

PART XIV

CROSS-BORDER AND INTERNATIONAL DIMENSIONS

CHAPTER 2¹

HISTORY AND EVOLUTION (ACTORS, FACTORS AND DEBATES)

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¹ This chapter is based on the preliminary description of Part XIV elaborated by G Saumier in 2021/22.

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1 This chapter describes the drivers and historical milestones in the evolution of procedural law in the last decades as a response to the presence of a foreign element in civil litigation. It explains as well the changes in the perception of such an element over time at the legislative level, in the judiciary and in academia.² Legal-political debates have shaped the development of the area: This is a good reason to include them, too.

1 HISTORICAL MILESTONES

In the development of procedural law, foreign elements have always been present as commercial exchanges across borders occurred over the centuries.³ However, the raise of the nation states in the late eighteenth and nineteenth centuries changed the situation considerably. In Continental Europe, nationality (and the domicile of a party inor outside the forum state) became predominant factors to determine the legal status of individuals and corporations. The nation states of the nineteenth and early 20th centuries conceived codifications to apply within the territory and (primarily) to the citizens domiciled therein.⁴ In some countries, foreigners were subjected to specific regimes mainly destined to protect domestic litigants against litigation abroad.⁵ This was the main reason why especially Continental jurisdictions provided for large heads of jurisdiction against foreign parties based on nationality⁶ or on the (minor) assets of the foreign persons within the country.⁷ The pertinent rules were found at scattered places in the civil codes or in the codes of civil procedure. These provisions were only rarely applied.

⁷ Sec 23 of the German Code of Civil Procedure and sec 99 Austrian Jurisdiktionsnorm – so-called 'umbrella rule' as a lost umbrella in a German hotel was considered as sufficient to establish jurisdiction based on assets, cf H Schack (n 3) *Internationales Zivilverfahrensrecht* para 397 ff.



² Looking back to developments in the law and practice of cross-border civil litigation during the past decades should reveal and assist in understanding the basic approaches to cross-border litigation in the systems under examination, their evolution and the drivers of this evolution. It shall also permit to discover convergences and their genesis.

³ This chapter does not envisage to explore the development of cross-border disputes since the beginning of history but aims to place current developments into the context of the past 100 years. As of today, the history of international procedural law has not been researched in detail, cf H Schack, *Internationales Zivilverfahrensrecht* (8th edn, Beck 2021) para 163 ff.

⁴ C v Bar and P Mankowski, Internationales Privatrecht Vol I (Beck, 2nd edn 2003) § 3 para 49–53; J Basedow, The Law of Open Societies – Private Ordering and Public Regulation in the Conflict of Laws (Brill 2015), part I, para 55 ff.

⁵ In the 19th and early 20th centuries, there was also a tendency of establishing 'mixed tribunals' with specific competences for foreigners, often from colonial powers, cf M Erpelding and H Ruiz Fabri (eds), *Mixed Arbitral Tribunals* (2023).

⁶ Example: Art 14 of the French Civil Code, cf P Kinsch, 'Droits de l'homme, droits fondamentaux et droit international privé' in Collected Courses of the Hague Academy of International Law – Recueil des cours (Brill 2005) Vol 318, 9, 13, 37 ff.

- Following the same approach common law courts based jurisdiction on the presence of 3 the defendant⁸ and subjected the initiation of proceedings against non-domiciliary parties on the discretionary decision of the court to permit service of process abroad.⁹ Similarly, the application of these special heads of jurisdiction remained rare exceptions to the ordinary unfolding of domestic civil proceedings in all jurisdictions.
- 4 During the last 50 years, this situation has changed considerably. The most important factor that triggered changes was the liberalization of national and regional markets.¹⁰ In this regard, the European Union has taken the lead in promoting cross-border interchange. The European Court of Justice developed basic principles of judicial cooperation like mutual trust and recognition and the free movement of judgments among EU Member States.¹¹ Within the Internal Market, any discrimination based on nationality is forbidden.¹² This jurisprudence changed the situation of the foreign party coming from another EU Member State into the Member State's courts dramatically. Yet, the situation of cross-border intra-EU proceedings is not yet considered as a domestic situation – and it should not.¹³
- 5 Clearly, the EU law maker has also clarified that the regional and integrated approach within the Union is not a model for a global cooperation in civil and commercial matters.¹⁴ Here, the Hague Conference of Private International Law (HCCH) is currently trying to recover the lead in providing universally accepted conventions in international

¹⁴ This approach became evident when the United Kingdom, during Brexit negotiations, strived to become a Contracting Party of the Lugano Convention, a parallel instrument of the Brussels Regimes, cf C Kohler, 'Ein europäischer Justizraum in Zivilsachen ohne das Vereinigte Königreich' (2021) Zeitschrift für Europäisches Privatrecht 781 ff.



⁸ Transient jurisdiction was based on the service of the foreign defendant within the court's district. In 2012, the Supreme Court of Canada held that jurisdiction was not established by service of process but required a 'real and substantive connection', Club Resorts Ltd v Van Breda, Cases 33606, 33692 (Supreme Court, Canada), Judgment 18 April 2012 [2012 SCC 17], G Saumier, Canadian Report, para 7. ⁹ Rules of the Supreme Court (1875), Order 11, cf A Dicey, J Morris and L Collins, *Conflict of Laws* (Sweet & Maxwell, 15th edn 2012) para 12-052 ff.

¹⁰ J Basedow (n 4) *The Law of Open Societies* part I, para 55 ff, analysing the impacts of globalisation. ¹¹ B Hess, 'Seminal Judgments (grand arrêts) in the Case Law of the Court of Justice' in B Hess and K Lenarts (eds), The 50th Anniversary of the European Law of Civil Procedure (Nomos 2020) 2 ff. ¹² Art 6 (3) of the Lisbon Treaty on the Functioning of the European Union.

¹³ This situation is fundamentally different from a domestic situation in a federation (like Australia, Canada or the US) where considerable identical or shared cultural pattern prevail at local level. It appears telling that the assimilation of the EU with a 'Federation' was made by American authors, not by Europeans, different opinion G Cuniberti, ch 4, para 34–37, endorsing the American perspective.

procedural law.¹⁵ This development started in the 1970s;¹⁶ it was confronted with major drawbacks in the 2000s, but has regained momentum 20 years later.¹⁷

- 6 Against this background, it appears necessary to distinguish different regulatory levels of cross-border proceedings: As of today, there is a global and most ambitious desire to interconnect the civil justice systems of individual states based on global common rules. However, this ambition is not present around the globe where different competing actors (states, regional organizations) are trying to get competitive advantages. In the disrupted world of today, regional cooperation has become more important; not only in the European Union, but also in Africa, South East Asia, Eurasia and in Latin America.¹⁸ Finally, there are also unilateral attempts of national lawmakers to expand the scope of their judicial system cross-border: either in a service-oriented way (as in Singapore)¹⁹ or in a more hegemonic way (as the Belt and Road Initiative of China).²⁰
- From the national reports submitted by the contributing authors of the Segment, it has become evident that the historical milestones during the last 50 years are variable across jurisdictions.²¹ For example, the Canadian report shows that both Quebec and the common law provinces in Canada underwent (coincidentally) significant change since the 1990s,²² whereas in the US the 'modern period' started already in the 1960s but gained momentum in the 1980s.²³ For the founding Member States of the EU, the late 1970s were a relevant moment, with the entering into force of the 1968 Brussels Convention and its uniform and autonomous interpretation by the CJEU.²⁴ However, not all the current Member States had accessed the European Union at that time, and

²⁴ Brussels Convention on Jurisdiction and Recognition and Enforcement in civil and commercial matters of 27 September 1968, cf B Hess (n 11) 'Seminal Judgments' 2 ff.



¹⁵ Since the Millennium, the HCCH has become a global organization; since the year 2000, 39 new Member States joined the HCCH, which now counts 85 Members and one Regional Economic Integration Organization (the EU). In 2016, the Council on General Affairs and Policy confirmed the HCCHs pursuit of universality as a central tenet of the Organization's operational strategy, CM Mariottini, Report on the HCCH, 2 f.

¹⁶ Cf the 1965 and 1970 Hague Service and Evidence Conventions, cf B Hess and V Richard, 'The 1965 Service and 1970 Evidence Conventions as crucial bridges between legal traditions?' in T John, R Gulati and B Köhler (eds), The Elgar Companion to the Hague Conference on Private International Law (Elgar 2020) 288 ff.

¹⁷ Cf the 2019 Hague Judgments Convention, CM Mariottini, 'Report on the HCCH' 3.

¹⁸ M Weller, 'Mutual Trust': A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?' in Collected Courses of the Hague Academy of International Law – Recueil des cours (Brill 2022) Vol 423, 37, 117 ff.

¹⁹ M Yip, 'The Singapore International Commercial Court: The Future of Litigation?' in X Kramer and J Sorabji (eds), *International Business Courts: A European and global perspective* (Eleven International Publishing 2019), 129 ff.

²⁰ P Sooksripaisarnkit and S Ramani Garimella, *China's One Belt One Road Initiative and Private International Law* (Routledge 2018) 1, 6 ff; M Weller (n 18) RdC 423, 37, para 170.

²¹ However, similar or parallel developments did not always start at the very same time.

²² G Saumier, Canadian Report, para 4.

²³ LE Teitz, American Report, 1.

therefore, the decisive referral point must be a different one.²⁵ From these initial reports, the following milestones can be identified as a starting point:

- The ratification of the 1968 Brussels Convention providing uniform heads of jurisdiction and permitting the free movement of judgments within the Internal Market; also impacting on the perception of third countries.²⁶
- 9 The *Mund & Fester* decision of the Court of Justice of the European Union prohibiting any indirect discrimination of foreign parties coming from other EU Member States.²⁷ This judgment transformed fundamentally the traditional approach of international civil procedural laws of the EU Member States that was based on the objective to protect the domestic party to the detriment of the foreign one.
- 10 The Morrison²⁸ and Baumann²⁹ judgments of the U.S. Supreme Court reducing the long-arm jurisdiction of American courts in international cases. Consequently, so-called f-cubed lawsuits³⁰ are, as a matter of principle, no longer admissible in the Federal Courts of the United States.³¹
- 11 The *Morguard* judgment (1990) of the Canadian Supreme Court on the recognition and enforcement of foreign judgments.³²
- 12 The comprehensive codification of private international law in the Civil Code of Quebec in 1994, following to a large extent recent developments in Switzerland and in the European Union.³³

³³ G Saumier, Canadian Report, para 4 and 5. See also above para 37.



²⁵ Examples: Spain and Portugal in 1989; the Central and Eastern European States in 2004 (although the ratification of the 1988 Lugano Convention had already set the grounds): M Szpunar and K Pakula, Polish Report, para 3.1).

²⁶ Especially the 1988 Lugano Convention, B Hess, *Europäisches Zivilprozessrecht* (De Gruyter, 2nd edn 2021) para 5.42 ff.

²⁷ Mund & Fester, Case C-398/92 (CJEU), Judgment 10 February 1994 [ECLI:EU:C:1994:52]. This judgment entailed a conceptual change of the national procedural law of the EU Member States where the foreign element was traditionally addressed by special norms based on nationality and/or the domestic domicile of the party.

²⁸ *Morrison v National Australia Bank* (US Supreme Court) 561 US 247, 266, Judgment 24 June 2010, holding that Sec 10 (b) of the Securities Exchange Act only applies to the purchase and sale of securities in the United States.

²⁹ Daimler AG v Bauman (US Supreme Court) 571 US 117, Judgment 14 January 2014, limiting general jurisdiction over foreign defendants, LE Teitz, American Report, 2.

³⁰ Foreign-cubed (class action) lawsuits where both parties are foreigners.

³¹ B Hess, 'The Private-Public Divide in International Dispute Resolution' in Collected Courses of the Hague Academy of International Law – Recueil des cours (Brill 2018) Vol 388, 49, para 69 ff.

³² Morguard Investments Ltd v De Savoye, Case 21116 (Supreme Court, Canada), Judgment 20 December 1990 [1990 3 SCR 1077]; G Saumier, Canadian Report, para 5.

- 13 The adoption of the 2019 HCCH Judgments Convention might become such a decisive moment in case many states from different parts of the world ratify the instrument.³⁴
- 14 These examples demonstrate that legislative initiatives as well as accompanying or parallel jurisprudence may transform the existing legal situation. Openness to concepts in foreign jurisdictions must be considered helpful as the Canadian examples demonstrate. Generally, openness to comparative procedural law as well as to developments of the jurisprudence of other jurisdictions may entail a more sophisticated (and restricted) approach as the development in the US demonstrates.³⁵

2 DRIVERS: FACTORS, ACTORS AND DEBATES

15 As the next subsection will reveal, the evolution in each jurisdiction is marked by diverse drivers, be they factors or actors. Furthermore, international legal-political debates play a growing role for the adaptation (or even reform) of domestic or regional systems. These drivers typically reflect different political, economic, cultural, and legal contexts. This subchapter will seek to identify how these contexts have influenced the development of procedural law in cross-border disputes. As a starting point, it considers:

2.1 Factors

16 An important and fundamental difference relates to the cultural backgrounds of the different legal systems.³⁶ Here, the difference between judge-made versus legislation-based systems plays a major role.³⁷ To some extent, it coincides with the delineation between civil law and common law jurisdictions. However, one needs to look more closely at the differences: As a matter of principle, all courts around the world apply procedures that are based on fixed rules – most of them are enacted by legislation; in some jurisdictions, the courts are empowered to the law making.³⁸ Yet, there are still important differences: In some countries, especially in the common law world, courts

³⁸ In this regard, the divide applies more clearly to substantive, not to procedural law, cf generally J Walker and O Chase, 'Introduction' in J Walker and O Chase (eds), Common Law, Civil Law and the Future of Categories (LexisNexis 2010), i ff.



³⁴ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> accessed 21 June 2024.

³⁵ From 2000 onwards, the case law in the US showed an increased awareness of the foreign defendant, LE Teitz, American Report, 2.

³⁶ Different legal traditions are also found in national jurisdictions as in Canada and (less obvious) in Belgium.

³⁷ Example (French Report by G Cuniberti): In France, cross-border litigation was usually considered a part of private international law. After 1804/1806, the *Cour de Cassation* and the doctrine (in an indirect dialogue) developed this area of law. Interventions of the lawmaker remained exceptional. After 1999, the situation changed entirely when the legislative competences were transferred to the European Union. Yet, in 2022, France engaged in a (self-standing national) codification of private and procedural international law, cf. D Foussard, ML Niboyet and C Nourissat, 'Réflexions méthodologiques sur le projet de code de droit international privé' (2022) Rev. Crit. DPI 477, 495 ff.

are empowered with considerable discretionary powers regarding the exercise of jurisdiction whereas other systems rely on more static and fixed rules. The most pertinent example in this regard is the *forum non conveniens*-doctrine in international jurisdiction.³⁹

- 17 An additional factor relates to the given political situation of a country. In countries living under a dictatorship, such as Spain or Portugal until 1975, the volume of international commercial exchanges was low and litigation with a foreign element anecdotal; and, consequently, the need for special rules addressing the field was equally limited.⁴⁰ On the other hand, growing economic exchange entailed the need to establish a legal framework aimed at backing and facilitating cross-border exchanges. Thus, the establishment of a network of railroads in Europe in the nineteenth century entailed the conclusion of (bilateral) treaties on civil cooperation among European states.⁴¹
- 18 Another important factor relates to the relationship between domestic and cross-border litigation. In federations like Australia, Canada or the United States, the highest amount of case law relates to inter-provincial/inter-state litigation. Especially in bigger countries, domestic litigation dominates the judicial practice. Sometimes, analogies are drawn between inter-state and international cases.⁴² The situation may be different in smaller countries, as the examples of Luxembourg and Liechtenstein demonstrate. In Luxembourg, large parts of the working population commute to the Grand Duchy from neighbour states and the Luxembourgish courts are often confronted with cross-border litigation.⁴³ It goes without saying that familiarity and consciousness with cross-border litigation generally increases the quality of case law in these settings. In Liechtenstein, almost all cases involve a foreign element, judges of the Supreme Court are often foreigners (from Austria and Switzerland) familiar with the procedural and substantive laws of Liechtenstein that largely follow the legal order of the neighbour states.
- 19 An additional factor relates to the differences and changes in doctrinal perceptions of the field. In some jurisdictions, international civil procedure is considered as a separate area of procedural law; while in others international civil procedural law belongs to private international law (or conflict of laws). The systematic classification does not directly influence the content of the rules, it is mainly related to the teaching of international law at universities and law academies. Yet, the perspectives of private international law and procedural law are different. Private international law looks at the different interests involved: those of the parties, of the courts, of the state and of the

⁴³ V Van den Eeckhout and C Santaló Goris, 'Country Report Luxembourg', in v Hein J and Kruger T (eds), Informed Choices In Cross-Border Enforcement (Intersentia 2021), 275, 276 ff.



³⁹ P Webb, 'Forum non conveniens: a comparative perspective' in T John, R Gulati and B Köhler (eds), *The Elgar Companion to the Hague Conference on Private International Law* (Elgar 2020) 390 ff.

⁴⁰ Intervention of M Requejo Isidro in an early meeting of Team 15.

⁴¹ Cf C v Bar and P Mankowski (n 4) Internationales Privatrecht § 2 para 21 f.

 $^{^{\}rm 42}$ This is especially the case in the US, cf LE Teitz, American Report, 3 ff.

international legal order.⁴⁴ Procedural law looks at fundamental guarantees (access to justice, fair trial, right of defence).⁴⁵ However, the emergence of new journals, commentaries, blogs, is a clear indication of a growing emancipation of the field.⁴⁶ In this regard, an emancipation of international civil procedure from neighbouring legal areas took place during the last two decades.⁴⁷

- 20 Sometimes single events impact considerably on the law making activities and the political perception of legal issues: for instance, the *Volkswagen/Dieselgate* litigation (since 2015) politically entailed the adaptation of the EU Directive on Consumer Collective Redress.⁴⁸ In the European Union, the opposition to class action litigation in the US was an impediment for the introduction of an EU remedy on collective redress until 2020.⁴⁹ Yet, since the millennium, more and more EU member states had adopted collective redress mechanisms that also apply in cross-border settings.⁵⁰ Thus, the adoption of the Directive on Consumer Collective Redress was finally broadly supported although its implementation in the EU-Member States shows prevailing resistance and enduring delays.⁵¹
- 21 In this context, additional attention must be paid to cross-fertilisation, which can be positive or negative. For example, in Canada, the Swiss Law on Private International Law and the Brussels and Rome Conventions served as a model for the code of private international law in Quebec. ⁵² Similarly, the 2000 Service and the 2001 Evidence Regulations of the EU were largely based on the model of the Hague Service and Evidence Conventions. ⁵³ In the meantime, however, both instruments were largely

⁵³ B Hess (n 26) *Europäisches Zivilprozessrecht* para 8.3 ff.



⁴⁴ Example: H Schack (n 3) Internationales Zivilverfahrensrecht para 250 ff.

⁴⁵ B Hess (n 26) Europäisches Zivilprozessrecht para 3.64 ff.

⁴⁶ In this regard, there is no doubt that international civil procedure is emancipated from the neighbouring areas and must be regarded as a self-standing area of law.

⁴⁷ P Mankowski, 'Über den Standort des IZPR' (2018) RabelsZ 82, 567 ff. Nevertheless, the development is still viewed differently in various jurisdictions. However, the practical and epistemic importance of international procedural entails that international civil procedural law should be recognized as a selfstanding area of law, in proximity to both private international law and procedural law.

⁴⁸ Directive (EU) 2020/1828, OJ 2020 L 409/1, cf F Gascón Inchausti, 'Acciones colectivas y Derecho europeo: el impacto de la Directiva 2020/1848 sobre el sistema procesal español' in F Gascón Inchausti and P Peiteado Mariscal (eds), *Estándares Europeos y Proceso Civil* (Atelier Libros Juridicos 2022), 699 ff.

⁴⁹ The distrust against US class actions came from cross-border cases brought against European defendants in the 1990s. More sympathy for collective redress existed within the EU Commission, whose proposals mainly addressed consumer and environmental protection.

⁵⁰ HW Micklitz and A Wechsler, 'What is Collective in EU Collective Redress?' in B Hess, L Ködderitzsch, X Kramer, M Tulibacka and S Voet (eds), *Delivering Justice: A Holistic and Multidisciplinary Approach - Liber Amicorum in Honour of Christopher Hodges* (Hart 2022) 65, 68 ff.

⁵¹ This does not exclude that its implementation triggered political resistance coming from the business sector as the current delays in many EU Member States demonstrate. A pertinent example is Austria, where the draft implementing law was adopted in summer 2024.

⁵² G Saumier, Canadian Report, para 4 ff.

changed and adapted to technological progress.⁵⁴ As a result, they do no longer reflect their original models but endorsed self-standing, modern regimes.

- 22 Sometimes, cross-fertilization is found at the level of procedural concepts. A pertinent example is the establishment of the concept of public interest litigation that started in the US in the 1970s and matured in the 1980s. The regulatory concept was taken up by the European Union after the millennium.⁵⁵ Over time, the conceptual perception of the parallelism of private and public enforcement reinforced the need to introduce a framework for cross-border cooperation of public authorities. In this regard, the EU General Regulation on Data Protection sets a comprehensive and complementary framework for private and public enforcement in cross-border situations.⁵⁶
- 23 Finally, political, economic, or pandemic crises may trigger change. Recently, the Covid-19 crisis in 2020–2022 entailed a major move of courts to use IT devices in the proceedings, including video-conferencing, ⁵⁷ also permitting the facilitation of crossborder proceedings by deviating from old concepts like territoriality and sovereignty as the basic foundation of jurisdiction to adjudicate.⁵⁸
- 24 Similarly, the current war of aggression initiated by Russia against Ukraine is accompanied by unilateral measures in procedural law. In this regard, the Russian legislator started adopting 'protective measures' for domestic parties, aimed at shielding sanctions of Western states. In 2021, the legislator enlarged the jurisdiction of Russian courts in favour of parties domiciled within the country.⁵⁹ On the other hand, sanctions imposed on Russia by Western democracies equally extended heads of jurisdiction and clawback-clauses against Russian defendants.

⁵⁸ B Hess, 'Cooperación judicial digital en el espacio de libertad, seguridad y justicia – La cooperación judicial en materia civil', in F Gascón Inchausti and P Peiteado Mariscal (eds), *Estándares Europeos y Proceso Civil* (Atelier Libros Juridicos 2022) 763, 771 ff; different opinion W Voß, 'Grenzüberschreitende Verhandlungen jenseits des Rechtshilfewegs – Wunsch oder Wirklichkeit?' in P Reuss and B Windau (eds), Göttinger Kolloquien zur Digitalisierung des Zivilverfahrensrechts (Sommersemester 2021) 43 ff. ⁵⁹ Presentation of A Trubacheva, research fellow at the MPI Luxembourg, in the Referentenrunde on 17 January 2023. Recently: K Mehtiyeva, Civil Procedure and International Sanctions, (2023) IJPL 270 ff.



⁵⁴ V Richard, 'La refonte du règlement sur l'obtention des preuves en matière civile' (2021) Rev. Crit. DIP 67 ff and id 'La refonte du règlement sur la signification des actes judiciaires' (2021) Rev. Crit. DIP 349 ff.

⁵⁵ B Hess, 'Verbesserung des Rechtsschutzes durch kollektive Rechtsbehelfe' in B Dauner-Lieb, HP Mansel and M Henssler (eds), *Zugang zum Recht: Europäische und US-amerikanische Wege der privaten Rechtsdurchsetzung* (Nomos 2008) 61, 73 ff.

⁵⁶ The CJEU explicitly recognizes the complementarity of private and public enforcement in the Regulation (EU) 2016/679, cf *Budapesti Elektromos Művek*, Case C-132/21 (CJEU), Judgment 12 January 2023 [ECLI:EU:C:2023:2] para 33 ff.

⁵⁷ B Krans and A Nylund (eds), *Civil Courts Coping with Covid-19* (Eleven 2021).

2.2 Actors

- 25 International civil procedure is largely influenced by different law- and rule-makers. Traditionally, national law makers took a perspective of protecting domestic litigants against the risks of the foreign element. Consequently, broad heads of jurisdiction, the security for costs, reciprocity as a prerequisite that a foreigner could initiate litigation or as a prerequisite of the recognition of foreign judgments, and the facilitation of provisional relief against foreign parties are procedural instruments to protect the domestic litigants.⁶⁰
- 26 However, this perspective of the national law maker is no longer the predominant one. As of today, many regional economic organizations (EU, MERCOSUR, OHADA, ASEAN, EURASIA), but also global International Organizations (The Hague Conference on Private International Law, ⁶¹ UNCITRAL ⁶² and Unidroit ⁶³) aim at facilitating cross-border exchanges and at reinforcing cross-border economic cooperation. However, in the development of the field, regional economic organizations and regional cooperation play an important role.⁶⁴
- 27 In this regard, the role and importance of the European Union is undisputed, J Basedow called it 'the world's experimental laboratory for private international law'. ⁶⁵ Harmonization of cross-border litigation started with the 1968 Brussels Convention, but was largely reinforced by the transfer of competences in the Amsterdam Treaty (1999). Since the Millennium, Europe has adopted a dense network of instruments and measures aimed at facilitating cross-border litigation.⁶⁶ Globally, European integration has become a model for regional wealth and integrative progress, including its framework for cross-border cooperation in civil and commercial matters.⁶⁷ However,

 65 J Basedow quoted by M Weller (n 18) RdC 423, 37, para 124.

 $^{^{67}}$ For an overview cf M Weller (n 18) RdC 423, 37, para 159 ff.



⁶⁰ Cf text at para 2 f. Bilateral conventions were concluded to overcome these barriers – these treaties were based on the idea of reciprocity, too. Cf W Hau, 'Internationales Zivilverfahrensrecht avant la lettre: zum 200. Jahrestag des bayerisch-württembergischen Jurisdictions-Vertrags (1821)' in S Kubis, KN Peifer, B Raue and M Stieper (eds), *lus Vivum: Kunst – Internationales – Persönlichkeit, liber amicorum Haimo Schack* (Mohr Siebeck 2022) 611, 616 ff.

⁶¹ Cf H Muir Watt, 'The work of the HCCH and the path of law: the politics of difference in unified private international law' in T John, R Gulati and B Köhler (eds), *The Elgar Companion to the Hague Conference on Private International Law* (Elgar 2020) 79.

⁶² UNCITRAL's last achievement is the 2019 'Singapore Convention of Mediation' signed by 46 countries. It entered into force on 12 September 2020.

⁶³ Especially by the ALI/Unidroit Principles on Civil Procedure (2004) setting standards for adjudicating transnational and commercial disputes and the ELI/Unidroit European Model Rules of Civil Procedure (2020).

⁶⁴ J Basedow (n 4) *The Law of Open Societies* part I, para 36: The importance of regional cooperation has been recognized by the HCCH when it opened regional offices in Latin America (Buenos Aires) and in South East Asia (Hong Kong). Cf The Rules for the Establishment of Regional Offices (2020) <https://www.hcch.net/en/governance/establishment-ro> accessed 21 June 2024.

⁶⁶ B Hess (n 26) *Europäisches Zivilprozessrecht* para 1.34 ff.

regionalism is not a European, but a contemporary global development as the following examples demonstrate.⁶⁸

- In Latin America, regional cooperation already started in the nineteenth century; the 1878 Convention of Lima was a first precursor; ⁶⁹ the 1928 Código Bustamente ⁷⁰ contained more than 400 articles on private international and procedural law, including a regime on letters rogatory (Art 388 to 393) and an additional one for recognition and enforcement (Art 423 to 433).⁷¹ In the framework of MERCOSUR⁷² and of OAS, ⁷³ the 1992 Protocol of Las Leñas is the most important instrument in the field of judicial cooperation. ⁷⁴ It provides access to justice (ch III), judicial cooperation including recognition and enforcement of judgments, by letters rogatory (ch IV and V). ⁷⁵ In addition, the 2019 Treaty of Medellin provides increased cooperation among Central Authorities by using electronic means. ⁷⁶ Still, cooperation is mainly based on international treaties and on formal letters rogatories. However, the region developed a dense regulatory framework of cross-border judicial cooperation.⁷⁷
- 29 Regional cooperation also takes place in Africa in the framework of the Organisation of African States and, in particular⁷⁸, within CEMAC⁷⁹ and OHADA⁸⁰. CEMAC is an economic and monetary integration organization with organs similar to the European Union. It

⁷² El Mercádo Común del Sur, created in 1991 by Argentina, Brazil, Paraguay and Uruguay.

⁸⁰ Organization for the Harmonization of Business Law in Africa. To date, 17 states are members of the OHADA, Benin, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Congo, Comoros, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, the Democratic Republic of Congo (DRC), Senegal, Chad and Togo. The Treaty's main objective is to address the legal and judicial insecurity in Member States.



⁶⁸ J Basedow (n 4) The Law of Open Societies part I, para 125 ff.

⁶⁹ It was only ratified by Peru and probably by Costa Rica.

⁷⁰ Código de Derecho Internacional Privado (Código de Bustamante) Convención de Derecho Internacional Privado, La Habana, 20 February 1928, signed by 20 states and ratified by 15 nations, cf J Samtleben, 'Bustamante, Antonio Sánchez de' in J Basedow, F Ferrari, P de Miguel Asensio and G Rühl (eds), *Encyclopedia of Private International Law Vol I* (2017) 244 ff.

⁷¹ Recognition operated either via exequatur or by letters rogatory to be submitted to central authorities.

⁷³ M Weller (n 18) RdC 423, 49, para 234 ff.

⁷⁴ It includes Brazil into the judicial cooperation. However, Protocol of Cooperation and Judicial Assistance in Civil, Commercial, Labour and Administrative Matters, signed on 27 June 1992, Decision 5/92, Meeting of the Justice Ministries of Mercosur.

⁷⁵ Critical M Weller (n 18) RdC 423, 49, para 310 ff, considering this approach as old-fashioned as it is based on the concepts of sovereignty and territoriality.

⁷⁶ Treaty of Medellin of July 2019, <https://comjib.org/wp-content/uploads/2019/08/Tratado_Mede llin_ES.pdf> accessed 1 February 2023.

⁷⁷ Unfortunately, statistics on the practical operation of the instruments are missing.

 ⁷⁸ Within the continent, several regional organisations strive for regional cooperation, M Weller (n 18)
 RdC 423, 49, para 230.

⁷⁹ Central African Economic and Monetary Community, EA Gatsi, 'L'espace judiciaire commun CEMAC en matière civile et commerciale' (2016) Uniform Law Review 101 ff; Member States are Cameron, Central African Republic, Chad, Equatorial Guinea, Gabon and the Republic of Congo.

disposes of conferred law making powers and of a regional Court of Justice.⁸¹ It is closely connected to OHADA as all its member states are also members of OHADA, which provides for uniform legislation in civil and business law. OHADA mainly promotes the harmonization of substantive law, but also provides for rules on (ad hoc and institutional) arbitration and mediation. Within CEMAC, the 2004 Convention on Judicial Cooperation covers international criminal and civil cooperation while mainly addressing criminal cooperation.⁸² However, it facilitates the access to justice by excluding any security for costs and makes legal aid available for the nationals of other CEMAC states (Articles 6–8). The recognition and enforcement of decisions from other contracting states is regulated in Articles 14–18. Recognition operates automatically, but exequatur is granted in the requested state. The conditions of recognition are listed in Article 14 which only requires that the court of origin had jurisdiction according to its national law.⁸³ Additional conditions are the lack of an irreconcilable decision, the respect of procedural fairness by the court of origin and of public policy.⁸⁴ The main effect of the recognition is the cross-border extension of res judicata. It seems that this instrument is not much used in practice.

- 30 Already in 1998, OHADA enacted a uniform act on the simplified recovery of debts. This complex act comprises 338 articles addressing mainly enforcement procedures. Cross-border recovery of debts is randomly addressed in Article 33 (2) that mentions foreign judgments as enforcement titles if they have been declared enforceable. Here, one would expect that the courts apply the 2004 CEMAC Convention. However, published case law shows that the courts apply pre-existing bilateral conventions.⁸⁵ Finally, the highly regulated system appears to be a legal implant, strongly influenced by European procedural law and French doctrine.
- 31 A much lower degree of regional cooperation is found in the ASEAN countries. Only a Bilateral Agreement of Judicial Cooperation of 1978 between Indonesia and Thailand exists.⁸⁶ Here, unilateral actions prevail, such as the international commercial courts in Singapore and Hong Kong and – outside of ASEAN – the Belt & Road Initiative of China. However, a high degree of bilateral cooperation is found between New Zealand and Australia in the framework of the Trans-Tasman Proceedings Regime of 2010. It permits Australian parties to initiate proceedings against defendants domiciled in New Zealand

⁸⁶ M Weller (n 18) RdC 423, 49, para 161.



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⁸¹ The Court was created in 2009, it is composed of six judges and one advocate general, it is located in N'Djamena, Chad <https://www.cemac.int/sites/default/files/inline-files/Convention_CJ.pdf> accessed 21 June 2024.

⁸² <http://www.droit-afrique.com/upload/doc/cemac/CEMAC-Accord-2004-cooperation-judiciaire.pdf > accessed 21 June 2024, EA Gatsi (n 79) 101, 105 ff.

⁸³ This is an unusual provision as most international instruments either regulate jurisdiction directly (as the Brussels I Regulation) or provide for indirect heads of jurisdiction to be reviewed by the court granting exequatur (as in Article 5 of the 2019 Hague Judgments Convention).

⁸⁴ EA Gatsi (n 79) 101, 109 ff.

⁸⁵ M Weller (n 18) RdC 423, 49, para 256–257.

before Australian courts and vice versa.⁸⁷ The courts may decline jurisdiction if the New Zealand court appears more appropriate to hear the case unless there is an exclusive choice of court agreement. Subpoenas can be served in the respective countries and witnesses, who have to appear in court at their place of residence, are heard via video link. Judgments can be registered and recognized as domestic judgments.⁸⁸

- Regional cooperation also exists in Eurasia.⁸⁹ Judicial cooperation between the Post-32 Soviet states is governed by a number of multilateral and bilateral treaties concluded after the dissolution of the Soviet Union.⁹⁰ The key multilateral conventions concluded within the framework of the Commonwealth of Independent States (CIS) are the Treaty on the Procedure for Resolving Disputes Related to the Performance of Economic Activity (Kiev, 20 March 1992), the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 22 January 1993, as amended) and the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau, 7 October 2002). These international treaties establish simplified regimes of judicial cooperation within the region and govern, among other things, the questions of international jurisdiction, judicial assistance and recognition and enforcement of foreign judgments in civil and commercial matters. The usage of Russian as the common language facilitates cooperation, which is based on the use of elaborate IT systems in the national jurisdictions.⁹¹ Some of the CIS states have further developed closer cooperation in economic matters under special international instruments like the Treaty on the Procedure for Mutual Enforcement of Judgments of Arbitrazh, Commercial and Economic Courts on the Territories of the Member States of the Commonwealth (Moscow, 6 March 1998) and the Treaty on the Procedure for Mutual Enforcement of Judgments of Arbitrazh Courts of the Russian Federation and Commercial Courts of the Republic of Belarus (Moscow, 17 January 2001).⁹² The cross-border enforcement of judgments requires exequatur proceedings.
- 33 The total number of applications for recognition and enforcement per year is usually relatively low in these countries, while the number of granted applications is relatively high. In 2021 in Russia, 278 cases on recognition and enforcement of foreign judgments and arbitral awards in economic matters were considered. Out of them, in 173 cases,

⁹² The recognition and enforcement of foreign judgments and arbitral awards from non-CIS states usually require the existence of an international treaty or is explicitly or impliedly based on the principles of reciprocity and international comity.



⁸⁷ Technically, the Regime extends jurisdiction based on the defendant's presence cross-border.

⁸⁸ <https://www.ag.gov.au/international-relations/publications/summary-key-provisions-trans-tasma n-proceedings-act-2010> accessed 21 June 2024.

⁸⁹ The following information was kindly provided by A Trubacheva, research fellow at the MPI Luxembourg.

⁹⁰ Although the co-operation is based on a common legal tradition, the treaties differ significantly in scope, established regimes, and contracting states.

⁹¹ Yet, digitalization mainly operates within the domestic system.

the application was satisfied. In 2020 out of 239 applications, 152 were granted.⁹³ In Uzbekistan, in 2021, in 45 recognition and enforcement cases in economic matters out of 56 recognition and enforcement were granted. Also, 98 out of 139 requests for judicial assistance were fulfilled.⁹⁴ In 2021 in Belarus, 144 applications for recognition and enforcement of foreign judgments in civil matters were considered, and 101 were satisfied. In economic matters out of 33 applications, 29 were granted.⁹⁵

- As a result, it can be stated that judicial cooperation, based on mutual trust (backed by shared values), has become an important driver of judicial cooperation at the regional level.⁹⁶ Consequently, the idea of favouring unilaterally the domestic party is no longer at the forefront, although it is still found in residual provisions like public policy and reciprocity.⁹⁷ In regional organizations, cross-border cooperation between courts and other judicial organs may even by reinforced by the application of principles coming from other legal fields. In this regard, EU law gives many examples: The abolition of exequatur and its replacement by standard forms borrowing from instruments of the Internal Market ('judicial passport'); the mutual recognition of standing of qualified entities in consumer protection; but also the general EU principle like fundamental freedoms, the superiority and the direct applicability of Union law.⁹⁸ The legal concept of the 'free movement of judgments' describes the cross border enforcement of judgments from other EU member states as the 'fifth fundamental freedom' of the Internal Market.⁹⁹
- 35 Additional developments and important progress have been triggered by national constitutional courts (applying constitutional fundamental human rights) and by supranational and international human rights' courts and tribunals (applying international human rights' standards). Similar to domestic law, international civil procedure has been generally influenced by the constitutionalization.¹⁰⁰ Today, the procedural guarantees of fair trial and access to justice apply to cross-border

¹⁰⁰ A prominent example in Art 24 of the Spanish Constitution guaranteeing effective judicial protection in Spanish courts to every person, Kinsch (n 6) RdC 318, 11, para 45.



⁹³ Legal Information Agency, 'Arbitrazh proceedings. Overall indicators by category of cases' (Russian Judicial Statistics) https://sudstat.ru/stats/arb/t/42/s/1> accessed 4 February 2023.

⁹⁴ Supreme Court of the Republic of Uzbekistan, 'The main indicators of the results of economic courts in 2018-2021 and 9 months of 2022' (Supreme Court of the Republic of Uzbekistan) <https://stat.sud.uz/iib.html> accessed 4 February 2023.

⁹⁵ Supreme Court of the Republic of Belarus. Internet portal of courts of general jurisdiction of the Republic of Belarus, 'Brief statistical data on the activities of courts of general jurisdiction in the administration of justice for 2021' (*Supreme Court of the Republic of Belarus*, 18 February 2022) https://court.gov.by/ru/justice_rb/statistics/baa6161e8d3941a1.html accessed 4 February 2023.
⁹⁶ M Weller (n 18) RdC 423, 49, para 118 ff.

⁹⁷ Another example is the reciprocity requirement in Art 29 Hague Judgments Convention (2019), CM Mariottini, 'Establishment of Treaty Relations under The 2019 Hague Judgments Convention' (2019/2020) Yearbook of Private International Law, 365, 367 ff; critical F Pocar, 'The 2019 Hague Judgments Convention' in liber amicorum Lord Collins (2022) 71, 80.

⁹⁸ B Hess (n 26) *Europäisches Zivilprozessrecht* para 3.1 ff (on the integrative function of the European Law of Civil Procedure); M Weller (n 18) RdC 423, 49, para 264 ff.

⁹⁹ B Hess (n 26) *Europäisches Zivilprozessrecht* para 3.14 ff.

litigation.¹⁰¹ They entail that states must provide residual heads of jurisdiction¹⁰² and that they limit the exercise of exorbitant jurisdiction.¹⁰³ During the proceedings, the foreign party has the right to be represented by a lawyer and to get a translation in case the party does not understand the language of the proceedings. As a result, the guarantee of fair trial has been adapted to the specific needs of cross-border litigation. At present, it is acknowledged that the guarantees of access to justice and fair trial also include the right of a party that a judgment (legally obtained) can be enforced cross-border.¹⁰⁴ Yet, in the recognition proceedings, the foreign judgment can be reviewed regarding due process requirements.¹⁰⁵

- 36 As already mentioned, the judiciary plays an important role in the development of new concepts of cross-border litigation.¹⁰⁶ This is not only the case in the common law world, but also applies in continental jurisdictions. As the procedural codes do not address international civil procedure comprehensively but rather randomly, courts are confronted with incomplete or even outdated rules. Consequently, they develop new concepts and adapt the existing framework to the needs of international cooperation.¹⁰⁷
- 37 An interesting example in this regard is found in the Netherlands: Art 431 (1) of the Code of Civil Procedure prohibits the enforcement of foreign judgments unless there is a special rule in a bilateral or multilateral treaty, in European Union law or in Dutch domestic law. According to Art 431 (2), the Dutch courts may decide the case again. As a result, the enforcement of judgments coming from non-EU Member States requires an international treaty or a specific domestic rule in law. ¹⁰⁸ Yet, the Netherlands only concluded a few treaties on the recognition and enforcement of foreign judgments.¹⁰⁹ In 2014, the *Hoge Raad der Nederlanden* (HR) was asked about the recognition and

¹⁰⁹ I am grateful to D Althoff, research fellow at the MPI Luxembourg, for providing this example to me.



¹⁰¹ Cf T Domej, 'Constitutionalisation and Fundamentalization of Civil Procedure,' CPLJ-Segment 4, ch 2, para 135 ff.

¹⁰² *Naït-Liman v Switzerland*, Case 51357/07 (ECtHR), Judgment 15 March 2018 [ECLI:CE:ECHR:2018:0315JUD005135707].

¹⁰³ T Pfeiffer, *Internationale Zuständigkeit und prozessuale Gerechtigkeit* (Klostermann 1995), 620 ff; different opinion H Schack (n 3) *Internationales Zivilverfahrensrecht* para 404.

¹⁰⁴ *Dolenc v Slovenia*, Case 20256/20 (ECtHR), Judgment 20 October 2022 [ECLI:CE:ECHR:2022:1020JUD002025620]; G Cuniberti, 'Le fondement de l'effet des jugements étrangers' in Collected Courses of the Hague Academy of International Law – Recueil des cours (Brill 2018) Vol 394, 101, 135 ff.

¹⁰⁵ Saccoccia v Austria, Case 69917/01 (ECtHR), Judgment 18 December 2018 [ECLI:CE:ECHR:2008:1218JUD006991701]; Avotiņš v Latvia, Case 17502/07 (ECtHR), Judgment 23 May 2016 [ECLI:CE:ECHR:2016:0523JUD001750207]; Dolenc v Slovenia, Case 20256/20 (ECtHR), Judgment 20 October 2022 [ECLI:CE:ECHR:2022:1020JUD002025620], para 61 ff.

¹⁰⁶ Cf the examples above, para 9–11.

¹⁰⁷ Example: On 14 September 1965, the German *Bundesgerichtshof* clearly separated international from local jurisdiction (venue) although the distinction was not clearly stated in the Code of Civil Procedure, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 44, 46, cf H Schack (n 3) *Internationales Zivilverfahrensrecht* para 486 ff.

¹⁰⁸ Art 431 had been enacted in 1838 and was based on the principles of territoriality and sovereignty, see above para 2.

enforcement of a Russian civil and commercial judgment.¹¹⁰ As there was no bilateral treaty between Russia and the Netherlands, the Court interpreted Art 431 (2) of the Code of Civil Procedure in a way a claim in a self-standing procedure asking for what the counterparty was ordered to in the foreign judgment, after the foreign judgment is recognised. This procedure, in which the court gave the criteria for recognition in absence of codified national rules for recognition of foreign civil and commercial judgments, results in a Dutch judgment that can be enforced in the Netherlands. The Court developed the criteria for the recognition of the judgments in accordance with international standards and foreign and European provisions. ¹¹¹ This judgment transformed the existing framework on the recognition and enforcement of foreign judgments. The HR clarified its case law in several subsequent decisions. ¹¹²

In some jurisdictions, academia may be an important force behind the adoption of rules adapted to civil litigation with a foreign element.¹¹³ Sometimes, individual actors are able to trigger far-reaching developments. This was the case in Germany in the early nineteenth century when *Johann Anton Feuerbach* pushed successfully the conclusion of bilateral treaties between German (sovereign) states addressing judicial cooperation in civil and criminal matters.¹¹⁴ In Latin America, *Antonio Sánchez de Bustamente* had considerable influence when he elaborated the Código de Bustamante, later enacted by an international treaty permitting judicial cooperation in civil and commercial matters.¹¹⁵ A more recent example is the impact of *Arthur van Mehren* on the project of a worldwide judgments' convention that failed at the millennium but was successfully concluded in 2019.¹¹⁶ A recent important contribution of legal science is the European Rules of Civil Procedure, jointly organized by Unidroit and the European Law Institute.¹¹⁷ This model code of modern civil procedural law was elaborated by academics from most

¹¹⁷ <https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit -rules-e.pdf> accessed 21 June 2024.



¹¹⁰ Case 13/04272, Gazprombank (Supreme Court of the Netherlands), Judgment 26 September 2014 [ECLI:NL:HR:2014:2838].

¹¹¹ The HR developed the following criteria: The jurisdiction of the foreign judge must be based on a ground for jurisdiction that according to international standards is generally acceptable; the foreign judgment was rendered in a judicial procedure that meets the requirements of due process. The recognition of the foreign judgment does not violate Dutch public policy; and the foreign judgment is not irreconcilable with a Dutch judgment rendered between the same parties or with an earlier given foreign judgment between the same parties in a dispute concerning the same subject matter and cause of action, which can be recognised in the Netherlands.

¹¹² Case 17/03826, Yukos (Supreme Court of the Netherlands), Judgment 18 January 2019 [ECLI:NL:HR:2019:54]; Case 20/00819 (Supreme Court of the Netherlands), Judgment 16 Jul 2021 [ECLI:NL:HR:2021:1170].

¹¹³ Academia plays a major role in systems, where legal doctrine elaborates commentaries on the pertinent provisions and is largely quoted by the jurisprudence as in Austria, Germany and Poland. ¹¹⁴ W Hau (n 60) 611, 612 ff.

 ¹¹⁵ Código de Derecho Internacional Privado (Código de Bustamante) Convención de Derecho Internacional Privado, La Habana, 20 February 1928, ratified by 15 nations, cf Samtleben (n 70).
 ¹¹⁶ Cf CM Mariottini (n 97) 365, 366.

European jurisdictions, it provides for comprehensive procedural rules in both domestic and cross-border proceedings.¹¹⁸

2.3 Debates

- 39 Generally, civil society plays a considerable role in the establishment and development of international civil procedure. Interested stakeholders (initially mainly merchants) are found in commercial and industrial circles; they are often formally organized in chambers of commerce or in industrial associations ('private ordering').¹¹⁹ Private organizations equally exist at the international level, most prominently the International Commercial Chamber (ICC) in Paris. This organization plays a paramount role in international arbitration ¹²⁰ but also addresses other forms of ADR. Usually, these private organizations are not directly involved in the development of international procedural law as they mainly focus on the settlement of international disputes outside of the courtroom. A prominent example in this regard are letters of credit. Their uniform, private regime at the global level permits the transport of goods in a way that effectively secures payment, usually without recourse to the courts. Here, private rulemaking overcomes structural deficiencies of the cooperation in civil and commercial matters by state courts.¹²¹
- 40 Other players of the civil society include consumer protection associations, often organized at the regional and global level; human rights advocates and, more recently, activists for the protection of the environment. During the last decades, the professionalization of these players (as Greenpeace, Amnesty International, or Friday for Future) has increased considerably.¹²² Finally, also (global) law firms and litigation funders strongly influence the international debate and promote technical and legal change.¹²³ These actors also largely develop litigation strategies based on forum shopping by considering litigation being an investment.
- 41 Finally, global debates and trends in litigation have a strong influence on the development of international civil procedure. This phenomenon is not new. It already existed since the nineteenth century when learned societies as the Institut de Droit

¹²³ A much telling actor is the litigation fundor Burford LLC (New York) who tries to impose himself as a well-regarded discussant in specialised blogs of international dispute settlement. The self-interest of the provider is usually not disclosed in the lengthy posts.



¹¹⁸ R Stürner, 'Die ELI-UNIDROIT Principles and Rules of Civil Procedure: Auf dem Weg zu einem europäischen Modellgesetz?' in B Hess (ed), *Europäische Modellregeln für Zivilverfahren* (Gieseking 2022) 7 ff.

¹¹⁹ J Basedow (n 4) The Law of Open Societies, part II, para 135 ff.

¹²⁰ G Born, International Commercial Arbitration (Wolters Kluwer 2020).

¹²¹ J Basedow (n 4) *The Law of Open Societies* part II, para 160 ff.

¹²² B Hess, 'Strategic Litigation: A New Phenomenon in Dispute Resolution' (2022) MPILux Working Paper 3.

International¹²⁴ or the International Law Association¹²⁵ have been providing fora where experts discussed potential reforms in public and private international law, including cross-border litigation.¹²⁶ Since the 1950s, the International Association of Procedural Law has established a specific forum for both comparative and international civil procedural law.

42 However, the present global debate also takes place outside this established framework. Guiding ideas and approaches to (cross-border) litigation are discussed in different parts of the world. In the 1990s, the transatlantic justice conflict was a much-discussed topic.¹²⁷ In the 1990s, a debate on public interest and collective litigation started in different parts of the globe.¹²⁸ At present, procedural discourses address public and private enforcement,¹²⁹ international commercial courts, and the abuse of litigation by SLAPPs.¹³⁰ These debates largely supported cross-fertilization in the field and triggered the adoption of similar national, regional, and international instruments to overcome the barriers of the foreign element in cross-border litigation. The most pertinent examples in this regard are the initiatives combatting climate change¹³¹ and the business and human rights movement.¹³²

3 SALIENT DEVELOPMENTS DURING THE LAST 50 YEARS

43 As demonstrated, international civil litigation has undergone considerable changes during the last 50 years. The following subchapters summarizes the most prominent developments.

 ¹³¹ W Kahl and MP Weller (eds), *Climate Change Litigation* (Beck 2021). Recently: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Case 53600/20 (ECtHR), Judgment 9 April 2024.
 ¹³² W Voß, 'Human Rights Litigation vor deutschen Gerichten' (2023) Zeitschrift für vergleichende Rechtswissenschaften 122, 172.



¹²⁴ Founded in 1873. Already at its first meeting in 1874, the members agreed to address issues of jurisdiction and enforcement of foreign judgments, cf F Pocar, 'Juridiction et exécution des jugements étrangers en matière civile et commerciale', in 150 Years Institut de droit international (in print). In 2022, the IDI adopted a Resolution on 'Private International Law and Human Rights', Annuaire 82 (2022), 197.

¹²⁵ Founded in 1873 with a more open membership. Most recently: H Ruiz Fabri H and JB Racine (eds), 'White Paper on Dispute Resolution', <https://www.ilaparis2023.org/en/white-paper/dispute-resolu tion/> accessed 30 January 2023.

¹²⁶ Since the 1950s, the International Association of Procedural Law has been providing a forum for comparative civil procedural law, including cross-border aspects.

¹²⁷ P Schlosser P, *Der Justizkonflikt zwischen den USA und Europa* (De Gruyter 1985).

 $^{^{\}rm 128}$ An additional example relates to Mediation and ADR, cf CPLJ-Part 15.

¹²⁹ B Hess (n 26) *Europäisches Zivilprozessrecht* para 3.59 ff.

¹³⁰ T Domej, 'The proposed EU anti-SLAPP directive: a square peg in a round hole' (2022) Zeitschrift für Europäisches Privatrecht 754 ff. The phenomenon of SLAPP was first discussed and regulated in the California and New York.

3.1 Fair Trial and Rule of Law in Cross-border Proceedings

- 44 The constitutionalization of civil procedure has transformed (and is still transforming) the basic approaches of international civil litigation.¹³³ The old paradigm of protecting the domestic party in cross-border settings has been replaced by a new paradigm of guaranteeing equal procedural fairness to both parties.¹³⁴ This paradigm shift has moved the perspective away from state interest to the rights and needs of the parties. It has much to do with the idea that access to justice and fair trial also control the way of how the 'foreign element' needs to be addressed in international litigation. It equally encompasses the right of a party to enforce a judgment cross-border. This entitlement is at least partially based on substantive human rights (as the right of privacy and family life) ¹³⁵ but also on the general procedural guarantee of a fair trial and access to justice.¹³⁶
- 45 As almost all human rights, the right of the judgment creditor to get his or her judgment enforced is not unlimited. It may be subject to a residual control in the state of enforcement. However, any review of the foreign judgment must be based on specific grounds for non-recognition that are mainly aimed at protecting the (human) rights of the debtor.¹³⁷ In this regard, the fair trial principle and the principle of equal treatment of the parties are the basis of the modern rules on recognition and enforcement of judgments.¹³⁸

3.2 Protection of the Weaker Party

46 The protection of weaker and even vulnerable parties has become a major topic as well in civil law as in (domestic) procedural law. Consumer protection started in the 1960s,¹³⁹ it was already present in the 1968 Brussels Convention where consumers got a specific exclusive head of jurisdiction at their domicile.¹⁴⁰ In the Brussels regime, the protection

¹⁴⁰ S Law, 'Article 17', in M Requejo Isidro (ed), *The Brussels Ibis Regulation* (Commentary, Elgar 2022) para 17.02.



¹³³ P Kinsch (n 6) RdC 318, 9, para 65 ff. See generally CPLJ-Part 4.

¹³⁴ Here, the old intention of privileging and favouring the domestic party as a matter of principle has been given up, P Kinsch (n 6) RdC 318, 9, para 65 ff.

¹³⁵ In contemporary public international law, human rights impact on the interpretation of international conventions and on the development of customary international law. In this regard, the case law of the ECtHR on the relationship between the immunity of states and of international organizations with the right of access to courts demonstrates interesting developments, cf B Hess (n 31) RdC 388, 39, para 220 ff. A recent example is *Basfar v. Wang* [2022] UKSC 20, where the Supreme Court of England & Wales interpreted the 1961 Vienna Convention on Diplomatic Immunities restrictively in order to combat modern slavery in the household of foreign diplomats. For a more restrictive view cf G Cuniberti, ch 4, para 5.

¹³⁶ See above para 35.

¹³⁷ See above n 104.

¹³⁸ For a more reluctant approach cf T Domej, 'Constitutionalisation and Fundamentalisation of Civil Procedure, Access to Justice', CPLJ-Part 4, ch 2, para 154 ff.

¹³⁹ J Basedow (n 4) The Law of Open Societies part III, para 609 ff.

of weaker parties such as insured persons (including the beneficiaries of insurance policies), employees and consumers has become an important policy objective of the instrument.¹⁴¹ Consequently, the CJEU has considerably expanded the scope of the protection of consumers.¹⁴²

- 47 This protection operates at different layers: Primarily, it opens up protective heads of jurisdiction at the protected persons' domicile, even against third state defendants. Secondly, it prohibits any jurisdiction clause that would the weaker party deprive of the favourable heads of jurisdiction. Finally, when it comes to recognition and enforcement the judicial organs of the requested Member State may review whether the incoming judgment respected the mandatory protection of the weaker party under the Regulation.
- 48 Globally, the broad European approach to the protection of weaker parties has not been endorsed (yet). Especially in the USA, vulnerable parties are still subject to (imposed) arbitration and jurisdiction clauses. ¹⁴³ Here, the balance within the unequal legal relationship still needs to be achieved. However, the European approach might also appear to far-fetched as, in practice, often wealthy persons profited from the protection of consumers. ¹⁴⁴ Yet, the protection of weaker parties (especially consumers) in the United Kingdom and in Australia has progressed much further. Hague instruments have taken up the idea of consumer protection, too. ¹⁴⁵
- 49 Finally, the protection of consumers and other vulnerable parties by collective procedures has become an important element in both domestic and cross-border proceedings. Here, the mutual recognition of the standing of consumer protection associations as well as the rights of individual consumers to join collective actions brought by qualified entities in other EU Member States has enlarged the cross-border protection of consumers' rights considerably.¹⁴⁶ The same considerations apply to the protection of data subjects under EU law within the European Union. In this area of law,

¹⁴⁶ In the years to come, one might expect that, largely, collective actions replace individual lawsuits of single consumers in cross-border settings.



¹⁴¹ B Hess (n 26) *Europäisches Zivilprozessrecht* para 6.103, 6.108 ff.

¹⁴² Example: Petruchová, Case C-208/18 (CJEU), Judgment 3 October 2019 [ECLI:EU:C:2019:825].

¹⁴³ Critical J Resnik, 'The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and Google Spain)' in B Hess and A Koprivica Harvey (eds), Open Justice – The Role of Courts in a Democratic Society (Nomos 2019), 177 ff.

¹⁴⁴ A striking example in this regard was *Mietz*, Case C-99/96 (CJEU), Judgment 27 April 1999 [ECLI:EU:C:1999:202], where a millionaire (and entrepreneur) who had ordered a yacht for thousands of Euros claimed repayment of a debt at his domicile. This constellation has happened on several occasions.

¹⁴⁵ Here, as specific focus relates to the protection of international tourists, cf C Lima Marques and T Cardoso Squeff, 'Global governance and co-operation on tourist-consumer matters: arguments in favour of a legal instrument to protect international tourists at the HCCH' in T John, R Gulati and B Köhler (eds), *The Elgar Companion to the Hague Conference on Private International Law* (Elgar 2020), 373, 380 ff., considering damage claims as small claims to be brought before the courts of the country visited and discussing representation by consumer centres/associations and ADR.

the extraterritorial application of mandatory regulatory law has been reinforced by cross-border collective redress.¹⁴⁷

- 50 Another important area of asymmetric private relations is labour law. ¹⁴⁸ European procedural law provides protective heads of jurisdiction (Articles 20–23 Brussels Ibis Regulation). While the employee may sue in different jurisdictions, the employer may only bring an action at the domicile of the employee. These provisions are mandatory and cannot be circumvented by choice of court agreements (Article 23); any violation entails a ground for non-recognition (Article 45 (3) Brussels Ibis Regulation). ¹⁴⁹ An additional ground of jurisdiction is found in Article 6 of the Posted Workers Directive (96/71/EC) opening jurisdiction for lawsuits enforcing binding labour law provisions in the Member State where the work is performed.¹⁵⁰
- 51 More recently, the 'business and human rights' initiative opens up additional heads of jurisdictions at the seat of groups of companies. Here, the focus lies mainly in the conflict of laws and substantive laws obliging the company to impose minimum standards on its subsidiaries and additionally in supply chains. Jurisdiction is open at the seat of the mother company and/or the seller in order to permit public interest litigation supported by human rights activists and unions.

3.3 Strengthening Party Autonomy in Cross-border B2B-Proceedings

52 Different values and perspectives apply to cross-border B2B relationships. Business relationships are characterized by an equal empowerment of both parties. Since 1945, there has been a clear tendency to strengthen party autonomy in cross-border proceedings and to permit choice of court agreements. ¹⁵¹ This tendency was predominantly recognized by the 2005 Hague Choice of Court Convention. ¹⁵² However, the scope of this instrument is limited as it only applies to exclusive choice of court clauses. The 2019 Judgments Convention enlarges the protection of party autonomy to non-exclusive jurisdiction clauses. ¹⁵³ Here, dispute resolution before state courts enters

¹⁵³ Art 5 (1)(m) of the 2019 Hague Judgments Convention. Note, however, that this provision only addresses indirect jurisdiction.



¹⁴⁷ B Hess (n 26) *Europäisches Zivilprozessrecht* para 11.100 ff, 11.106.

¹⁴⁸ The main focus here is the enforcement of mandatory labour law, cf J Basedow (n 4) *The Law of Open Societies* part III, para 655 ff.

¹⁴⁹ B Hess (n 26) *Europäisches Zivilprozessrecht* para 6.122 ff.

¹⁵⁰ B Hess (n 26) Europäisches Zivilprozessrecht para 6.126 ff.

¹⁵¹ This development started from a situation where parties were prohibited from agreeing to any choice of court agreement because of the 'public' nature of civil proceedings, cf C Kohler, 'L'autonomie de la volonté en droit international privé: un principe universel entre libéralisme et étatisme' in Collected Courses of the Hague Academy of International Law – Recueil des cours (Brill 2012) Vol 359, 285, para 299, 367 ff.

¹⁵² <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court> accessed 21 June 2024; T Hartley, 'Choice-of-court agreement under European and international instruments' (OUP 2013).

in competition with international commercial arbitration.¹⁵⁴ Yet, according to recent estimations, 80 to 90 % of international commercial contracts contain an arbitration clause.¹⁵⁵

3.4 Competition among Dispute Resolution Providers

- 53 Empowering parties to choose among different jurisdictions for the resolution of their disputes entails that states jurisdictions are competing among themselves in order to attract high value cases.¹⁵⁶ These cases might be beneficial to the local bar but also for the development and promotion of the respective legal system. In this regard, the emergence of international commercial courts, obviously primarily aimed at attracting high value disputes in the (financial) interest of the local bar has become a widespread phenomenon during the last 20 years.¹⁵⁷ Yet, despite the common denomination, the structure of these courts is very different. Generally, this development was also a reaction to the expansion of commercial (and investment) arbitration aimed at bringing commercial disputes back to state courts.¹⁵⁸ Still, the success of these specialized courts has not been fully assessed, but it appears that they are now attracting more and more international cases.¹⁵⁹
- 54 During the last decades, the competition among jurisdictions within regional frameworks also increased considerably. Before Brexit, the London Commercial Court provided for the most successful hub in Europe. Since the 2020s, French, Dutch and German International Commercial courts are taking the lead in international commercial litigation despite of sophisticated marketing strategies of the English judiciary and bar. ¹⁶⁰ At the same time, London is losing its dominance for litigation initiated by Russian

¹⁶⁰ The Brussels regime does no longer apply to the United Kingdom.



¹⁵⁴ H Ruiz Fabri and JB Racine (n 125) 13.

¹⁵⁵ Cf the annual surveys on international arbitration conducted by the Queen Mary University London, the data are based on an online survey and telephone interviews, <https://arbitration .qmul.ac.uk/research/2021-international-arbitration-survey/> accessed 21 June 2024. Critical regarding bold data based on rough estimations, cf S Vogenauer, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' in H Eidenmüller (ed), Regulatory Competition in Contract and Dispute Resolution (Beck 2013), 227, 242 ff.

¹⁵⁶ G Wagner, 'Dispute Resolution as a Product: Competition between Civil Justice Systems' in H Eidenmüller (ed), Regulatory Competition in Contract Law and Dispute Resolution (Beck 2013) 347.

¹⁵⁷ M Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) 9 International Journal of Procedural Law 4 ff; X Kramer and J Sorabji (eds), *International Business Courts: A European and global perspective* (Eleven International Publishing 2019) 1, 11 ff; W Gu and J Tam, 'The Global Rise of International Commercial Courts: Typology and Power Dynamics' (2022) Chicago Journal of International Law, 443 ff.

¹⁵⁸ B Hess, 'Arbitration and the Brussels Ibis Regulation: London Steam-Ship Owners' Mutual Insurance Association' (2023) Common Market Law Review, 533.

¹⁵⁹ Outside of the established international instruments, the 'exportability' of judgments remains a problem, cf M Requejo Isidro (n 157) 4, 46 f.

oligarchs.¹⁶¹ Generally, civil litigation is in a similar situation as international arbitration where the different national systems (and providers) are openly compete to attract litigants to their services. However, state courts need to provide for equal and fair access to all litigants, independently of the value of claims. In this regard, the competitiveness of state courts compared to arbitration appears to be limited.¹⁶²

55 Another important development relates to the evaluation of the performance of state courts.¹⁶³ Here, the (not undisputed) Doing Business Reports of the World Bank, but also the measuring of courts' efficiency based on statistics by CEPEJ (a Committee of the Council of Europe) have become influential instruments in the public debate about the performance of courts.¹⁶⁴ A more ambitious approach is found within the EU, especially regarding the Judicial Scoreboard and the European Semester, and eventually, the European Commission has become a powerful player regarding the reform of national procedures.¹⁶⁵ However, these reforms are primarily implemented by EU Member States at the national level.

3.5 New Forms and Techniques of Cross-border Cooperation among Judicial Authorities

56 The last decades equally experienced a comprehensive reinforcement and transformation of international judicial assistance. In many jurisdictions, the role and the competences of central authorities dealing with requests for judicial assistance have been largely expanded. ¹⁶⁶ Online and digital cooperation has become the new normal in judicial assistance, which is now commonly called judicial cooperation. ¹⁶⁷ Today, the old paradigm of supporting cross-border proceedings by (limited) international assistance has been transformed into the paradigm of active cooperation among specialized public authorities. New forms of direct cooperation have been established: so-called 'liaison judges' (located abroad, usually at foreign justice ministries or central authorities) support national justices involved in cross-border litigation. ¹⁶⁸ Furthermore, judicial

¹⁶⁸ B Hess (n 26) *Europäisches Zivilprozessrecht* para 3.104.



¹⁶¹ This development was triggered by the war Russia launched against the Ukraine in February 2022. The 2022 Portland Report on Commercial Courts noted a drop by 34% of cases filed in London. According the Report, 'a combination of Brexit, COVID-19 and increased competition from other international courts is likely to be responsible.' https://portland-communications.com/publications/commercial-courts-report-2022/> accessed 21 June 2024. Different opinion G Cuniberti, 'Marchés captifs et marchés concurrentiels dans la concurrence judiciaire franco-britannique' (2022) Étude comparée de l'activité des juridictions commerciales de Londres et de Paris, La Semaine Juridique 2022, 2279.

¹⁶² Critically L Clover Alcolea, 'The rise of International Commercial Courts: A Threat to the Rule of Law?' (2022) 13 Journal of International Dispute Settlement 413 ff.

¹⁶³ Although international organizations perform these evaluations in a comparative perspective, they focus primarily domestic proceedings and usually do not target cross-border litigation.

¹⁶⁴ A Dori, *The Governance of EU Justice Reforms* (Diss jur Heidelberg, 2023).

¹⁶⁵ A Dori, *The Governance of EU Justice Reforms* (Diss jur Heidelberg, 2023).

¹⁶⁶ B Hess (n 26) Europäisches Zivilprozessrecht para 3.98 ff.

¹⁶⁷ See above text at para 10.

networks support judicial cooperation where stakeholders meet regularly to discuss and exchange experiences and challenges of cross-border cooperation. The main objective of these networks is to foster mutual trust in order to facilitate cross-border cooperation.¹⁶⁹

- 57 The digital revolution of civil litigation affects deeply the judicial cooperation in civil matters. ¹⁷⁰ Digital communication accelerates exchanges (among justices, foreign parties, and central authorities). Standardization of procedural acts, the usage of forms, and of translation programmes overcome linguistic and (sometimes) cultural barriers. The HCCH attempted to take the lead in these developments at a global level. ¹⁷¹ However, digitalizing justice systems at the domestic level (including cross-border cooperation) is much depending on the availability of funding and a working infrastructure to implement the respective systems. In this regard, federal states or regional economic organizations (as especially the European Union) are usually more powerful than the global players.
- 58 In this regard, the European Union has started an ambitious program¹⁷²: Already in 2009, the Commission had adopted a first formal four-year action plan on digitalization, which got several follow-ups. More importantly, the EU Commission provided funding for pilot projects to enhance digital cooperation. In this regard, the so-called e-CODEX project was most successful.¹⁷³ Initially developed by some stakeholders in a couple of Member States and (financially) supported by the EU Commission, it has finally become the technical solution for the interconnection of the different domestic IT systems of EU Member States. The e-CODEX system is a decentralized secured communication system. It consists of several software tools aimed at setting up so-called "access points for secure communication". Access points using e-CODEX can communicate with other access points over the internet via a set of common protocols, with no central system involved. Each access point can be linked to a national case management systems.¹⁷⁴ It seems that, at present, no other competing IT system is working with the same degree of maturity.¹⁷⁵

¹⁷⁵ The functioning of the system has been tested in various pilot projects related to various existing instruments of cross-border cooperation.



¹⁶⁹ These networks operate at global level (as the HCCH network on family judges), regionally (as the European Judicial Network) and sometimes autonomously (as the Network of Commercial Courts). ¹⁷⁰ See CPLJ-Part 9.

¹⁷¹ F Heindler, 'The digitalisation of legal co-operation – reshaping the fourth dimension of private international law' in T John, R Gulati and B Köhler (eds), *The Elgar Companion to the Hague Conference on Private International Law* (Elgar 2020), 428 ff.

¹⁷² B Hess (n 22) *Europäisches Zivilprozessrecht* para 2.105 ff.

¹⁷³ Cf the description of e-CODEX by the EU Commission, COM(2020) 710 final, p 5.

¹⁷⁴ E-CODEX was developed by 21 EU Member States with the participation of other third countries/territories and organizations between 2010 and 2016. The total costs of developing the system was about 24 million Euro, of which 50 % were funded by the EU and 50 % by the participating Member States. Cf the Explanatory Report 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) 712final, p 5.

As a result, the European Union (or, to be more explicit, the EU Commission) has taken the lead in the cross-border digitalization of civil procedures.¹⁷⁶

4 RATIONALE AND OVERARCHING OBJECTIVES OF INTERNATIONAL CIVIL PROCEDURE

- 59 Looking back at the last 50 years of development, one must finally assess the rationale of international civil procedural law. To what extent do overarching or even converging trends exist? The following part formulates some tentative answers. The starting point of International Civil Procedure is not different from civil procedure in general: It aims at facilitating access to justice and fair and equal proceedings in cross-border litigation. The difference to domestic litigation is the foreign element and the aim is to address and overcome the obstacles caused by the otherness¹⁷⁷ of several legal orders involved in the dispute.
- ⁶⁰ In this regard, different regulatory strategies can be observed: At the domestic, national level, unilateral solutions may favour or discourage the access to justice of foreign parties and foreign decisions. In this regard, the *lex fori* principle entails disruptive effects.¹⁷⁸ Constitutional guarantees and human rights require the establishment of a system that permits the foreign party to effectively defend his or her rights.¹⁷⁹ In addition to this, unilateral rulemaking may also refer to and integrate model laws in order to provide for more harmonized solutions. Courts may also consider the case law in other jurisdictions when interpreting and developing rules of international civil procedure. Finally, there is a current trend of overcoming reciprocity as a guiding technique in international civil procedure as reciprocity does not respect the rights and interests of the parties involved in the dispute at hand.¹⁸⁰ However, there are still powerful jurisdictions that rely largely on this concept.¹⁸¹
- 61 At the regional level, different strategies can be observed. Here, the idea is to overcome the cross-border effect by unified rules. These rules may aim at delineating jurisdictional spheres or they may even contain uniform rules and procedures. Usually, regional systems are based on mutual trust in common values shared by all states participating in regional cooperation. The specific strength of regional systems is the establishment of

¹⁸¹ Most prominently the People's Republic of China, cf M Weller (n 18) RdC 423, 37, 206 ff. The Belt and Road Initiative mitigated the approach, M Weller (n 18) RdC 423, 37, para 221.



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¹⁷⁶ Cf. Regulation (EU) 2022/850 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), OJ 2022 L 150/1, and Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, http://data.europa.eu/eli/reg/2023/2844/oj. ¹⁷⁷ H Muir Watt (n 61) 79, 82 ff, addressing private international law in general.

 ¹⁷⁸ As it does not recognise per se (as a conflict rule) the 'otherness' of the international dispute involving a cross-border element but addresses the issue from the lenses of national procedural law.
 ¹⁷⁹ As a result, constitutional guarantees counterbalanced unilateral law making directed against 'foreigners', J Basedow (n 4) *The Law of Open Societies* part III, para 732 ff.

¹⁸⁰ H Schack (n 3) Internationales Zivilverfahrensrecht para 43.

courts that interpret the uniform rules in a binding way.¹⁸² Consequently, these systems provide for two sets of rules: those on cooperation and collaboration within the system and those applicable to third states. Yet, there is also the possibility to apply the same rules internally and to third states.¹⁸³ At the regulatory level, regionalization has become an important trend in international civil procedure.

- 62 The possibilities of law making at the international and/or global level are more restricted as the policies and regulatory activities of the HCCH, Unidroit and UNCITRAL demonstrate. Yet, these international organizations equally strive for a better coordination of the different national and regional rules by providing instruments with uniform rules. The disadvantage of international cooperation is the inflexibility of international conventions that can only be changed by agreement of all states (and REO) bound by them. The more states ratify a convention, the more difficult is to change and to adapt it to new needs.¹⁸⁴ Furthermore, there is no international court that interprets these instruments in a uniform way.¹⁸⁵ Due to these constraints, these organizations tend to use soft law instruments to adapt old instruments to changed circumstance. Soft law techniques (such as model laws and the usage of information technology) are also used to achieve better coordination of the national systems in a pragmatic way.¹⁸⁶
- 63 The foreign element implies additional regulatory objectives of international civil procedure: One is to provide legal certainty in international/cross-border settings through uniform and predictable rules this objective also explains the favourable approach of modern procedural law in strengthening party autonomy in cross-border settings. ¹⁸⁷ Another objective is the avoidance of disruption in cross-border disputes.¹⁸⁸ Again, the establishment of uniform rules addressing the specific needs of litigants in cross-border settings appears to be the adequate approach, especially with regard to jurisdiction, pendency, and the recognition and enforcement of judgments.

¹⁸⁸ A first pragmatic step is to collect and systemize information about the respective domestic, regional and international systems. For a comprehensive view cf Standing International Forum of Commercial Courts, Multilateral Memorandum on Enforcement of Commercial Judgments for Money (2nd edn 2021), <https://www.judiciary.uk/wp-content/uploads/2020/12/6.7387_JO_Memorandum_on_Enfor cement_2nd_Edition_April2021_WEB.pdf> accessed 21 June 2024.



¹⁸² The most prominent and compelling court in this regard is the CJEU and its case law on the Brussels' system, cf B Hess (n 11) 'Seminal Judgments' 2 ff.

 ¹⁸³ An example is the application of the rules/case law on personal jurisdiction to America as to foreign defendants in the US and in Canada, LE Teitz, American Report, 3; G Saumier, Canadian Report, para 3.
 ¹⁸⁴ Prominent examples in this regard are the Hague Service and Evidence Conventions, cf Hess and Richard (n 16) 288 ff.

¹⁸⁵ Attempts of the HCCH to confer such competence on the Permanent International Court of Justice failed in the 1930s, cf. Van Loon JH and De Decker S, 'The Role of the International Court of Justice in the Development of Private International Law' in R Lesaffer, JB Vervliet and JH van Loon (eds), *One century peace palace, from past to present* (2013) 73, 107 ff.

¹⁸⁶ They might be understood as an organized way of cross-fertilization in international regulation and harmonization.

¹⁸⁷ H Muir Watt (n 61) 79, 80 ff.

64 Finally, the modern perception of courts rendering services to litigants and the legal community as a whole encourages cross-border cooperation and interchange. Here, private and commercial laws provide a framework for the cross-border interchanges of goods, services, and finances; they are also destined to permit the cross-order movement of individuals and families.¹⁸⁹ Without robust coordination of the judicial systems and an openness to the foreign party and his or her specific needs, global interchanges cannot operate. In this regard, international civil procedure operates as a facilitator of global exchanges in the modern world.

¹⁸⁹ J Basedow (n 4) The Law of Open Societies General Conclusion, para 767.



ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
Art	Article/Articles
BGH	Bundesgerichtshof (Federal Court of Justice) [Germany]
CEPEJ	Conseil de l'Europe Commission européenne pour l'efficacité de la justice (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
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	exempli gratia (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)
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
pt	part
SCC	Supreme Court Canada
Sec	Section/Sections
trans/tr	translated, translation/translator
UK	United Kingdom
UNIDROIT	Institut international pour l'unification du droit privé (International Institute for the Unification of Private Law)
US / USA	United States of America
v	versus
vol	volume/volumes
* * *	***



LEGISLATION

International/Supranational

Brussels Convention on Jurisdiction and Recognition and Enforcement in civil and commercial matters of 27 September 1968

Código de Derecho Internacional Privado (Código de Bustamante) Convención de Derecho Internacional Privado, La Habana, 20 February 1928, signed by 20 states and ratified by 15 nations

Directive (EU) 2020/1828, OJ 2020 L 409/1

El Mercádo Común del Sur

Hague Evidence Convention (1970)

Hague Service Convention (1965)

Hague Judgments Convention (2019)

Lisbon Treaty on the Functioning of the European Union

Lugano Convention (1988)

Protocol of Cooperation and Judicial Assistance in Civil, Commercial, Labour and Administrative Matters, signed on 27 June 1992, Decision 5/92, Meeting of the Justice Ministries of Mercosur.

Regulation (EU) 2016/679

Singapore Convention of Mediation (2019)

Treaty of Medellin of July 2019

National

Austrian Jurisdiktionsnorm, section 99

French Civil Code, article 14

German Code of Civil Procedure, section 23



CASES

International/Supranational

Mund & Fester, Case C-398/92 (CJEU), Judgment 10 February 1994 [ECLI:EU:C:1994:52].

Mietz, Case C-99/96 (CJEU), Judgment 27 April 1999 [ECLI:EU:C:1999:202].

Avotiņš v Latvia, Case 17502/07 (ECtHR), Judgment 23 May 2016 [ECLI:CE:ECHR:2016:0523JUD001750207].

Naït-Liman v Switzerland, Case 51357/07 (ECtHR), Judgment 15 March 2018 [ECLI:CE:ECHR:2018:0315JUD005135707].

Saccoccia v Austria, Case 69917/01 (ECtHR), Judgment 18 December 2018 [ECLI:CE:ECHR:2008:1218JUD006991701].

Petruchová, Case C-208/18 (CJEU), Judgment 3 October 2019 [ECLI:EU:C:2019:825].

Dolenc v Slovenia, Case 20256/20 (ECtHR), Judgment 20 October 2022 [ECLI:CE:ECHR:2022:1020JUD002025620].

Budapesti Elektromos Művek, Case C-132/21 (CJEU), Judgment 12 January 2023 [ECLI:EU:C:2023:2].

National

Case 1/65 (Federal Court of Justice, Germany), Judgement 14 Juni 1965.

Morguard Investments Ltd v De Savoye, Case 21116 (Supreme Court, Canada), Judgment 20 December 1990 [1990 3 SCR 1077].

Morrison v National Australia Bank (US Supreme Court) 561 US 247, 266, Judgment 24 June 2010.

Club Resorts Ltd v Van Breda, Cases 33606, 33692 (Supreme Court, Canada), Judgment 18 April 2012 [2012 SCC 17].

Daimler AG v Bauman (US Supreme Court) 571 US 117, Judgment 14 January 2014.

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