Views and News from the 9th Journal of Private International Law Conference 2023 in Singapore

Four years after the 8th JPIL conference in Munich, the global community of PIL scholars finally got another opportunity to exchange thoughts and ideas, this time at Singapore Management University on the kind invitation of our co-editor Adeline Chong.

The conference was kicked off by a keynote speech by Justice *Philip Jeyaretnam* (Singapore International Commercial Court), providing an in-depth analysis of the Court of Appeal's decision in *Anupam Mittal v Westbridge Ventures II [2023] SGCA 1* (discussed in more detail here).

The keynote was followed by a total of 23 panels and four plenary sessions, a selection of which is summarised below by our editors.

Arbitration (Day 1, Panel 1)

Saloni Khanderia

The panel discussed various aspects of arbitration ranging from arbitration clauses to the recognition and enforcement of arbitral awards.

The session commenced with Dr. *Ardavan Arzendeh* of the National University of Singapore present his paper on 'Jurisdiction and Arbitration Clauses in the Same Contract', evaluating the treatment of jurisdiction and arbitration clauses in the same contract through the law of England and Wales. The speaker stated that there are 2 categories of such cases: 1) the clauses are naturally reconcilable through importance given either to the wording of the clauses or the intention of the parties; and 2) the clauses are not naturally reconcilable as the parties have included an exclusive jurisdiction and a mandatory arbitration clause in the agreement. The courts in these instances have typically given importance to the arbitration clause. The presentation suggested a more defensible course of action in such a situation: Courts should approve both the clauses and give a choice to the parties to pursue the matter either through litigation or arbitration. Hence, giving equal weight to the choices of the parties.

The second speaker, Ms. *Ana Coimba Trigo* of the NOVA School of law presented her paper on 'Deference or Distrust? Recognizing Foreign Commercial Arbitration Awards in the US Against Procedural Fairness Concerns'. The presentation focused on Article V(1)(b) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, that allows parties to oppose the recognition and enforcement of arbitral awards on very selected grounds. Frequently referred to as "procedural fairness". However, the Convention is silent on the interpretation and application of this ground. Additionally, there is no indication of what law is appliable to this ground. This leads to uncertainty as to what standards the US courts apply in interpreting and applying Article V(1)(b) of the Convention. A reading of the existing empirical data allows us to understand whether the US courts cite other foreign courts and if they follow a comparative approach and what are the diverse standards (lex fori or another lenient approach) applied when distrust of foreign arbitrators is raised by the parties.

Following this, Dr. *Priskila Pratita Penasthika* from The Universitas Indonesia presented her paper on 'CAS Arbitration Award: Its Jurisdictional and Enforcement Issues in Indonesia'. The Court of Arbitration for Sport (CAS) does

not always require a specific arbitration agreement between the parties for conferring jurisdiction on it. Instead, the CAS may accept a sports related dispute if the statutes or regulations designate that it has jurisdiction. The presentation analysed whether sports- related arbitration would be covered under the ambit of commercial awards for them to be recognised and enforced in Indonesia under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

The final speakers, Mr. *Gautam Mohanty* from Kozminski University and Dr. Wasiq Abass Dar from O.P. Jindal Global University presented their paper on 'Strategic Leveraging of Party Autonomy in Private International Law: Determining the Limits in International Commercial Arbitration'. The presentation focused on demarcating the outer limits of party autonomy in private international law. It particularly focused on mandatory rules and public policy as they are limitations to party autonomy. It highlighted the impact of new dimensions of mandatory rules and public policy on party autonomy. The presentation analyses the conflict of laws situation when tribunals are faced with a situation of having to disregard the applicable law chosen by the parties on account of overriding mandatory norms. It also analyses the role and application of international and transnational public policy. The presentation analysed the theoretical approaches taken by tribunals in relation to mandatory norms such as contractual, jurisdictional and the hybrid approach.

Foreign Judgments (Day 1, Panel 2)

Tobias Lutzi

The first panel dedicated to foreign judgments began with *Aygun Mammadzada* (Swansea Law School) making the case for the UK and Singapore ratifying the 2019 HCCH Judgments Convention. Compared to the common-law rules on recognition & enforcement (to which many European judgments will also be subject in the UK post-Brexit), she argued the Convention offers an acceptable, more streamlined framework, e.g. because it does not require a judgment creditor to seek a domestic decision based on the judgment debt.

Anna Wysocka-Bar (Jagiellonian University) then looked in more detail at the exclusion of contracts of carriage from the 2019 Convention (Art 2(1)(f), putting it into the context of the specific treatment those contracts also receive in other contexts. According to the speaker, this peculiar treatment appears to be

primarily driven by the existence of other, potentially conflicting conventions such as the CMR Convention. Looking at the specific provisions in those Conventions pertaining to foreign judgments, though, Anna convincingly demonstrated that the potential for conflict is actually very small, making it difficult to justify the exclusion.

Jim Yang Teo (Singapore Management University) finally discussed the problem of res judicata within the framework of the *Belt & Road Initiative*, contrasting the approach advocated by China (based on a triple-identity test and limited to claim preclusion, at the exclusion of issue exclusion) with the transnational approach of the Singaporean courts emerging from *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14. According to the speaker, this latter approach, which notably includes consideration of comity, may be particularly relevant interesting in the context of an inherently transnational project like the *Belt & Road Initiative*.

Plenary Session 2

Michael Douglas

The second plenary session, chaired by *Ardavan Arzandeh* (NUS), explored some interesting issues of direct and indirect jurisdiction. *Stephen GA Pitel* (Western University) kicked things off with a presentation that was right up my ally: 'The Extraterritorial Impact of Statutory Jurisdiction Provisions'. He considered the example of a jurisdictional provision of a privacy statute of British Columbia in matters with a foreign element. The specific example provoked consideration of a broader question: how should a forum deal with an applicable foreign statute which includes a provision that actions under the statute must be heard in a certain court of that foreign statute's local jurisdiction? See *Douez v Facebook, Inc* [2017] 1 SCR 751. The Canadian approach seems sensible; I wonder if it can neatly transpose to my native Australia, which includes an explicit US-style full faith and credit provision in the Constitution. (Over coffee, my compatriots wondered whether our messy Cross-vesting Scheme would have a role to play.)

The other three presentations of the plenary were also compelling. *Junhyok Jang* (Sungkyunkwan University) spoke on 'Jurisdiction over the Infringement of Personality Rights via the Internet from a Korean Perspective – Effects Test as an Alternative to the Quantitative Dépeçage of *Shevill*'. The Korean perspective was comparative; the presentation compared the South Korean approach to those of

the EU and the US. While the presentation offered a view on how approaches to the topic were converging between jurisdictions, diversity remains. Eg in Australia, the mere occurrence of some of the damage in the jurisdiction—which in the case of defamation, could involve hurt feelings in the forum when present there—could justify exercise of long-arm jurisdiction, no matter how many elements the matter otherwise features. The speech was another reminder of the ongoing challenges that digital subject matter pose for the traditional territorialism of private international law.

Yeo Tiong Min (SMU), a home-town hero whose monograph on choice of law for equity is must-read material for common (private international) lawyers, looked at the *res judicata* effects of foreign judgments for issue estoppel in a presentation on 'Challenging Foreign Judgments for Errors of Law and the Common Law'. (I will have to go away and read *Merck Sharp & Dohme Corp v Merck KGaA* (2021) 1 SLR 1102 properly.) *Louise Ellen Teitz* (Roger Williams University) rounded out the plenary with her speech on 'Judgment Recognition and Parallel Litigation: The Carrot and Stick'. The presentation informed me of how the issue has been playing out in the USA, comparing the situation there to the work done in international fora like the HCCH. All the talk of *lis pendens* got me *lis peckish* for some lunch. Fortunately, it was lunchtime after this plenary.

Choice of Law (Day 3, Panel 3)

Zheng Sophia Tang

The panel focuses on choice of law, chaired by Prof *Sophia Tang*. Assoc Prof Dr *Philippine Blajan* at Sorbonne School of Law, University Paris 1 presented 'The Combination of Party Autonomies in the Private International Law of Contracts: Security, Virtuosity, Tyranny?' She proposed that, in civil and commercial practices, parties of a contract should attach importance to the interactions between choice of jurisdiction and choice of law. Firstly, the effect of choice of law is uncertain until the lex fori is identified. Secondly, even if there is a choice of court clause, one party could still bring a suit in another court in breach of the jurisdiction clause, and evade the mandatory provisions of the forum state. Through combining their choices, the parties enhance their freedom of contract because they escape a mandatory provision. Thirdly, Prof Blajan listed various types of combination between choice of law and choice of court clauses, including choice of state law and choice of state court, choice of state law and choice of non-state court, choice of non-state law and choice of non-state court and so on.

The second speaker is Prof *Saloni Khanderia* at OP Jindal University, who presented 'The Law Applicable to Documentary Letters of Credit in India: A Riddle Wrapped in an Enigma?' Prof Khanderia points out that letters of credit has received negligible attention from Indian lawmakers, regardless of their significance in fostering international trade in India. As there is no specific legislation for letter of credit in India, the UCP might be the only choice for the parties and the court. But there are several exceptions to the application of the UCP, including the agreements that are expressly excluded from the application of the UCP, claims containing allegations of fraud and so on. In such a case, the Indian court would apply lex fori. On the other hand, in lack of any supreme principles of the interpretation of application of law, courts are given great discretion to the application of the UCP and other laws. Prof Khanderia proposed limiting the application of the lex fori to adjudicate claims on fraud, and replacing the lex fori with the lex loci solutions to identify the country with which the contract has the closest and most real connection.

The third speaker Asst Prof *Migliorini* at the Uni of Macau presented 'Contracts for the Transfer of Personal Data in Private International Law — A European Perspective'. In data transactions where the seller established in the EU and the buyer a non-EU jurisdiction, the GDPR would be applied extraterritorially. The GDPR would be applied as overriding mandatory rules under the context of cross-border transaction, which would lead to the conflict with the proper law of the transaction contract. However, could data be treated as 'property' and subject to a commercial contract? Would status of a fundamental right hamper the commercial transfer of personal data? Prof Migliorini suggests that contracts for transfer of personal data should be qualified as transfer of license to use the personal data, so that the complicated issues of personal data trading and human rights shall not arise and mandatory provisions of the law governing the initial license (i.e. the GDPR) should apply.

—

Overall, the conference highlighted the range and wealth of current research on PIL. It is no surprise that participants are already looking forward to the next JPIL conference, which will take place at University College London in September 2025.