

Second Issue of ICLQ for 2023

Further to my post on first view articles for the second issue of ICLQ 2023, the second issue for ICLQ for 2023 was just published. It contains the following conflict of laws article that was not included in the first view articles:

S Camilleri, "Sense and Separability":

This article explores the doctrine of separability, as understood in particular in the English legal tradition. It does so by reference to the decisions in Sulamérica Cia Nacional de Seguros SA and others v Enesa Engenharia SA and others and ENKA İnşaat ve Sanayi A.Ş. v OOO 'Insurance Company Chubb' & Ors that explore the relevance of the concept when determining the law applicable to the arbitration agreement. These decisions largely treat the doctrine as irrelevant to the determination of the law governing the arbitration agreement. They do so because of the way in which English law views separability as tied inimically to the concept of enforcement of the arbitration agreement. This is unsurprising given the content of section 7 of the Arbitration Act 1996 and the position of the doctrine of separability as a legal fiction that must be restricted to its defined purpose. Viewed against the potential reform of the Arbitration Act 1996, the author asks whether a broader view of separability can be adopted. The author's view is that there are cogent and compelling reasons for adopting a broader view, that would promote certainty and consistency in a way that is not best served by the current approach.