Graziano and J Neels (ed), *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague* (Oxford University Press 2021); S Symeonides, 'The Story of Party Autonomy' in D Girsberger, T Kadner Graziano and J Neels (ed), *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague* (Oxford University Press 2021); Hague Principles on Choice of Law in International Commercial Contracts 2015 (HCCH).

¹⁵⁰ See Council on General Affairs and Policy of the Conference, Conclusions & Recommendations, of 24-26 March 2015 (HCCH).

reliable, and fast means of access to the content of the foreign law. The work at The Hague Conference on access to foreign law also was reflected in some existing Hague conventions as well as tools being developed to help with the practical operation of some of the conventions.¹⁵¹

3.5 Models

- 55 Several models for determining foreign law already exist and have been studied by scholars and academic groups. The difficulty of resources is always cited as a reason for the lack of access to foreign law. While this continues to be a problem, the burgeoning of new technology and artificial intelligence suggests a rapidly expanding access to foreign law content. The inherent need to understand the law within its context cannot be solved as easily with AI, especially in common law and non-codified legal systems and traditions.
- 56 Existing mechanisms for cross-border cooperation range from informal memoranda of understanding, such as those currently in effect between New South Wales and the New York state courts, where there is no binding obligation,¹⁵² to multilateral conventions that require reciprocal performance, such as seen in the Hague Evidence Convention, and provide a framework for future use. The exchange of information can occur through administrative units, such as Central Authorities, or may be in the form of direct judicial communication, which, as discussed below, has been particularly successful in the context of the 1980 Hague Child Abduction Convention. A hybrid option in the form of a cross-border ‘certification’ process, similar to the one currently used by many federal courts in the United States to resolve questions of uncertain state law, is another possibility.¹⁵³ Soft-law models that rely on networks of lawyers or ‘think tanks’ could also be incorporated into either a voluntary or mandatory system of cooperation.¹⁵⁴
- 57 There is an increasing number of models to look to for examples of enhanced judicial and administrative cooperation. Several of the modern Hague conventions rely on cooperation among contracting states, both between their administrative units or Central Authorities, and their courts, through direct communication. One can look for guidance from the

¹⁵¹ See above para 13.

¹⁵² Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law (20 December 2010) http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_internationaljudicialcooperation/SCO2_agreement_newyork.html; Spiegelman (n 18) 216 (discussing an innovative mechanism that has been adopted in New South Wales, whereby a question of foreign law may be referred to a foreign court for determination). The MOU has not been used often if at all.

¹⁵³ See above para 6.

¹⁵⁴ See above para 47,49.

Evidence Convention¹⁵⁵ and the family law conventions, such as the 1980 Child Abduction Convention¹⁵⁶ and the 1996 Child Protection Convention.¹⁵⁷ The Hague Conference instruments have had a direct impact on EU regulations and internal practices. In addition, the Hague Conference's increasing use of Special Commissions on the Practical Operation of many of the conventions in the family law and legal cooperation areas to produce 'post-convention' soft-law Guides to Good Practice, Practical Handbooks, forms for requesting and providing information under the convention and now shared on the website, and other tools enhance cooperation and provide open and free access to users of the conventions—judges, administrative agencies, lawyers, and persons impacted by the conventions.

- 58 The 1980 Abduction Convention is a particularly good example of mechanisms both in the convention itself and developed by the Hague Conference Permanent Bureau with its member states to help provide access to the law that is involved in all the contracting states.¹⁵⁸ Within the convention itself, Article 14¹⁵⁹ provides what is equivalent to a provision for taking judicial notice of foreign law in connection with the determination that the taking or retaining custody of the child is wrongful and in breach of custody rights under the convention.¹⁶⁰ There is a matching provision, Article 15,¹⁶¹ which allows the court or the Central Authority in the contracting state that is being asked to return the child to obtain an opinion from the authorities of the state of the child's habitual residence on whether they deem the child wrongfully removed or retained as defined under Article 3 of the Convention.

¹⁵⁵ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (HCCH) (describing the procedures of evidence regarding international civil litigation).

¹⁵⁶ Hague Convention on the Civil Aspects of International Child Abduction, 670 of 25 October 1980 (HCCH).

¹⁵⁷ Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996 (HCCH).

¹⁵⁸ Requejo Isidro (n 3); Teitz (n 122) 1086-86.

¹⁵⁹ Hague Convention on the Civil Aspects of International Child Abduction, 670 of 25 October 1980 (HCCH), Art 14. In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

¹⁶⁰ Requejo Isidro (n 3).

¹⁶¹ Hague Convention on the Civil Aspects of International Child Abduction, 670 of 25 October 1980 (HCCH), Art 15. The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall – so far as practicable – assist applicants to obtain such a decision or determination.

Article 14 has been used¹⁶² while Article 15 has not been as successful. In some legal systems, there is no possibility of getting a legal determination and even if possible, the long delay far exceeds the need for expediency in return and the 6-week goal.¹⁶³ In fact, while the convention provides a formal provision requiring an opinion with the help of the Central Authorities or administrative agencies, the development and increased use of the International Hague Network Judges have provided direct communications in this area faster and more effectively than Article 15.

- 59 One could easily see the addition or creation of a binding instrument, using as a model a system of Central Authorities, to provide foreign law. If the Central Authority has limited resources, it could conceivably forward the request to a network of academics or lawyers to prepare the answer—but of course, that raises questions of cost, delay, reliability and impartiality. The model of providing opinions under Article 15 has the potential to reach more broadly and to be incorporated into soft-law and hard-law in regional instruments or bilateral agreements. For the 1980 Abduction Convention, there are also country profiles posted online, suggested forms, multi-volume Guides to Good Practice, and related projects of judicial cooperation—the soft-law Principles of Direct Judicial Communication¹⁶⁴ and the International Hague Network Judges structure.
- 60 Another mechanism that has helped with providing the content of foreign law and access to how other contracting states interpret provisions in the 1980 and 1996 Conventions, including what is ‘wrongful removal or retention,’ is the database created to provide decisions of contracting states construing the 1980 Convention. This database, INCADAT,¹⁶⁵ is especially important to provide users of the convention free access to opinions in one database and helps further the Convention’s intention of uniform application.

¹⁶² Requejo Isidro (n 3)137; see *MBR v YR* (District Court in Tel Aviv-Yaffo, Israel), Judgment 17 April 2020, FC 10701-04-20, para 10, 11 of the Discussion and Ruling; Case 2001/21768 (Paris Court of Appeal, France) Judgment 2 February 2002; *Armiliato v Zaric-Armiliato* (District Court, US), Judgment 3 May 2001 [2001 SDNY] (Art 14 referred to, but not needed in this case as the proof for foreign law was clear in accordance with US law).

¹⁶³ Hague Abduction Convention Art 11 requires the court or administrative authorities to act expeditiously in the proceedings for the return of the child. Requejo Isidro (n 3).

¹⁶⁴ Direct Judicial Communications - Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges of 2013 (HCCH).

¹⁶⁵ See HCCH, ‘Child Abduction Section’ <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction> for links to database and to specialized areas. See also HCCH, INCADAT <https://www.incadat.com/en>.

- 61 The same need for access to foreign law interpretation and content is evident in conventions such as UN Convention on the International Sale of Goods¹⁶⁶ (CISG) from 1980. The convention itself in Article 7 requires uniformity in application.¹⁶⁷ The UNCITRAL Secretariat created tools to help further this purpose which was especially important in the years when the convention first entered into force in 1988 when there was limited technology and access to the foreign law. UNCITRAL created a database on cases construing the convention, CLOUT (Case Law on UNCITRAL Texts Digest),¹⁶⁸ using national reporters in each contracting state. This database has helped achieve the uniform application and provided access to foreign law.

3.6 Enhanced Judicial Cooperation

- 62 While not specifically replying to a formal request, direct judicial communication concerning the content of the foreign law is an easy step forward from the model of Hague Conventions with enhanced cooperation between Central Authorities, such as in the 1996 Child Protection Convention¹⁶⁹, to considering ways for cooperation between judiciaries. In practice, this model has been followed with the Hague 1980 Convention and the Hague Network of Judges established to cooperate with other judges—and the related Principles for Direct Judicial Communication.¹⁷⁰ The direct judicial communication process has been criticized by some for its *ex parte* nature and concerns with confidentiality.¹⁷¹ Nonetheless, it is also being suggested for the current work at the Hague Conference on direct jurisdiction in connection with Multiple Proceedings.¹⁷² The model has also been used in the European

¹⁶⁶ International Sale of Goods has 97 contracting states. International Sale of Goods (Vienna, 1980) (CISG).

¹⁶⁷ Art 7(1) provides: 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. International Sale of Goods (Vienna, 1980) (CISG) Art 7(1).

¹⁶⁸ The caselaw and digest are available at: 'Case Law on UNCITRAL Texts (CLOUT)' United Nations Commission on International Trade Law https://uncitral.un.org/en/case_law.

¹⁶⁹ Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996 (HCCH).

¹⁷⁰ Direct Judicial Communications - Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges of 2013 (HCCH).

¹⁷¹ See eg, The Tenth Meeting of the Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions, of June 1–10 June 2011 (HCCH) 2.

¹⁷² See Council on General Affairs and Policy, Working Group on Jurisdiction: Report 2024, of 2 February 2024.

Union with the European Judicial Network which was set up in 2002 for civil and commercial matters.¹⁷³

The Network's main tasks are direct contacts and case-handling between national Network contact points, facilitating cross-border access to justice through information given to the public and to practitioners through factsheets and other publications available at the European e-Justice Portal in all Union languages, evaluating and sharing of experience on the operation of specific Union law instruments in civil and commercial matters.¹⁷⁴

- 63 It has met with mixed success but represents a significant investment and commitment of resources and time.¹⁷⁵

3.6.1 Certification

- 64 Certification is a variation on the direct judicial communication. One finds this model in US practice. The certification process is available in some jurisdictions and may involve a certification from a federal court to the highest court of a state on a question of uncertain state (not federal) law. The certification gives very specific facts to use in deciding how the state law applies, reflecting the common law tradition. An example is Rule 52 of the Seventh Circuit which allows the court when faced with 'questions arising under the laws of [a] state which will control the outcome of a case pending in the federal court' to 'certify such a question to the state court in accordance with the rules of that court' and to 'stay the case [...] to await the state court's decision'.¹⁷⁶ The US process can be time-consuming and depends on cooperation from the state court. A similar process is available in a very limited number of states and jurisdictions allowing certification between states (rather than between federal court and state court) based on a uniform law.¹⁷⁷ This uniform law has the

¹⁷³ 'The European Judicial Network in civil and commercial matters (EJN-civil) facilitates the networking of judicial authorities in EU countries in order to improve judicial cooperation'. 'Judicial Cooperation in civil and commercial matters', European Judicial Network, https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do.

¹⁷⁴ 'Judicial Cooperation in civil and commercial matters', European Judicial Network, https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do.

¹⁷⁵ See eg, J Verhellen, 'Access to Foreign Law in Practice: Easier Said Than Done' (2016) 12 Journal Private International Law 281, 290–93.

¹⁷⁶ See *Cleary v Philip Morris Inc.* (Seventh Circuit Court, US), Judgment 25 August 2011 [2011 7th Cir].

¹⁷⁷ The National Conference of Commissioners on Uniform Certification of Questions of Law [Act] [Rule] (1995) (Uniform Law Commission) (US). Only eight states and the District of Columbia have enacted this Act. Uniform Law Commission Legislative Fact Sheet - Certification of Questions of Law (1995) (US). The statute also allows certification to a state by courts of Mexico or Canada.

potential to include certifications to or from the courts of Mexico or Canada if a state chooses to include the provision in its own act.¹⁷⁸

- 65 This model of courts cooperating on answering a question of content and interpretation of their law for another court has been taken up in the international context—with some MOUs—specifically the two initiated by Judge Speigelman of the Supreme Court of New South Wales in Australia, one with the New York state courts and one with the Supreme Court of Singapore. To facilitate the practice, the Supreme Court of New South Wales and of Singapore adopted procedural rules.¹⁷⁹ To avoid problems with US law and the prohibition against giving ‘advisory’ opinions, under the New York agreement, the judges answer voluntarily, and the opinion is not binding. There is also an example of the Supreme Court of Singapore cooperating with the Commercial Court in London to answer a question of English law.¹⁸⁰ There are a few other ad hoc examples.¹⁸¹ So far the MOUs have been very limited, with one case reported from Australia.¹⁸² But the model offers a possibility of combining direct judicial communication with a process for obtaining a written opinion on the application of a foreign law.

3.6.2 Clearinghouses and Networks

- 66 One last example is that of a clearinghouse or network of experts to answer questions of foreign law, much as a certification process might work but not with judicial cooperation. The examples frequently given are the Max Planck Institute in Hamburg or the Swiss Institute of Comparative Law in Lausanne. During the consideration of the Hague Conference work on foreign law, thought was given to whether an individual country, such as the United States, could set up a network of academics and attorneys to assist in answering incoming requests for questions of foreign law. In connection with a US reply to a Hague Conference Questionnaire,¹⁸³ US lawyers were surveyed through the ABA International Section about their use of other networks, such as the one in Hamburg, or

¹⁷⁸ ‘Also included as an option is the bracketed language in this section [Section 2] and in Section 3 permitting certification to and from Canada, a Canadian province or territory, Mexico or a Mexican state. Because the concept of certification to and from international tribunals and courts of other nations still presents numerous uncertainties, this section does not include such other tribunals and courts at this time. Obviously, the enacting State is free to include any other courts it may choose’. The National Conference of Commissioners on Uniform Certification of Questions of Law [Act] [Rule] (1995) (Uniform Law Commission) (US).

¹⁷⁹ Requejo Isidro (n 3); see Uniform Civil Procedure Rules 2010 (Amendment No 34) (Australia) § 125; Supreme Court of Judicature Act 2014 (Rules of Court) 29(1)(a)-(b).

¹⁸⁰ Requejo Isidro (n 3) 141; see Uniform Civil Procedure Rules 2010 (Amendment No 34) (Australia) § 125; Supreme Court of Judicature Act 2014 (Rules of Court) 29(1)(a)-(b) (Singapore).

¹⁸¹ Requejo Isidro (n 3) 141.

¹⁸² Ibid.

¹⁸³ See Teitz (n 3).

setting up a US version. Lawyers voiced concern with problems of delay, costs, neutrality, and reliability.

3.6.3 Amicus/Friend of the Court Briefs

- 67 One simple model utilized in some recent US cases where foreign law is crucial to the decision is that of briefs of amicus curiae. The filing by foreign governments and regional and intergovernmental organizations in US courts has increased. Since 1978 there have been approximately forty of these filed in the US Supreme Court, including in criminal cases, such as looking at customary ‘international law’ on death penalty for minors. One of the better-known examples is the European Union’s brief in *Intel v Advanced Micro Devices*¹⁸⁴ in 2004 in connection with discovery cross-border under 28 USC Section 1782. The EU filed an amicus brief indicating that it was not a ‘tribunal’ for purposes of the US statute in question, which provides the basic requirements and parameters of the scope of discovery available for interested parties seeking information located in the United States for use in foreign proceedings.

The European Commission is taking the highly unusual (for it) step of appearing as an amicus curiae in this case because it is deeply concerned that 28 USC § 1782 (‘Section 1782’) could be interpreted and applied in a manner like that embraced by the Ninth Circuit below that would directly threaten the Commission’s enforcement mission in competition law and possibly interfere with the Commission’s responsibilities in other areas of regulatory concern as well. Far from its intended, laudable purpose of aiding the tribunals of foreign sovereigns, Section 1782 could become a threat to foreign sovereigns if interpreted expansively by this Court.¹⁸⁵

- 68 The concern with amicus briefs of course is the question of neutrality and impartiality, especially where the sovereign or a related entity is a party or has a vested interest in the outcome of the litigation, as illustrated by a recent case using an amicus to provide content of foreign law, *Animal Science*.¹⁸⁶ On the other hand, where the sovereign’s interpretation of its own law is not a preliminary question or the sovereign is not directly in a partisan position, this process could be helpful and could be viewed as analogous to a certification

¹⁸⁴ See generally *Intel Corporation v Advanced Micro Devices, Inc* (n 85).

¹⁸⁵ Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, *Intel Corporation v Advanced Micro Devices, Inc* (n 85).

¹⁸⁶ *Animal Science Products, Inc v Hebei Welcome Pharmaceutical Co* (Supreme Court, US), Judgment 14 June 2018 [2018 SCUS] 1865.

process. In light of the decision in *Animal Science*, courts are free to accord the opinion of the amicus with appropriate weight on a case-by-case basis, reviewing factors such as

[r]elevant considerations include the statement's clarity [...]; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.¹⁸⁷

- 69 The question is whether these amicus briefs are beneficial and if so, how they can be encouraged for their instructive value, especially in courts which fear the mysteries of foreign or international law. Can we find a way to incorporate these amicus briefs in a more neutral manner, yet continue to profit from the potential use of the amicus to put the foreign or international law in context? One important question is whether this model could be incorporated into existing practice in both common law and civil law systems.

3.7 Conclusion

- 70 Cooperation has traditionally required the existence of bilateral or multilateral conventions. Many bilateral conventions providing for reciprocal assistance in legal matters refer expressly to exchanges of information regarding substantive law – although they do not usually establish a procedure for the purpose.¹⁸⁸ Private international law multilateral conventions done at The Hague regarding specific family matters include rules to the same effect.¹⁸⁹ Furthermore, multilateral conventions *ad hoc* have been adopted within the frame of regional organizations setting up a system of administrative cooperation: the best-known ones being the 1968 London Convention and Protocol of 1978 on the information on foreign law of the Council of Europe, and the 1979 Montevideo Convention on proof of and information on foreign law, registered by the Organization of American States in 1986.¹⁹⁰

¹⁸⁷ Ibid 1868.

¹⁸⁸ See eg, Judicial cooperation treaty on civil and commercial matters and the recognition and enforcement of judicial decisions of June 28, 1972 (France – Tunisia), Art 25; Cooperation treaty on justice matters between the French Republic government and the government of the United-Republic of Cameroon 1974 (France – Cameroon), Art 61; Convention on judicial cooperation in civil, commercial and administrative matters between the Kingdom of Spain and the Kingdom of Morocco 1997 (Spain – Morocco), Art 33.

¹⁸⁹ Hague Convention Concerning the International Administration of the Estates of Deceased Persons of 2 October 1973 (HCCH), Art 5; Hague Convention on the Civil Aspects of International Child Abduction, 670 of 25 October 1980 (HCCH), Art 7e, 8f; Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993 (HCCH), Art 7.2a; Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996 (HCCH), Art 30.2; Hague Convention on the International Protection of Adult, of 13 January 2000 (HCCH), Art 29.2.

¹⁹⁰ The Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters (the 'Minsk Convention'), is usually referred to as well, but only one provision is actually devoted to the application of foreign law.

But as discussed earlier, these are dated and have not proven to be particularly helpful to litigants.

- 71 In addition to these conventions, there is an emerging trend both at the Hague Conference and in the European Union to promote, or even to impose, direct judicial communication in specific fields. These relate to child abduction and insolvency, which theoretically could be of use also regarding the exchange of information on the foreign law as applicable to an open procedure. Other legal systems as we have seen have taken up the model with informal memoranda of understanding.¹⁹¹
- 72 Since harmonization of both treatment of foreign law and the application do not seem possible at this time, mechanisms for increased cooperation, such as through direct judicial cooperation, and means to increase easy and free access to the content of foreign law appear to be the best paths forward at the moment.

4 HARMONIZATION THROUGH COMMUNICATION AND DIGITALIZATION: THE FUTURE IS NOW

- 73 As we have seen, cross-border cases often require obtaining evidence as well as applying foreign law. And that means determining the content of that foreign law. The underlying link is access to the foreign law. Today that access is being provided through digitalization and communication between judicial systems. We have looked at some suggested models and examples of systems utilizing some mechanisms. There is no better example today than in the European Union where technology through digitalization is making judicial cooperation a reality within the EU. And the EU Unified Patent Court today is a microcosm of these multiple trends of increased judicial cooperation and increased access, and digitalization mentioned in Sections 2 and 3 above.¹⁹²
- 74 We have made reference to the EU Regulation on digitalization and also to e-CODEX.¹⁹³ E-CODEX allows direct digital communication between judicial authorities and parties within the EU as part of the EU political priority of digitalization. The system was developed by 21 Member States with the participation of other third countries/territories and organisations between 2010 and 2016. The total costs of developing the system were about 24 million

¹⁹¹ This model of courts cooperating on answering a question of content and interpretation of their law for another court has been taken up in the international context—with some MOUs—specifically initiated by Judge Speigelman of the Supreme Court of New South Wales in Australia and the New York State courts. To avoid problems with US law and the prohibition against giving ‘advisory’ opinions, under the New York agreement, the judges answer voluntarily, and the opinion is not binding. See Teitz (n 3).

¹⁹² Much of this section comes from a yet unpublished article by B Hess (n 71).

¹⁹³ Regulation of the European Parliament and of the Council on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), 2022/850 of 30 May 2022 (EU).

Euro, of which 50% were funded by the EU and 50% by the participating Member States.¹⁹⁴ The Digitalization Regulation of December 27, 2023, establishes a uniform legal framework for the use of electronic communication and digital tools in cross-border legal proceedings. It covers communication between competent authorities/natural or legal persons; the use of videoconferencing or other distance communication technology; the application of electronic signatures and electronic seals; the legal effects of electronic documents; and electronic payment of fees. The Regulation establishes that communication between competent authorities of different EU Member States, as well as communication between competent authorities of different Member States and between a national competent authority and EU body or agency, shall be carried out through a decentralized IT system whenever possible. In addition, the EU has created an EU Justice Scoreboard, which includes a specific section on digitalization developments in the Member States.¹⁹⁵ The Scoreboard's purpose is described as:

to assist the Member States improve the effectiveness of their national justice systems by providing objective, reliable and comparable data. Effective justice systems are essential for implementing EU law and for upholding the rule of law and the values upon which the EU is founded. They ensure that individuals and businesses can fully enjoy their rights, strengthen mutual trust, and help to build a citizen-, business- and investment-friendly environment.¹⁹⁶

Thus, all these regulations strive to provide common integrated technological means for judicial cooperation as well as access to the law.

- 75 Perhaps intellectual property and cyberspace have created an environment that allows for cooperation in 'crossborder' dispute resolution and some harmonization of the underlying legal concepts. An early example is the Uniform Domain-Name Dispute-Resolution Policy (UDRP)¹⁹⁷ set up by ICANN¹⁹⁸ to handle domain name disputes in 1999 and administered by the WIPO Arbitration and Mediation Center.¹⁹⁹

¹⁹⁴ Cf Explanatory Memorandum of the EU Commission of 2 December 2020 regarding the proposed Regulation on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726, COM (2020), 5.

¹⁹⁵ EU Justice Scoreboard, European Commission https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

¹⁹⁶ Ibid.

¹⁹⁷ 'WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP)', WIPO, <https://www.wipo.int/amc/en/domains/guide/>.

¹⁹⁸ ICANN <https://www.icann.org/>.

¹⁹⁹ 'WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP)', WIPO, <https://www.wipo.int/amc/en/domains/guide/>.

- 76 Today, the fully digitalized United Patent Court²⁰⁰ started operations in June 2023, with 17 contracting states.²⁰¹ Since the start of operations on 1 June 2023, the Court has received a total of 411 cases.²⁰² The UPC offers a uniform framework specialized for patent litigation at a European level, hearing both infringement and revocation actions. It has exclusive jurisdiction in respect of ‘classic’ European patents and European patents with unitary effect (Unitary Patents).²⁰³ The Court comprises a Court of First Instance, a Court of Appeal, and a Registry. It has its own rules.²⁰⁴ Its judges come from all over Europe. The case management and the actual proceedings are all handled online, and hearings are by videoconferencing. The cases are all available online as well, giving access to the law as it has been developed. The parties and judges can communicate through this structure and digital environment. Thus, digitalization makes access available, and the underlying harmonization of the substantive law has allowed for a system of harmonized procedure and use of foreign law--- a model of the future for other countries and regions that address specialized areas of the law that have extensive cross-border elements. The UPC takes the UDRP and WIPO system and fully develops the online environment for complicated cross-border disputes.
- 77 The framework of European Union and competence allows the harmonization that is not yet possible through unrelated legal systems with no overarching legal structure. One can imagine the EU’s model being followed in other areas of regional cooperation and perhaps in international organizations with global members, including the Hague Conference on Private International Law, UNCITRAL, UNIDROIT, and more specialized areas such as WIPO.

5 PRO-NATIONAL BIAS?

- 78 There is limited empirical evidence of how often there is a pro-national bias in the result favoring the litigant domiciled (or holding the nationality) of the forum State and against the foreign litigant. If one found open hostility, in the context of a foreign investment treaty, it might trigger investment arbitration proceedings to obtain compensation from state.²⁰⁵ One mechanism to obtain some advantage is that of forum selection clauses, especially when

²⁰⁰ *Unified Patent Court: A single patent court for Member States of the EU*, <https://www.unified-patent-court.org/en/news/case-load-court-start-operation-june-2023-update-end-june-2024>.

²⁰¹ 24 Member States have signed the UPCA so far (not Spain, Poland and Croatia). Agreement on a Unified Patent Court (UPCA), OJ EU C 2013/1, of 19 February 2013 (EU) 1–40.

²⁰² *Unified Patent Court: A single patent court for Member States of the EU*, <https://www.unified-patent-court.org/en/news/case-load-court-start-operation-june-2023-update-end-june-2024>.

²⁰³ Court Presentation, A single patent court for Member States of the EU, Unified Patent Court, <https://www.unified-patent-court.org/en/court/presentation>.

²⁰⁴ ‘Legal Documents’ *Unified Patent Court: A single patent court for Member States of the EU*, <https://www.unified-patent-court.org/en/court/legal-documents/69>.

²⁰⁵ Eg, *Loewen Group, Inc. and Raymond L Loewen v United States of America*, ICSID Case No ARB (AF) 98/3.

one has unequal bargaining power and when these clauses are one-sided, as used in some areas such as the financial sector. In some legal systems, no particular protection is given to weaker parties such as consumers and the forum selection clause can be used to gain an advantage—procedural or substantive, even without a choice of law clause. From a procedural standpoint, forum selection clauses can allow concentration of cases in a forum that is less friendly to defendants or which limits procedural mechanisms such as collective redress actions. There are cases where powerful parties use forum selection clauses to concentrate litigation in slow (and expensive) jurisdictions.²⁰⁶ Individual legal systems may provide protection to foreign nationals.

- 79 The second aspect of pro-national bias is that which may show up in the application of law that favors the litigant domiciled in the forum state against the foreign litigant. This is of course more likely to occur for several reasons. First, litigants where possible forum shop for the best law and procedure. And there is the possibility in some legal systems to have parallel litigation or negative declarations, allowing a party who might normally be a defendant to become a plaintiff in a more favorable forum.²⁰⁷ Second, courts may be more likely to favor their own litigants because to do so may allow them to use their own law with which they are more familiar. Indeed, there have been limited studies that have shown what foreign law sources courts refer to, reinforcing the homeward bound tendency.
- 80 In legal systems without codified choice of law rules, courts may exhibit forum bias in the application of law. Two well-known examples in choice of law theory used by some US state courts²⁰⁸ clearly result in forum bias and litigants selecting the forum are usually the plaintiffs since there are no codified rules of adjudicative jurisdiction. Leflar's 'better law' theory, used in five states,²⁰⁹ inherently tends to apply forum law as does the 'lex fori' theory, used in two states.²¹⁰ Another example of where there may be a bias for forum nationals is in systems where public policy can be employed as a sword as opposed to a shield from foreign law. Finally, some legal systems require application of forum law and

²⁰⁶ For example, forum selection clauses used by *Facebook* and *Google* often designate Californian and (within the EU) Irish courts. Another example where arbitration clause to New York in the standard franchise contracts of *Subway* concluded with small businesses in Europe. L Cadet et al, *Privatising Dispute Resolution* (1st edn, Nomos 2019) 17, 36.

²⁰⁷ L E Teitz, 'Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation' (2004) 10 *Roger Williams University Law Review* 1.

²⁰⁸ Choice of law in the US is largely a matter of individual state law, rather than federal law, and the limiting impact of the federal constitutional requirement is minimal. See *Allstate Insurance Co v Hague* (Supreme Court, US), Judgment 31 January 1981 [1981 SCUS] (requiring a significant aggregation of contacts with the parties and occurrences, creating state interests, such that the application of its law is neither arbitrary or fundamentally unfair).

²⁰⁹ See S C Symeonides and W C Purdue (n 7).

²¹⁰ *Ibid.*

prohibit the application of foreign law.²¹¹ In that case, the party who initiated the suit is likely to have selected the most favorable forum if possible. Forum shopping will continue as long as there is no harmonization of both jurisdictional rules and choice of law. Convergence in some procedural aspects and some substantive law could serve to reign in forum bias and parties shopping for favourable law.

²¹¹ One recent example of this in the United States is the series of antforeign law statutes promoted around as early as 2007 and continuing until at least 2018 in the US. See Teitz (n 3).

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ALI	American Law Institute
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
ATCCP	Code of Civil Procedure (Austria)
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
BID	<i>Banco Interamericano de Desarrollo</i> (Inter-American Development Bank)
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
ch	chapter
CJEU	Court of Justice of the European Union
EBRD	European Bank for Reconstruction and Development
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
ibid	<i>ibidem</i> (in the same place)
ICPR	Civil Procedure Regulations (Israel)
ICT	Information and Communication Technologies
ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)

JCCP	Code of Civil Procedure (Japan)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
pt	part
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
TCCP	Code of Civil Procedure (Turkey)
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes

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