International Civil Litigation
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A. Notion and Scope of International Civil Litigation

1 International Civil Litigation (ICL) encompasses all civil litigation in domestic courts involving a foreign element. The term classically refers to cross-border litigation in civil law matters in a domestic court involving a foreign party. In this context, ICL regulates situations where the international elements of the litigation require the co-ordination of the jurisdiction of courts in different States, or the delimitation of parallel lawsuits—this includes the application of concepts such as lis pendens and forum non conveniens. The recognition and enforcement of foreign judgments and of other enforceable titles (settlements, notarial instruments) equally serve as instruments to co-ordinate judicial proceedings.

2. Today, the term ICL extends far beyond its classical notion. It relates to cross-border judicial co-operation in civil matters, ie the service of documents, the taking of evidence, and legal aid for foreigners. Furthermore, it covers international commercial and investment arbitration, ie the enforcement of arbitral agreements and the recognition of arbitral awards by civil courts. Only recently, cross-border enforcement and insolvency have become important areas of ICL. The latest developments in this context relate to cross-border collective redress and to private law enforcement. In these areas of ICL, the subject-matter of the litigation includes public interests which are closely intertwined with regulatory strategies. As a result, these lawsuits may give rise to concerns with regard to sovereignty and the prohibition on interfering with domestic affairs of affected States. The different cultural approaches of the civil and the common law jurisdictions to these concerns entailed serious ‘judicial conflicts’ which finally impeded the conclusion of a world-wide convention on jurisdiction and the recognition of civil judgments in the framework of the Hague Conference on Private International Law.

3 Traditionally, ICL is regarded as a part of private international law distinct from public international law. However, diplomatic and sovereign immunities, as well as the basic concepts of jurisdiction, ie territoriality, sovereignty, and non-interference in the domestic affairs of foreign States, always applied to ICL. In addition, the traditional concept of the protection of aliens in international law guarantees minimum standards of procedural fairness in domestic courts world-wide. As ICL directly affects procedural law which regulates the exercise of the judicial authority of the State, the relationship between ICL and public international law was always much closer than the relationship between private and public international law. Finally, the malfunctioning of a domestic judicial system may entail the international responsibility of the respective State under public international law.

4 Since the beginning of the second half of the 20th century, relations between ICL and public international law have been tightened further. One reason for this development is the considerable improvement of the legal position of individuals in international law. Recourse to various international tribunals is no longer limited to States, but has been partially opened to private litigants. The most salient examples are dispute settlement mechanisms in human rights treaties and investment arbitration. The proliferation of international tribunals entails forum shopping between domestic and international fora. Secondly, human rights guarantees, especially the fundamental right of access to justice and to a fair trial (especially Art. 6 Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] and Art. 47. Charter of Fundamental Rights of the European Union [CFR]) directly apply to ICL and modify the traditional concepts. Traditionally, public international law regulated relations and co-operation among States. The same basic concept applied to ICL where the traditional perspective mainly relied on sovereignty and disregarded the individual’s right of access to justice. The modern concept, by contrast, focuses equally on the protection of private litigants and on the efficient enforcement of their procedural and substantive rights. One prominent example is the protection of children under the Hague Convention on the Civil Aspects of International Child Abduction of 1980 [concluded 25 October 1980, entered into force 1 December 1980] [Art. 5(b) Hague Child Abduction Convention]. Modern developments such as human rights litigation and the decentralized enforcement of public international law by civil courts reflect an increasing awareness of these rights and foster the application of public international law by domestic courts. In addition, the internet and e-justice are transforming the traditional concepts of ICL. Although these developments have not entailed a complete reversal of the former, traditional concept, ICL is in a phase of modernization.
B. Basic Concepts

1. The Traditional Approach

According to the traditional approach, the judiciary forms part of the exercise of State authority and is confined to its territory. Consequently, judgments of the courts of one State do not have any cross-border effect by themselves, unless they have been recognized by the foreign State concerned. Any direct exercise of judicial authority with extra-territorial effects requires the permission of the affected State—according to a famous saying: ‘States are not free to send troops or bailiffs over the border’, and courts are not permitted to sit on the territory of a foreign State without consent of the latter. As a result, the summoning of witnesses by foreign courts or the compulsory production of evidence located abroad without reference to international conventions has sometimes led to diplomatic protest. These activities are sometimes qualified as enforcement jurisdiction. However, this approach is not generally recognized in some jurisdictions, civil litigation is less focused on the activities of the court, but rather on the behaviour of the private parties. Hereafter, extraterritorial injunctions directed against litigants abroad, (ie anti-suit injunctions, cross-border e-discovery), are permitted.

As far as the jurisdiction of the civil courts is concerned, the standards established by public international law are more lenient. According to the Lotus doctrine (→ Lotus, Th.), States enjoy almost unlimited discretion in the establishment of the jurisdiction of their courts in international matters; public international law only requires a genuine link for the exertion of adjudicatory jurisdiction. However, the application of universal jurisdiction in civil matters remains controversial. Furthermore, insufficient international co-operation in civil matters provided unilateral strategies by some States, which created so-called exorbitant grounds of jurisdiction (ie jurisdiction based on the nationality of the plaintiff; jurisdiction based on the assets of the defendant within the court’s circuit—the so-called ‘umbrella rule’, because jurisdiction may even be based on the forgotten umbrella in the hotel—and general jurisdiction for activities carried out worldwide, based on business activities in the forum State). Although these heads of jurisdiction ensure the access of domestic litigants to their home courts, the defendant is often brought into a precarious situation: he must defend his case in a remote jurisdiction, retain a foreign lawyer, use a foreign language, and will be subject to an unfamiliar procedural law. Thus, even if a foreign defendant accepts the treatment of a domestic party, the factual disadvantages are still significant. Admittedly, for some private actors, ie multinational enterprises, these disadvantages may be less noticeable than for purely private litigants—especially in family matters.

Although sovereignty and territoriality form the basis of ICL, States were always inclined to cooperate in civil and commercial matters and to assist each other mutually in the conduct of cross-border litigation. Initially, this co-operation was based on courtesy. Many codifications of civil procedure from the 19th century provided for specific rules on jurisdiction, recognition of foreign judgments, and judicial co-operation based on reciprocity. In practice, judicial co-operation was effected mainly through diplomatic channels. Since the late 19th century, this practice has been consolidated and improved by bilateral and multilateral conventions on judicial assistance. The first multilateral convention in ICL was concluded within the framework of the Hague Conference of Private International Law in 1883 (→ Hague Conventions on Private International Law and on International Civil Procedure). In this framework, reciprocity was no longer a requirement for judicial assistance. Nevertheless, the basic structure of these conventions was still cumbersome: judicial co-operation was regarded as a part of foreign policy; it was conducted in a formalistic way, via different authorities outside the courts, and the granting of judicial assistance was conceived of as a discretionary act. In 1965 and in 1970, the Hague Conference adopted two conventions on the service of documents and the taking of evidence which went one step further: both instruments allowed direct contacts between the requesting and the requested judicial authority; support is provided by central authorities (Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters; Convention on the Taking of Evidence Abroad in Civil and Commercial Matters). The application of these conventions in practice has proved difficult, mainly due to persistent formal requirements and the need for translations.

2. Recent Developments

The most prominent driving factors behind the current developments are human rights, especially the guarantee of a fair trial (Art. 6 ECHR). This fundamental right guarantees the plaintiff access to justice by providing an accessible tribunal, a speedy trial, and efficient enforcement structures. The guarantee equally includes defendant’s rights to be informed about the proceedings—by efficient service of the documents instituting the proceedings; to defend efficiently the claim against him, and to be protected against disproportionate enforcement. The right to a fair trial serves as a guiding principle in the interpretation of international procedural law, ie in the context of the service of documents, general clauses—like public policy clauses—directly refer to constitutional standards. However, the guarantee of a fair trial is not unlimited; it must be balanced against other principles and objectives of public international law. Accordingly, the right to efficient access to a court does not per se restrict the immunity of a defendant State in civil courts (→ Al Adsadi Case).

The second development of ICL concerns the increasing proliferation, fragmentation, and complexity of international dispute resolution. Transnational litigation not only transgresses the boundaries between domestic and international but also the boundaries between private and public international law. Investment protection is an area where public and private international laws are closely interlinked in diverse and fragmented frameworks of dispute resolution (→ Investments, International Protection). In investment and in commercial arbitration, international institutions strongly compete for the most liberal regime.

Furthermore, the proliferation of dispute resolution bodies has resulted in parallel litigation of related disputes in different courts and arbitral tribunals: for instance, lawsuits for war damages involving questions of sovereign immunity, access to justice, and the applicability of European procedural law are currently litigated in national courts, in the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), and even the International Court of Justice (ICJ). As a result, forum shopping has become a widespread practice—not only in respect of competing national courts, but also regarding arbitration and litigation as well as overlapping dispute-resolution bodies.

Coherent solutions for the delimitation of parallel and overlapping litigation have yet to be developed. In practice, virtually all existing tools for the delineation of parallel proceedings have been applied, ranging from the simple mechanism of allowing parallel proceedings and conflicting judgments, to more complex mechanisms such as anti-suit injunctions, judicial abstention, comity, forum non conveniens, estoppel, abuse of procedure, lis pendens, res judicata, etc. One practical solution might be the furtherance of an improved co-operation between judges in specific fields such as child abduction, insolvency, or in commercial litigation when main proceedings and provisional measures are sought after simultaneously by different States. Similar forms of co-operation have already been established in international criminal law, ie by introducing the principle of complementarity in Art. 17 Rome Statute of the International Criminal Court (→ International Criminal Courts and Tribunals, Complementarity and Jurisdiction).

The third development relates to the use of information technology in civil procedures. One example is the procedure of the European
13 Developing computerization also implies several changes: the new procedures are highly standardized in order to allow a fast and comprehensive assessment of typified claims; hearings are replaced by written proceedings; the taking of evidence is equally standardized and often limited; service of process and communication between the court and the parties are usually handled electronically. In addition, theCourts of the Member States and works online. Nevertheless, the impact of the new technologies exceeds these changes so that they influence and modify comparative procedural law as such. This discipline is increasingly focusing on the efficiency of national systems by comparing data. Within the → Council of Europe (CoE), the Commission on the Efficiency of Justice collects and compares electronic data of the judicial systems of the Member States; the → World Bank Group ranks judicial systems worldwide with regard to their performance. Although the comparability of the data obtained is still questionable, there is no doubt that the availability of these data opens up new avenues for an empirical approach in comparative law.

3. Specific Questions concerning Regional ICL Sources

14 The most important development of the last decade has been the elaboration of a comprehensive European legal framework for cross-border litigation. The starting point was the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Idem 27 September 1968, entered into force 1 February 1973) (Brussels Convention). Due to the case law of the ECJ, the convention has become one of the most successful instruments of ICL. Since 1 May 1998 Art. 81 Treaty on the Functioning of the European Union (TFEU) → Lisbon Treaty confers a specific competence for law-making in the field of judicial co-operation in civil matters to the European Union. This legislative development was triggered and accompanied by the case law of the ECJ on the international procedural laws of the Member States. The ECJ fully implemented the principle of non-discrimination of EU law in the procedural laws of the Member States and excluded any discriminatory treatment of parties domiciled in other EU Member States. Since 1999 the European law-maker has used the legislative competence intensity and has adopted 11 instruments on ICL ranging from jurisdiction and recognition and enforcement in civil and family matters to cross-border judicial assistance, international insolvency, mediation, and legal aid.

15 In addition, European law-making pursues its own regulatory strategy and deviates from the traditional concepts of ICL. It is based on the principles of mutual trust and confidence in the proper functioning of the procedural systems of the EU Member States. According to these principles, which have been recognized by the ECJ, judicial acts, in particular judgments and acts of the judicial authorities of the EU Member States without exequatur. Modern European procedural law is aimed at abolishing exequatur proceedings. They are considered ”interim proceedings” hampering the swift cross-border movement of judgments and of other enforceable titles in the European Judicial Area. At present, Arts 38–44 Brussels I Regulation still require the granting of exequatur as a prerequisite of the enforcement of foreign titles (Council Regulation (EC) 44/2001). Although the regulation accelerates exequatur proceedings considerably, these proceedings entail additional costs and delays for creditors who seek to enforce their judgments abroad. The EU Commission’s Green Paper on the Review of Council Regulation (EC) No 44/2001 envisages a general abolition of exequatur in the near future (Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM[2009] 175 final [21 April 2009]). This development has been prepared by procedural instruments of the so-called second generation since 2004. These instruments adopt a different regulatory approach. They are based directly on the principles of mutual trust, access to justice, and fair trial. Mutual trust means mutual recognition and, consequently, the abolition of exequatur proceedings. The abolition of exequatur does not entail that the cross-border enforcement of foreign titles ensures without any control of their procedural conformity. Yet, this control is no longer exerted in the form of exequatur proceedings but takes place in the Member State where the judgment is given. Additionally, the new instruments—reflecting the exception of Council Regulation (EC) 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Co-operation in Matters relating to Maintenance Obligations ("Maintenance Regulation")—contain specific provisions which address the most crucial procedural irregularities and establish → minimum standards of procedural fairness. These specific provisions address the content of the complaint, its service on the defendant, the hearing, and, if applicable, the necessary and accessible remedies. The new instruments also allow the cure of minor procedural defects. The most elaborate instrument in this regard is the Regulation (EC) 861/2007 Establishing a European Small Claims Procedure ("Small Claims Procedure Regulation"), which contains a comprehensive European procedure implementing the constitutional requirements of Art. 47 CFR. As a result, the new instruments provide for specific procedures in designated areas of law. The classical provisions of ICL aimed at the co-ordination of autonomous national procedures are replaced by comprehensive procedures for cross-border litigation.

16 In the field of co-operation in civil matters the old paradigm of territoriality and sovereignty was unable to address the needs of the European Judicial Area in an adequate manner: when the Treaty of Amsterdarn entered into force, cross-border service of documents was burdensome and the average time for transmitting a lawsuit from Germany to an addressee in Spain was about two years—a period of time which amounted to a denial of justice. In May 2000, the European legislator enacted a Council Regulation (EC) 1206/2001 ("Service Regulation") on the cross-border service of documents which introduces practical improvements. On the other hand, the system of formal judicial assistance with the help of central authorities is restructured in a better way and the regulation foresees direct communications among the requesting and the requested judicial authority. However, the most innovative provision is Art. 14 Service Regulation which permits direct postal service in all other Member States of the EU. For many EU Member States, this system introduced a change. Before 2000, most systems did not allow direct cross-border service. Service was considered an act of public authority. Accordingly, any extra-territorial effect was viewed as an infringement of the territorial authority of the affected State. In this respect, the implementation of the Service Regulation entitled a genuine paradigm shift: the service of documents is no longer considered an act of sovereignty, but, according to its objective, as an act which shall inform the defendant about the instituted proceedings. The new perspective is different: it focuses primarily on the parties of the proceedings and their interests. The case law of the ECJ related to the interpretation of the Regulation (Case C-442/03 Götz Leфер v Berlin Chemie AG [2005] ECR I-06691; Case C-140/07 Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin [2008] ECR I-0367) strongly supports the new concept of the EU legislator.

17 Since 2000 the new basic concept has been applied in other fields of judicial co-operation, for example in the cross-border taking of evidence. Council Regulation (EC) 1206/2001 of 28 May 2001 on Co-operation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters permits the direct taking of evidence by a court of an EU Member State on the soil of another Member State. According to the regulation, an Austrian court hearing a claim on tortious liability is allowed to inspect the place of accident in ...
France. The Austrian court still requires permission of the French judicial authorities, but the latter is usually obliged to grant permission. In practice, the cross-border taking of evidence mainly consists of holding video conferences with witnesses residing abroad.

18 The European law of judicial co-operation, as it stands today, is based on the EU concept of mutual co-operation and mutual trust. The judicial authorities of the Member States are obliged to co-operate closely in order to guarantee free access to justice and the right to a fair trial. The old paradigm of assistance by courtesy among sovereign nations has been replaced by a concept based on the needs of the individual parties and their procedural rights.

19 Intensified judicial co-operation is also taking place in other Integrated Regional Organizations, i.e. the MERCOSUR. Legal harmonization is dealt with by the 1992 Protocol of Las Lenas on Judicial Co-operation which provides for rules on jurisdiction, recognition, and enforcement of judgments, arbitral awards, and cross-border service and the taking of evidence (Protocolo de Cooperación e Asistencia Jurisdiccional en Materia Civil, Comercial, Tributaria e Administrativa [signed 27 June 1992, entered into force 6 August 2000] 2145 UNTS 399). However, these instruments follow the old paradigm of judicial assistance by letters of request and are based on the principles of territoriality and sovereign equality of the participating States. Interim measures of protection are addressed by the 1994 Protocol of Ouro Preto (Protocolo Adicional al Tratado de Asunción sobre la Estructura Institucional del MERCOSUR). Arbitration is addressed by the Protocol of 1986 (Acuerdo sobre Arbitraje Comercial Internacional del MERCOSUR [signed 23 July 1986]). The delineation between the regional instruments and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (done 10 June 1958, entered into force 7 June 1966) [330 UNTS 38] (New York Convention) has proved difficult. In Africa, harmonization of procedural law has been achieved by the Organization for Harmonization of Business Law in Africa (Organisation pour l’Harmonisation en Afrique des Affaires), i.e. with regard to the recognition and enforcement of arbitral awards.

C. Sources

1. National Laws

20 Due to the limited role of public international law, rules of ICL are often a part of national procedural laws or of the domestic provisions of private international law. Even if supra-national instruments or international conventions apply, the imperative behind these sources is eventually rooted in national law. In many States, the regulatory framework lacks transparency. Legal literature, especially in the EU, advocates the compilation of the diverse texts in a comprehensive—umbrella—instrument. The fragmented situation of the rules on ICL in many States is a major impediment to efficient cross-border litigation.

2. International Treaties

21 International → unification and harmonization of laws is a significant aspect of ICL since international harmony promotes effects like the protection of existing private rights in the case that an individual becomes subject to the procedural laws of another State. In particular, uniform rules help to exclude forum shopping and competing litigation in international settings. As in private international law, unification and harmonization of laws includes bilateral as well as multilateral treaties, although the latter are more commonly compared to private international law. As far as such treaties are self-executing (which typically is the case in international procedural law), national law determines whether the treaty is directly applicable (Treaties, Direct Applicability). As to content and effect, ICL does not distinguish between instruments providing for uniform private international law rules (ie uniform—not to be confused with substantive uniform law) and those which are only applicable in cases where the laws of the signing States conflict. Often, multilateral treaties in the area of private international law are proposed by international institutions or organizations such as the United Nations (UNCITRAL), the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), and the COE.

3. Regional Co-operation: The European Community

22 Under Art. 81 TFEU the EU may adopt all legislative instruments contained in Art. 288 TFEU. In legislative practice, regulations have been the most common instrument as they establish uniform regimes which apply directly in all EU Member States without any additional legislative implementation. Accordingly, the Council Regulations Brussels I and II as well as the Council Regulations on insolvency (Council Regulation [EC] 1346/2000), on service and on the taking of evidence (Council Regulation [EC] 1451/2000), on cross-border cooperation in civil matters, and on the taking of evidence abroad (Council Regulation [EC] 1206/2001), are to be considered as uniform, directly applicable law in the European Judicial Area. The new instruments of the second generation, which provide for comprehensive procedures in specific fields, are equally based on regulations. Uniform law responds to the specific needs of civil procedure which is aimed at legal certainty and equal and uniform application by the courts. In European international procedural law, directives remain the exception—if used; they mainly address the harmonization of internal civil procedures.

23 In practice, informal instruments, especially decisions and recommendations, are important tools of European procedural legislation. The most prominent example is the European Judicial Network in Civil Matters (‘Network’), which serves as a communication platform among stakeholders in the European Judicial Area (ie officials of the central authorities, law-makers, practitioners, and academics). The Network is legally founded on a decision of the Council of the EU; however, its non-binding legal nature does not diminish its paramount importance for the judicial co-operation. The same considerations apply to similar tools of e-justice which are non-binding, yet operating very efficiently.

4. Private Sources of Law

24 Private sources of law play an important role in arbitration and other fields of alternative dispute resolution (ie mediation, online dispute resolution). In these areas, the parties agree on a mechanism of dispute resolution based on their consent and are referred to private institutions and regulatory frameworks. According to a modern doctrine, elaborated by French scholars, international arbitration is by its nature transnational and deterritorialized from national law. However, the recognition and enforcement of arbitral awards and the enforcement of arbitration clauses are subject to national procedural law and to international conventions, ie the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards.

D. Specific Issues
1. Jurisdiction
25 As private international law jurisdiction requires a genuine link between the dispute and the adjudicating body, much room is left for the determination of jurisdiction by the States. At present, two different systems of jurisdiction prevail. In the common law world, jurisdiction is based on the court’s power over the parties (jurisdiction in personam) or the object of the litigation (jurisdiction in rem). Jurisdiction in personam rests on the domicile/presence of the defendant in the State; with the permission of the court it may be based on the service of the claim on a defendant outside of the jurisdiction. In the United States, personal jurisdiction is also based on business activities of a person in the court’s district; this head of jurisdiction encompasses world-wide business activities of the defendant. However, this wide determination of jurisdiction is modified by constitutional law (due process) and/or by judicial discretion. The deciding court may conditionally dismiss the claim under the doctrine of forum (non) conveniens if another competent court seems to be more appropriate for resolving the litigation.

26 In contrast, most continental law systems base jurisdiction on defined grounds: according to the basic rule, the defendant must be sued at his seat/domicile (actor sequitur forum rei). Additional grounds of jurisdiction are the place of performance of contractual obligations, the place where damages are sustained, and the place where a branch of the defendant is operative. Exclusive jurisdiction is established, inter alia, for immovable property, for disputes regarding registry matters, and for intellectual property litigation (→ Intellectual Property, International Protection). The Brussels I Regulation is framed in accordance with the approach of the continental law systems. So far, the ECJ has not interpreted the Regulation on the basis of the English understanding of jurisdictional issues ([Case C-28/10] Andrew Olusoga v. N. B. Jackson[2005] ECR I-01383—forum non conveniens; [Case C-185/07] Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc[2009] ECR I-00663—anti-suit injunctions). Nevertheless, the Regulation has become a popular and successful instrument in the EU Member States which adhere to the procedural culture and the tradition of the common law.

27 Despite the differences of both systems, there are many grounds of jurisdiction which are generally accepted by both, for instance jurisdiction based on consent. Jurisdiction agreements are now dealt with by the 2005 Hague Convention on Choice of Court Agreements which provides for the priority of the court chosen in parallel proceedings. The convention was the remaining compromise of a much more ambitious project that failed in 2000—the drafting of a worldwide Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Hague Conference on Private International Law: Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters Adopted by the Special Commission) (adopted 30 October 1999) 3).

28 In matrimonial and parental responsibility matters, national procedural laws often base jurisdiction on the habitual residence of the spouses and the children; additional jurisdictional grounds refer to the nationality or the domicile of the spouse(s). The Brussels Ibis Regulation establishes seven different heads of jurisdiction in divorce matters which are mainly based on common connecting factors of the spouses—this multitude of competent courts entices forum shopping and does not meet the need for a balanced system. In parental responsibility matters, Art. 15 Brussels Ibis Regulation provides for the transfer of the proceedings to a foreign court better situated to hear the case. This provision endorses the common law model of the most suited forum in the interest of the welfare of the child. It remains to be seen whether this approach will be extended in future instruments of European procedural law. However, this example demonstrates that differences between procedural cultures may diminish when practical solutions are necessary for the benefit of the parties.

29 Universal jurisdiction in civil matters is one of the unresolved issues. Although this kind of jurisdiction has been firmly established in criminal law, it is still controversial in civil procedural law. The main difference between criminal and civil law lies in the fact that criminal proceedings—at least court proceedings—presuppose the presence of the defendant. This is not the case in civil proceedings where the burden of defending a case based on universal jurisdiction in a remote or even hostile forum may constitute a heavy burden for a defendant confronted with alleged severe infringements of fundamental rights—and, possibly, with alleged criminal behaviour. Accordingly, ‘political litigation’ should rather be based on valuable grounds of jurisdiction which require at least a reliable connection between the court and the alleged infringement. Otherwise, universal jurisdiction should only be exercised as a residual jurisdiction when efficient relief at the place of the injury or at the seat of the defendant is not available.

2. Recognition and Enforcement
30 The principle of territoriality determines that the enforcement of a foreign judgment depends on its recognition. Historically, the recognition of foreign judgments was at the core of ICL. Today, it still is of great importance in practice. Recognition of foreign judgments means that the legal effects of the foreign judgment are extended to the State where the recognition takes place. According to modern concepts, recognition is granted in an expedited procedure without a full review of the foreign judgment (révision au fond). Traditionally, recognition presupposes that the foreign court which rendered the judgment had jurisdiction to hear the case under the procedural standards of the State where the judgment shall be enforced. As a rule, the foreign judgment must be final (res iudicata). In addition, a limited review takes place with regard to procedural minimum standards and public policy. Today, many States transform exequatur proceedings into a simple registration of the foreign judgment.

31 In the European Judicial Area, the old concept of granting exequatur has been replaced by the concept of free movement of judgments and mutual recognition. This concept aims at abolishing exequatur proceedings. Once a judgment has been rendered, it shall freely circulate within the European Judicial Area, without any review in the Member State of enforcement. The abolition of exequatur does not entail that the cross-border enforcement of foreign titles ensues without any control of their procedural conformity. Yet, this control is no longer exerted in the form of exequatur proceedings but takes place in the Member State where the judgment is given. The legal technique is different: Regulation (EC) 865/2004 Creating a European Enforcement Order for Uncontested Claims is based on a certificate which functions as a European enforcement clause. Before granting the clause, the issuing authority verifies whether minimum standards for procedural fairness as provided by the regulation are met. Similar provisions are found in Regulation (EC) 1896/2006 on Creating a European Order for Payment Procedure and in the Small Claims Procedure Regulation. Consequently, the new instruments—with the exception of the Maintenance Regulation (EC) 42/2009—contain specific provisions which address the most crucial procedural irregularities and establish minimum standards of procedural fairness. These specific provisions address the content of the complaint, its service on the defendant, the information of the defendant regarding the initiation of proceedings, and accessible remedies. The new instruments also allow the court of minor procedural defects. The recognition of the title operates automatically on the basis of standard forms. The creditor may start enforcement simply by presenting the judgment and the accompanying standard form to the competent enforcement agent.

3. Arbitration
32 The practical importance of international commercial arbitration has increased considerably—especially in Asia—over
the last decade. The number of arbitration institutions is equally increasing. The advantages of arbitration, especially with regard to international disputes, are the control of the parties over the place of arbitration, the unbundling of the proceedings, the expertise of the arbitrators, the choice of the applicable law, and the confidentiality of the dispute. The 1958 New York Convention, with its more than 130 State Parties, guarantees the enforcement of arbitral agreements and awards practically world-wide. The current development is directed towards an increased application of transnational law like the → UNIDROIT Principles of International Commercial Contracts (→ Commercial Contracts, UNIDROIT Principles). These principles are applied as a neutral law which may overcome cultural differences among the parties.

33 A second important area of arbitration relates to investment disputes. In these proceedings, host States are directly involved as parties; the legal basis of the arbitration proceedings is often a bilateral investment protection treaty ("BIT"); → Investments, Bilateral Treaties—more than 2,500 such treaties have been concluded to date—and multilateral treaties. In most of these treaties, States agree to submit their disputes to arbitration, which is often organized by institutions such as the ICSID, the → International Chamber of Commerce (ICC), or the → Permanent Court of Arbitration (PCA). In investment disputes, public international law is regularly directly applied as the subject matter is directly influenced by public interests of the State party. Investment protection treaties contain → most favoured nation clause(s), clauses ensuring equitable treatment, and provision for a full and efficient compensation in the case of expropriation. The recognition and enforcement of the award is regulated by the 1958 New York Convention and by the ICSID-framework (Convention on the Settlement of Investment Disputes between States and Nationals of Other States). Although States waive State immunity with regard to dispute resolution (ie arbitration and the recognition of the award), immunity from enforcement is still a major impediment for private parties.

4. International Insolvency

34 Modern concepts implement the universality of insolvency proceedings, a concept which permits cross-border effects of insolvency. As a result, the opening of insolvency proceedings in the State where the main interests of the creditor are located entails a blocking effect ("stay") which is recognized in all other States where assets of the insolvent debtor are located. Insolvency proceedings are subject to the lex fori concursus according to which the insolvency law of the State where the proceedings are opened applies to all procedural matters of the insolvency, including in cross-border situations. Accordingly, the disruptive effects of insolvency on pending litigation and enforcement proceedings abroad are recognized, equally the power of the administrator to represent the estate abroad. On the other hand, all creditors—including creditors domiciled abroad—are treated equally in the insolvency proceedings. However, cross-border enforcement of insolvency may be limited by secondary proceedings in other States where assets are located. In these proceedings the administrator of the main proceedings has a right to participate and to represent the creditors of the main proceedings. In practice, the co-operation of administrators in parallel or co-ordinated proceedings has become a major issue. At present, a considerable number of the issues of cross-border co-ordination of insolvency proceedings are still unresolved. Recently, the introduction of a specific regime addressing State insolvencies has also been discussed in the context of the financial crisis.

5. Cross-Border Enforcement

35 According to the traditional concept of ICL, enforcement measures are strictly limited by the principle of territoriality. As a matter of principle, international conventions only regulate the recognition of foreign judgments and other enforceable instruments. The enforcement of the title after its recognition remains a purely national matter of the requested State. However, this traditional concept impedes cross-border debt collection. In international settings creditors are confronted with different legal systems, language barriers, additional costs, delay, and, sometimes, with an open reluctance on the part of national authorities to enforce foreign titles. From the perspective of creditors, different enforcement structures may have the effect of borders between States. Also, the principle of territoriality is flawed by the difficulty of localizing non-tangible → debts. This was demonstrated by a decision of the French Cour de Cassation. The court permitted the seizure of bank accounts which were held by the foreign branch of a French bank, although the House of Lords did not permit the seizure of bank accounts located in Switzerland. Furthermore, since cross-border service by post is permitted, Austrian and German enforcement organs send garnishment orders directly to third debtors domiciled in foreign States. These examples demonstrate a growing need for cross-border enforcement.

36 In 2000, the European Commission conducted comparative research which resulted in the publication of a Green Paper on the cross-border attachment of bank accounts (Commission of the European Communities ‘Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union: The Attachment of Bank Accounts’ COM[2000] 618 final [24 October 2000]). According to the proposal, the court of the main proceedings may directly seize bank accounts in other EU Member States. However, the legal effects of the seizure and the further utilization of the enforcement proceedings shall be subject to the insolvency laws where the account is located. The European attachment order will function as a preliminary measure and supplement the provisional measures under Art. 31 Brussels I Regulation. A legislative proposal of the EU Commission in the field of enforcement seems imminent.

6. Private Law Enforcement

37 The so-called decentralized enforcement of public international law by domestic courts has become an important subject of private international law. The same concept is equally applied with regard to the implementation of public interest through civil litigation in the areas of cartel law, securities litigation, products liability, intellectual property litigation, consumer protection, and anti-discrimination. Equally, the case-law of the ECJ with regard to the enforcement of EU law by the courts of the EU Member States is based on similar patterns. According to the basic concept, civil litigants shall implement public interests (like the safety of products) by civil lawsuits. In the US the role and the position of the private litigant has been described as a private public attorney who pursues public interests and acts not only for his own profit, but equally for the public welfare.

38 This concept deviates to some extent from the old paradigm of civil procedure where civil litigation was conceived as a purely private matter among the litigants. The inclusion of public interests in civil litigation entails a transformation of the procedural structures and the underlying principles: the efficient enforcement of public interest by civil courts requires an empowerment of the private litigant with regard to disclosure, access to information, preservation of evidence, and a reduction of litigation risks. In addition, the concept equally further the introduction of collective redress which has become a political issue not only within the EU, but also on the global level: in the US, so-called “private” class actions, mainly composed of foreign plaintiffs and directed against foreign defendants, have become a much-discussed and criticized phenomenon (see also → United States Alien Tort Statute).

39 In cross-border situations, private law enforcement entails fundamental concerns as it normally results in the extraterritorial enforcement
of regulatory concepts with regard to conduct abroad. Against this background, the United States Supreme Court recently held that a presumption against extraterritoriality normally bars the application of regulatory laws with regard to corporate conduct abroad (Morrison v. National Australia Bank Ltd/United States Supreme Court [34 June 2010] 561 US). However, as far as the implementation of binding public international law is concerned, these considerations may be less convincing. Nevertheless, from the perspective of the affected States, there may be still a genuine legitimate interest of controlling unlawful behaviour occurring within their territories. Thus, the failure of the Hague project of a world-wide convention on jurisdiction and enforcement in civil and commercial matters was mainly due to the fact that a consensus on the underlying principles of civil litigation no longer exists.

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