Developments in Third-Party Litigation Funding in Europe and Beyond

Written by Adrian Cordina, PhD researcher at Erasmus School of Law, project member of the Vici project 'Affordable Access to Justice' which deals with costs and funding of civil litigation, financed by the Dutch Research Council (NWO)

This blog post reports on a conference on Third Party Litigation funding (TPLF) as well as some other activities in the area of costs and funding, including a new project by the European Law Institute on TPLF.

(1) Conference 'The Future Regulation of Third-Party Funding in Europe'

22 June 2022, Erasmus University Rotterdam

The right of access to civil justice continues to be constrained by the cost, complexity and delays of litigation and the decline in legal aid. Private litigation funding methods litigation like third-party litigation funding (TPLF) and alternative dispute resolution (ADR) methods have been developing, which address these challenges to a certain extent. The debate on whether and to what extent TPLF should be regulated in Europe has also been gathering pace. On the one hand, proponents argue that it facilitates access to civil justice whilst, on the other hand, critics say that there may be risks of abuse. These issues were critically discussed during the conference 'The Future Regulation of Third-Party Funding in Europe' held on the 22nd of June 2022. It concluded the online seminar series on 'Trends and Challenges in Costs and Funding of Civil Justice' organised by Erasmus School of Law in the context of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO). Team members of the project are project leader Xandra Kramer, and Eva Storskrubb, Masood Ahmed, Carlota Ucin, Adriani Dori, Eduardo Silva de Freitas, Adrian Cordina, assisted by Edine Appeldoorn.

The series commenced in December 2021 with a general session that addressed several topics related to access to justice and costs and funding, including collective redress and litigation costs reforms, and a law-and-economics

perspective. The second seminar in January 2022 was dedicated to legal mobilisation in the EU. The third one in February addressed the impact of public interest litigation on access to justice, and the fourth one in March, litigation funding in Europe from a market perspective. The April seminar focused in on austerity policies and litigation costs reforms, and the May session was dedicated to funding and costs of alternative dispute resolution (ADR).

The aim of this seventh and final conference of the seminar series was to reflect on the need and type of regulation of TPLF from different points of view. By seeking to engage representatives from both academia and stakeholders, the conference aimed to foster a lively exchange and contribute to the debate. The event was introduced by a keynote speech by Professor Geert Van Calster (KU Leuven, Belgium) who examined the key issues in TPLF.

The first panel was chaired by Xandra Kramer and addressed the current status quo of the regulation of TPLF and the possibilities of further regulation. Paulien van der Grinten outlined the situation of TPLF in the Netherlands from the point of view Senior Legislative Lawyer at the Ministry of Justice and Security. The presentation of Johan Skog (Kapatens, Sweden) highlighted the lack of factual basis in the European Parliament Research Service Study for the concern of TPLF giving rise to excessive and frivolous litigation. David Greene (Edwin Coe, England) centred his presentation around a critical outlook on litigation costs and funding and the merits and demerits of TPLF in England and Wales. Following the presentations of the first panel, a discussion among the participants and attendees ensued, including discussant Quirijn Bongaerts (Birkway, The Netherlands). Amongst others, the question of disclosure of funding was debated.

The second panel was chaired by Eva Storskrubb (Uppsala University and Erasmus University Rotterdam) and focused on the modes and levels of regulation of TPLF. With respect to the Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation, also examined in an earlier entry in this blog, Kai Zenner (European Parliament, Head of Office (MEP Axel Voss)) focused on the process which led up to the Draft Report and the risks of TPLF. Victoria Sahani (Professor, Arizona State University) approached the issue of TPLF from the perspective of arbitration, both commercial and investor-State arbitration. Finally, wrapping up the second panel and providing reflections connected to the preceding panelists, Albert Henke (Professor, Università degli Studi di Milano) addressed the issue of regulation and the multiple variables it

faces.

The conference was held in hybrid format. In spite of some coordination challenges that this posed, both the live audience and online attendants found the opportunity to comment on the presentations and interact with the speakers, also with the use of the chat function. The discussions and interventions showed how opportune the timing of the conference was, as it was held at a period when the Draft Report is being deliberated and scrutinised, and when the debate on regulating TPLF is taking centre stage at a European and international level.

A more extensive conference report is scheduled for publication in the Dutch-Flemish journal for mediation and conflict management (Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement (TMD).

(2) Further activities and publications on costs and funding

Recently, a special issue of Erasmus Law Review, edited by Vici members Masood Ahmed and Xandra Kramer on Global Developments and Challenges in Costs and Funding of Civil Justice (available open access). This Special Issue contains ten articles and is introduced by an editorial article by Ahmed and Kramer. It includes articles on different aspects of costs in six jurisdictions. John Sorabji focuses on legal aid insurance and effective litigation funding in England and Wales; David Capper on litigation funding in Ireland; Michael Legg on litigation funding in Australian class actions; Nicolas Kyriakides, Iphigeneia Fisentzou and Nayia Christodoulou on affordability and accessibility of the civil justice system in Cyprus; Jay Tidmarsh on shifting costs in American discovery; and Dorcas Quek Anderson on costs and enlarging the role of ADR in civil justice in Singapore. Three papers focus on general topics. Ariani Dori inquires in her paper whether the fact-finding process that supports the preparation of the EU Justice Scoreboard, as well as the data this document displays, conveys reliable and comparable information. Adrian Cordina critically examines, including from a law-and-economics perspective, the main sources of concern leading to the scepticism shown towards TPF in Europe, and how the regulatory frameworks of England and Wales, the Netherlands, and Germany in Europe, and at the European Union level, the Representative Actions Directive addresses these concerns. In view of the UKSC's finding of non-infringement of Article 6 ECHR in Coventry v. Lawrence [2015] 50, Eduardo Silva de Freitas argues that a more holistic view of the procedural guarantees provided for by Article 6 ECHR is called for to properly

assess its infringement, considering mainly the principle of equality of arms.

Some of the papers will be presented during an online seminar that will take place at the end of 2022.

(3) ELI project on Third Party Litigation Funding

The importance of Third Party Litigation Funding is also highlighted by the adoption of a new project by the European Law Institute (ELI) on TPLF. The commencement of the two-year-long project was approved by the ELI Council in July 2022. It will be conducted under the supervision of three reporters (Professor Susanne Augenhofer, Ms Justice Dame Sara Cockerill, and Professor Henrik Rothe) assisted by researchers Adriani Dori and Joseph Rich, and with the support of an International Advisory Committee. The project's main output will be the development of a set of principles (potentially supplemented by checklists) to identify issues to be considered when entering into a TPLF agreement. Adriani will participate as a project member (together with Mr Joseph Rich). The final outcome is expected in September 2024.

Enforceability of CAS awards in Greece – a short survey

Introductory remarks

Applications to recognize and enforce CAS awards are not part of Greek court's daily order business. About ten years ago, the first decision of a Greek court was published, which accepted an application to declare a decision of the Court of Arbitration for Sports (CAS) enforceable. For this ruling, see here (in English), and here (in Spanish). Two recent decisions are added to this short list of judgments, where the corresponding decisions of the above sports arbitration body were again declared enforceable

(Piraeus Court of first instance, decision published on 28. July 2021, and

Thessaloniki Court of first instance, decision published on 26. April 2022, both unreported).

A summary of the new decisions

The first decision concerned a company of sport? management located in France, who initiated CAS proceedings against a football team in Greece due to non-payment of agreed fees for the transfer of a football player. The CAS granted the application and ordered the payment of 45.000 Euros and 16.391 CHF for the costs of the arbitral proceedings (case number 2018/O/5850).

The second decision concerned two accredited sports managers from Argentina against an Argentinian football player who terminated unilaterally the agreement, hence, he failed to abide by the conditions of the contract signed with the managers. They initiated arbitration proceedings before the CAS, which ordered the payment of 1 million Euros and 49.585,80 CHF for the costs of the arbitral proceedings (case number 2014/O/3726). The player appealed unsuccessfully before the Swiss Supreme Court (no reference available in the text of the decision).

Main findings

From the assessment of the aforementioned decisions, it is possible to draw the following conclusions:

- **NYC: The ruler of the game**. The application of the New York Convention regarding requests to recognize CAS awards is undisputable and common to all Greek decisions.

- **National rules of Civil procedure.** From the combination of Articles 3 and 4 NYC, and those of the Greek Code of Civil Procedure (Book on voluntary jurisdiction), it is clearly concluded that the true meaning of

Articles 3 and 4 of the above convention is that, the one who requests the declaration of enforceability of a foreign arbitral award, is required to present the relevant decision and the arbitration agreement, either in original or in an official copy, as well as an official translation into the Greek language, *during the hearing* of his application, and without being obliged to file these documents at the court, when submitting the relevant application.

This because, to the eyes of Greek judges, Article 4 NYC, referring to a presentation "at the time of the application", does not determine the procedural 'moment' (stage) when the documents of the arbitration agreement and the arbitral decision must be submitted to the court. It simply determines the burden of proof and the party borne with it. The procedural method and the time of presentation of the documents referred to in Article 4 § 1 NYC are still regulated by the procedural law of the trial judge, in the case at hand the Greek Code of Civil Procedure.

- **Field of application of CAS.** On the grounds of the decisions rendered by Greek courts, it has been confirmed that the CAS has jurisdiction over the following disputes:
- Application for arbitration by an athlete against the team in which he plays;
- Application for arbitration by the sports manager of athletes and/or coaches against the sports club.
- Application for arbitration by the sports manager against the athlete.

- **Enforceability in the country of origin not a pre-requisite.** Contrary to finality, it is not necessary to meet the condition of enforceability of the arbitral award in the state of origin, i.e., Switzerland.

- **Enforceability of CAS Costs.** The 'order' awarding arbitration costs, following the CAS award, must also be declared enforceable, according to Rule R.64.4 CAS Procedural Rules. The matter is noteworthy, as the above 'order' is issued after the award by the CAS Secretariat, not by the arbitration Panel that ruled on the dispute, and without the participation

of the parties. However, it should be underlined that the letter from the CAS Secretariat merely specifies the amount of the arbitration costs awarded by the Panel; hence, it is considered as belonging to the award's operative part. In addition, the act of awarding costs is notified to the parties in accordance with CAS rules.

- **Irreconcilable judgments.** It is not necessary to furnish a certificate of non-irreconcilability with a decision, by following the domestic model of article 903 § 5 and 323 nr. 4 Greek Code of Civil Procedure. According to the judgment of the Greek court, it is not permissible to transfuse a condition regulated by domestic arbitration law into the context of the New York Convention.

- **No revision on the merits.** Finally, although not directly stated in the text of the NYC, a revision of the foreign arbitral award by the Greek court is prohibited, the latter being unanimously accepted and labelled as the principle of non-examination on the merits.

Case C-572/21: The Court of Justice of the EU on the interrelationship between the Brussels II bis Regulation and the 1996 Child Protection Convention

– The perpetuatio fori principle

Written by Mayela Celis, UNED

On 14 July 2022 the Court of Justice of the European Union (CJEU) ruled on the interrelationship between the *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* (Brussels II bis Regulation) and the HCCH 1996 Child Protection Convention. This case concerns proceedings in Sweden and the Russian Federation and deals in particular with the applicability of the *perpetuatio fori* principle contemplated in Article 8(1) of the Brussels II bis Regulation. The judgment is available here.

Facts

Mother (CC) gave birth to child (M) in Sweden. CC was granted sole custody of the child from birth.

Until October 2019 child resided in Sweden.

From October 2019 child began to attend a boarding school on the territory of the Russian Federation.

Father (VO) brought an application before the District Court of Sweden and several proceedings ensued in Sweden, holding *inter alia* that Swedish courts have jurisdiction under Article 8(1) of the Brussels II bis Regulation. CC brought an application before the Supreme Court of Sweden asking the court to grant leave to appeal and to refer a question to the CJEU for a preliminary ruling.

Question referred for preliminary ruling

'Does the court of a Member State retain jurisdiction under Article 8(1) of [Regulation No 2201/2003] if the child concerned by the case changes his or her habitual residence during the proceedings from a Member State to a third country which is a party to the 1996 Hague Convention (see Article 61 of the regulation)?'

Main ruling

Article 8(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, read in conjunction with Article 61(a) of that regulation, must be interpreted as meaning that ***a court of a Member State that is hearing a dispute relating to parental responsibility does not retain jurisdiction to rule on that dispute under Article 8(1) of that regulation where the habitual residence of the child in question has been lawfully transferred, during the proceedings, to the territory of a third State that is a party to the Convention*** on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996 (our emphasis).

Analysis

This is a very welcome judgment as it allows for the proper application of the 1996 Child Protection Convention to a case involving an EU Member State (Sweden) and a Contracting Party to the 1996 Child Protection Convention (the Russian Federation).

At the outset, it should be emphasised that this case deals with the *lawful* transfer of habitual residence and not with the *unlawful* transfer (removal or retention) such as in the case of international child abduction. In the latter case both the Brussels II bis Regulation and the 1996 Child Protection Convention provide for the retention of the jurisdiction in the EU Member State / Contracting State in which the child was habitually resident immediately before the removal or retention.

It is also important to clarify that contrary to the Brussels II bis Regulation, the 1996 Child Protection Convention does not adopt the principle of *perpetuatio fori* when dealing with general basis of jurisdiction (Article 5 of the Convention; see also para. 40 of the judgment). The 1996 Child Protection Convention reflects the view that the concept of habitual residence is predominantly factual and as such, it can change even during the proceedings.

As to the principle of *perpetuatio fori*, the CJEU indicates:

> *"By referring to the time* ***when the court of the Member State is seised****,*

> *Article 8(1) of Regulation No 2201/2003 is an expression of the principle of perpetuatio fori, according to which that court does not lose jurisdiction even if there is a change in the place of habitual residence of the child concerned during the proceedings" (para. 28, our emphasis).*

With regard to the interrelationship between these two instruments, the CJEU says:

> *"In that regard, it should be noted that Article 61(a) of Regulation No 2201/2003 provides that, as concerns the relation with the 1996 Hague Convention, Regulation No 2201/2003 is to apply 'where the child concerned has his or her habitual residence on the territory of a Member State'" (para. 32).*
>
> *"It follows from the wording of that provision that it governs relations between the Member States, which have all ratified or acceded to the 1996 Hague Convention, and third States which are also parties to that convention, in the sense that the general rule of jurisdiction laid down in Article 8(1) of Regulation No 2201/2003* ***ceases to apply where the habitual residence of a child has been transferred, during the proceedings, from the territory of a Member State to that of a third State which is a party to that convention****" (para. 33, our emphasis).*

In my view, this judgment interprets correctly Article 52 of the 1996 Child Protection Convention, which was heatedly debated during the negotiations, as well as the relevant provisions of the Brussels II bis Regulation. In particular, the formulation in both Article 61(a) of the Brussels II bis Regulation "where the child concerned has his or her habitual residence on the territory of a Member State" and Article 52(2) of the 1996 Child Protection Convention "[This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain] in respect of children habitually resident in any of the States Parties to such agreements [provisions on matters governed by this Convention]" has been properly considered by the CJEU as the habitual residence of the child is the Russian Federation.

To rule otherwise would have reduced significantly the applicability of the 1996 Child Protection Convention and would have run counter Articles 5(2) and 52(3)

of the referred Convention (see para. 42 of the judgment).

As this judgment only deals with Contracting Parties to the 1996 Child Protection Convention, it only makes us wonder what would happen in the case of bilateral treaties or in the absence of any applicable treaty (but see para. 29 of the judgment).

For background information regarding the negotiations of Article 52 of the 1996 Child Protection Convention see:

– Explanatory Report of Paul Lagarde (pp. 601-603)

– Article by Hans van Loon, "*Allegro sostenuto con Brio*, or: Alegría Borrás' Twenty-five Years of Dedicated Work at the Hague Conference." In J. Forner Delaygua, C. González Beilfuss & R. Viñas Farré (Eds.), Entre Bruselas y La Haya: Estudios sobre la unificación internacional y regional del derecho internacional privado: *Liber amicorum* Alegría Borrás (pp. 575-586). Madrid: Marcial Pons, pp. 582-583.

Just released: EFFORTS Report on Practices in Comparative and Cross-Border Perspective

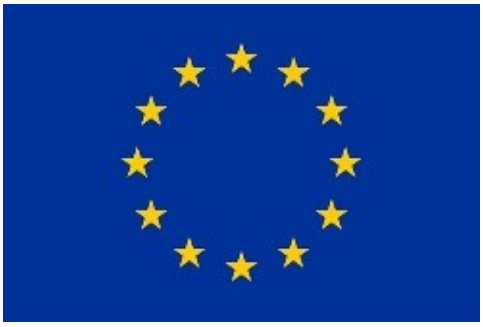
On 19 July 2022, a new Report on practices in Comparative and Cross-Border Perspective was posted on the website of **EFFORTS (Towards more EFfective enFORcemenT of claimS in civil and commercial matters within the EU)**, an EU-funded Project conducted by the University of Milan (coord.), the Max Planck Institute Luxembourg for Procedural Law, the University of Heidelberg, the Free University of Brussels, the University of Zagreb, and the University of

Vilnius.

The Report was authored by Marco Buzzoni and Carlos Santaló Goris (both Max Planck Institute Luxembourg for Procedural Law).

By building upon the deliverables previously published by the Project Partners (available here), the Report casts light on the implementation of five EU Regulations on cross-border enforcement of titles (namely: the Brussels I-bis, EEO, EPO, ESCP, and EAPO Regulations) in the seven EU Member States covered by the Project (Belgium, Croatia, France, Germany, Italy, Lithuania, and Luxembourg). Against this background, the Report notably provides an in-depth analysis of national legislation and case law in an effort to identify general trends and outstanding issues regarding the cross-border recovery of claims within the European Union.

Regular updates on the EFFORTS Project are available via the Project's website, as well as LinkedIn and Facebook pages.



Project JUST-JCOO-AG-2019-881802
With financial support from the Civil Justice Programme of the European Union

Is Chinese Judicial Mediation Settlement 'Judgment' in Private International Law?

Judicial mediation is a unique dispute resolution mechanism in Chinese civil procedure. Wherever civil disputes are brought to the court, the judge should, based on parties' consent, mediate before adjudicating. Judicial mediation, therefore, is an 'official' mediation process led by the judge and if successful, the judge will make a document to record the plea, the fact and the settlement agreement. This document is called 'judicial mediation settlement' in this note.

On 7 June 2022, the Supreme Court of New South Wales recognized and enforced two Chinese judicial mediation settlement issued by the People's Court of Qingdao, Shandong Province China in Bank of China Limited v Chen. It raises an interesting question: is Chinese judicial mediation settlement recognisable as a foreign 'judgment' and enforceable in the other country? Two commentors provide different views on this matter.

Judicial Mediation Settlement can be classified as 'Judgment'
Zilin Hao, Anjie Law Firm, Beijing, China

In Chinese civil trial practice, there are two types of legal document to merits issued by courts that has the res judicata effect, namely Minshi Panjue Shu ("MPS") (civil judgment) and Minshi Tiaojie Shu ("MTS"). The MTS refers to the mediation settlement reached by the parties when a judge acts as a mediator and as part of the judicial process. It has been translated in various ways: civil mediation judgment, civil mediation statement, civil mediation, mediation certificate, mediation agreement, written mediation agreement, written mediation statement, conciliation statement and consent judgment, civil mediation statement, mediation agreement and paper of civil mediation. In order to distinguish it from private mediation settlement, the mediation settlement reached during the court mediation process is translated into the 'judicial mediation settlement'.

No matter how the translation of MTS is manifested, the intrinsic nature of a judicial mediation settlement should be compared with the civil judgment, and

analysed independently in the context of recognition and enforcement of judgments ("REJ"). Take the HCCH 2019 Judgments Convention as an example in an international dimension, Article 4 Paragraph 3 of the Convention provides that "A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin." In terms of REJ, a foreign judgment shall be effective and enforceable. While the validity of a foreign judgment specifically means when the judgment is made by a court has competent jurisdiction, the parties' rights in proceedings are not neglected or violated, and the judgment is conclusive and final; the enforceability is more associated with types of judgments, such as fixed sum required in monetary judgments.

1. What is a judicial mediation settlement

Firstly, judicial mediation settlement is granted effectiveness by Chinese court in accordance with Article 100 of Civil Procedure Law of China (revised in 2021), which stipulates that "When a mediation agreement is reached, the people's court shall prepare a written mediation statement, stating the claims, the facts of the case and the result of the mediation. The written mediation statement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court and shall be served on both parties. A written mediation statement shall come into force immediately upon signatures after receiving by both parties." In the civil trial proceedings of China, judges are encouraged to carry out mediation on a voluntary and lawful basis, failing which, a judgment shall be rendered forthwith. Article 125 also affirms that for a civil dispute brought by the parties to the people's court, if it is suitable for mediation, mediation shall be conducted first, unless the parties refuse mediation. According to Article 96 of Civil Procedure Law of China, in trying civil cases, a people's court shall conduct mediation to the merits of case under the principle of voluntary participation of the parties and based on clear facts. Article 97 Paragraph 1 states that mediation conducted by a people's court may be presided over by a single judge or by a collegiate bench. Thus, with the consent of parties, judges are entitled to make a judicial mediation settlement. Once a written mediation statement based on the mediation agreement reached by parties is made by the judges and served to litigant parties, the judicial mediation settlement shall come into effect.

Secondly, the effective judicial mediation settlement has the enforceability. As paragraph 3 of Article 52 of Civil Procedure Law represented, the parties must

exercise their litigation rights in accordance with the law, abide by the litigation order, and perform legally effective judgments, rulings and mediation decisions. Therefore, assumed China is the state of origin to make a judicial mediation settlement, which has effect, and it is enforceable in the state of origin.

2. Similarity between judicial mediation settlement and judgment

Although the mediation and judgment exist under different articles of the Chinese Civil Procedure Law (an MTS under art 97, an MPS under art 155), the judicial mediation settlement has more common points than difference compared with a civil judgment. First of all, in terms of adjudicative power, the judicial mediation settlement is not only a verification of the parties' agreement as the judges are involved in the whole of mediatory process and they exercise the power of adjudication. The consent of parties to mediation is a premise, but the judicial mediation settlement is not only to do with the parties' consent. For example, according to Article 201 of the Civil Procedure Law of China, where a mediation agreement is reached through mediation by a legally established mediation organization and an application for judicial confirmation is to be filed, both parties shall jointly submit the application to the prescribed court within 30 days from the date when the mediation agreement takes effect. After the people's court accepts the application and review it, if the application complies with the legal provisions, the mediation agreement will be ruled as valid, and if one party refuses to perform or fails to perform in full, the other party may apply to the people's court for enforcement; if the application does not comply with the legal provisions, the court will make a ruling to reject the application. Moreover, the written mediation statement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court, which also means the judges or courts are responsible for the mediation decision they have made.

Secondly, the judicial mediation settlement has the almost same enforceability with the civil judgment. On the one hand, the judicial mediation settlement and other legal documents that should be enforced by the people's court must be fulfilled by the parties. If one party refuses to perform, the other party may apply to the people's court for enforcement. On the other hand, a legally effective civil judgment or ruling must be performed by the parties. If one party refuses to perform, the other party may apply to the people's court for enforcement, or the judge may transfer the execution to the executioner.

Thirdly, the judicial mediation settlement has the legal effect of finality similar with a final civil judgment. According to article 102, if no agreement is reached through mediation or if one party repudiates the agreement prior to service of the mediation settlement, the people's court shall promptly make a judgment. Therefore, once a written mediation statement (MTS) served and signed by both parties, it has the same binding force as a legally effective judgment.

It is worth noting that mediation can take place in several different stages: if mediation is possible before the court session, the dispute shall be resolved in a timely manner by means of mediation; after the oral argument is over, a judgment shall be made in accordance with the law. If mediation is possible before the judgment, mediation may still be conducted; if mediation fails, a judgment shall be made in a timely manner. The people's court of second instance may conduct mediation in hearing appeal cases. When an agreement is reached through mediation, a mediation statement shall be prepared, signed by the judges and the clerk, and affixed with the seal of the people's court. After the judicial mediation settlement is served, the judgment of the first instance and original people's court shall be deemed to be revoked. Therefore, the mediation is a vital part of adjudication power of people's court has in China.

Additionally, under the common law, a "judgment" is an order of court which gives rise to res judicata. According to Article 127 (5) of Civil Procedure Law of China (2021): "if a party to a case in which the judgment, ruling or civil mediation has become legally effective files a new action for the same case, the plaintiff shall be notified that the case will be handled as a petition for a review…" , which represents that a legally effective civil mediation by the court establishes res judicata and embodies a judgment.

3. Conclusion

To conclude, Chinese civil mediation could be recognized and enforced by foreign countries as a judgment. For now, China and Australia have neither signed a bilateral judicial assistance treaty, nor have they jointly concluded any convention on the recognition and enforcement of foreign court judgments, but de facto reciprocity should have been established between China and Australia (or at least the states of Victoria and NSW). Although there was the precedent of Bao v Qu; Tian (No 2) [2020] NSWSC 588 judgment recognized and enforced by the Supreme Court of New South Wales, the civil mediation judgment marks the first

time that foreign courts of common law jurisdictions may recognize and enforce Chinese mediation judgments, which means important reference for other common law jurisdictions. Also, it has broadened the path for many domestic creditors who have obtained judicial claims through civil mediation, especially financial institutions, to recover and enforce the assets transferred by the debtor and hidden overseas.

Chinese Judicial Mediation Settlement should not be treated as 'judgment'

Jingru Wang, Wuhan University Institute of International Law

1. Applicable Law

Whether a foreign document that seeks recognition and enforcement is a 'judgment' is a question of law. Therefore, the first question one needs to consider is which law applies to decide the nature of the foreign document. In Bank of China Limited v Chen, Harrison AsJ held that this matter should be determined under the law of Australia, which is the country where recognition is sought.

Interestingly, the Singapore High Court gave a different answer to the same question. In Shi Wen Yue v Shi Minjiu and another, the Assistant Registrar held that it was indeed the law of the foreign country where an official act occurs that determines whether that official act constitutes a final and conclusive judgment. Therefore, he applied Chinese law to determine the nature of the judicial mediation settlement.

It is argued applying the law of the state of origin is more appropriate. When the parties seek recognition of a foreign judgment, they anticipate that the foreign judgment is viewed as having the effect it has in its state of origin. But by applying the law of the state of recognition, a document may have greater or less effect in the state of recognition than in the state of origin. In Bank of China Limited v Chen, the plaintiff advocated for applying the Australian Law, stating that applying the law of the state of origin may lead to absurd mistakes. For example, if a ticket were regarded as a judgment by a foreign state, the Australian would have to treat it as a judgment and enforce it. The argument can hardly be the case in reality. Firstly, it is suspicious that a civilized country in modern society may randomly entitle any document as "judgment". Secondly,

even if the state of origin and the state of recognition have different understandings of the notion of judgment, a state usually will not deny the effect of a foreign state's act in order to preserve international comity, unless such classification fundamentally infringes the public order of the state of recognition in some extreme occasions. Therefore, out of respect for the state of origin, the nature of the judicial mediation settlement shall be determined by Chinese law as a question of fact.

2. The Nature of Judicial mediation settlement

In Bank of China Limited v Chen, Harrison AsJ made an analogy to a consent judgment in common law jurisdiction when determining the nature of judicial mediation settlement. It was held that both were created by the parties' consent but nevertheless are judgments being mandatorily enforceable and having coercive authority. On the contrary, the Assistant Registrar in Shi Wen Yue v Shi Minjiu and another specifically pointed out that "a common law court must be conscious of the unexamined assumptions and biases of the common law". The common law and civil law view the notion of judicial power differently. The common law embodies an adversarial system of justice. Thus, the common law courts do not take issue with settlement agreements being given the imprimatur of consent judgments. However, in civil law countries, judges play an active inquisitorial role. They are "responsible for eliciting relevant evidence" while party-led discovery is anathema and seen as a usurpation of judicial power. Therefore, it is the proper and exclusive province of judges to judge and issue judgments. It would almost be a contradiction in terms for a party-negotiated settlement to be given the moniker of a consent judgment. For these reasons, judicial mediation settlements are not labelled as judgments.

Chinese law explicitly differentiates the judicial mediation settlement from judgment. Primarily, court judgments and judicial mediation settlements fall under different chapters in the Chinese Civil Procedure Law, while the former belongs to Part II "Adjudication Process". It is further evidenced by the principle that the parties reaching an agreement during judicial mediation cannot request the court to make a judgment based on such an agreement.

A judgment reflects the court's determination on the merits issue after adjudication. The judicial mediation settlement is a document issued by the court which records the settlement agreement reached between the parties during the

judicial mediation. The differences between them are as follows. Firstly, the judicial mediation settlement shall be signed by the judicial officers and the court clerk, be affixed with the seal of the people's court and shall be served on both parties. It comes into force once the parties sign after receiving. The parties are entitled to repudiate the agreement prior to service of the mediation agreement. Namely, the court's confirmation per se is insufficient to validate a judicial mediation settlement. The effectiveness of judicial mediation settlement depends on the parties' consent. Conversely, a judgment does not require the parties' approval to become effective.

Secondly, a judicial mediation settlement could be set aside if it violates the law or party autonomy, which are typical grounds for invalidating a contract. The grounds for nullifying a judgment include erroneous factual findings or application of law and procedural irregularities, which put more weight on the manner of judges.

Thirdly,the content of the judicial mediation settlement shall not be disclosed unless the court deems it necessary for protecting the national, social or third parties' interests. However, as required by the principle of "Public Trial" and protection for people's right to know, a judgment shall be pronounced publicly. Disclosing the judgment is important for the public to supervise the judicial process. Compared to court judgments, since a judicial mediation settlement is reached internally between the parties for disposing of their private rights and obligations, naturally, it is not subject to disclosure.

Fourthly, while the judicial mediation settlement is a document parallel to judgment in the sense of putting an end to the judicial proceedings, the effect of the judicial mediation settlement is more limited. An effective judicial mediation settlement settles the parties' rights and obligations on the merits and refrains them from filing another lawsuit based on the same facts and reasons. A judicial mediation settlement is enforceable against the debtor immediately without requiring further order or judgment from the Chinese court. However, unlike judgments, judicial mediation settlements lack the positive effect of res judicata. In other words, matters confirmed by judicial mediation settlements cannot be the basis of the lawsuits dealing with different claims afterwards.

It is fair to say that the judicial mediation settlement combines party autonomy and the court's confirmation. But it would be far-reaching to equate the court's

confirmation with exercising judicial power. Judges act as mediators to assist the parties in resolving the dispute instead of making decisions for them. The judicial mediation settlement is intrinsically an agreement but not barely a private agreement since it has undertaken the court's supervision.

3. Conclusion

It is understandable that the plaintiff sought to define judicial mediation settlements as judgments. The judgment enforcement channel is indeed more efficient than seeking enforcement of a private agreement. However, considering the nature of the judicial mediation settlement, it is doubtful to define it as court judgment. In the author's opinion, since the original court has confirmed the justification of the judicial mediation settlement, it shall be recognized by foreign states. At the same time, a different approach to recognition is worth exploring.

Adoption of the 'Lisbon Guidelines on Privacy' at the 80th Biennial Conference of the International Law Association

On 23 June 2022, the *Lisbon Guidelines on Privacy*, drawn up by the *ILA Committee on the Protection of Privacy in Private International and Procedural Law*, were formally endorsed by the International Law Association at the 80th ILA Biennial Conference, hosted in Lisbon (Portugal).

The Committee was established in 2013 further to the proposal of Prof. Dr. Dres. h.c. Burkhard Hess (Director at the Max Planck Institute Luxembourg) to create a forum on the protection of privacy in the context of private international and procedural law. Prof. Dr. Dres. h.c. Burkhard Hess chaired the Committee, and Prof. Dr. Jan von Hein (Albert-Ludwigs-Universität Freiburg) and Dr. Cristina M. Mariottini (Max Planck Institute Luxembourg) were the co-rapporteurs.

In accordance with the mandate conferred by the International Law Association, the Committee – which comprised experts from Australia, Austria, Belgium, Brazil, Croatia, France, Germany, Italy, Japan, the Republic of Korea, Luxembourg, Portugal, Spain, the United Kingdom, and the United States of America – focussed on the promotion of international co-operation and the contribution to predictability on issues of jurisdiction, applicable law, and circulation of judgments in privacy (including defamation) matters, taking into account, i.a., questions of fundamental rights. In this framework, the Committee expanded its analysis also to the questions arising from the interface of privacy with personal data protection.

The Guidelines are premised on two fundamental principles: notably, (i) foreseeability of jurisdiction, and (ii) parallelism between jurisdiction and applicable law. They are accompanied by a detailed Article-by-Article Commentary, which provides a comprehensive analysis of the Guidelines, complemented by examples, including illustrations taken from copious national, regional and supranational jurisprudence.

Overall, the Committee took note of the fact that, in spite of the differences between legal systems, constitutional values play a major role in the legal treatment of privacy. In particular, substantial layers of public law enter into the equation of private enforcement of privacy. This notion and the limits that stem from the impact that such layers of public law forcibly have on claims must be taken into due consideration with respect to the jurisdiction as well as to the law applicable to these claims and bear a remarkable impact on the subsequent eligibility of privacy judgments for circulation.

Against this background, the Committee proceeded to design a system based, in essence and subject to substantiated exceptions, on the foreseeability of jurisdiction and a principled parallelism between jurisdiction and applicable law. The latter approach has the advantage of saving time and costs, but must be balanced against the danger of forum shopping. In so far, the approach of the Guidelines (Article 7) distinguishes between jurisdiction based on the defendant's conduct (Article 3) and jurisdiction localized at the defendant's habitual residence (Article 4). While a defendant's conduct that is significant for establishing jurisdiction will usually also indicate a sufficiently close connection for choice-of-law purposes, the general jurisdiction at the defendant's habitual residence is rather neutral in this regard and thus complemented by a specific conflicts rule.

Moreover, a necessary degree of flexibility is introduced by providing for party autonomy (Article 9) and an escape clause (Article 8). In order to take into account that personality rights and privacy protection are rooted in constitutional values, Article 11 contains a provision on public policy and overriding mandatory rules.

The Committee was cognizant that, to date, the recognition and enforcement of a foreign judgment on privacy rights is a matter primarily governed by national law. In response to this status quo, the Guidelines design a system for the recognition and enforcement of foreign privacy judgments that pursues consistency and continuity (esp. Article 12) with the rules on jurisdiction while also taking into account the characteristic objections to and obstacles that in many instances preclude the circulation of judgments that fall in the scope of the Guidelines (Article 13).

The adoption of the Guidelines marks the completion of the Committee's mandate.

Traveling Judges and International Commercial Courts

Written by Alyssa S. King and Pamela K. Bookman

International commercial courts—domestic courts, chambers, and divisions dedicated to commercial or international commercial disputes such as the Netherlands Commercial Court and the never-implemented Brussels International Business Court—are the topic of much discussion these days. The NCC is a division of the Dutch courts with Dutch judges. The BIBC proposal, however, envisioned judges who were mostly "part-timers" who may include specialists from outside Belgium. While the BIBC experiment did not pass Parliament, other commercial courts around the world have proliferated, and some hire judges from outside their jurisdictions.

In a new paper forthcoming in the American Journal of International Law, we set out to determine how many members of the Standing International Forum of Commercial Courts hire such "traveling judges," who they are, why they are hired, and why they serve.

Based on new empirical data and interviews with over 25 judges and court personnel, we find that traveling judges are found on commercially focused courts around the world. We identified nine jurisdictions with such courts, in Hong Kong, Singapore, Dubai, Abu Dhabi, Qatar, Kazakhstan, and the Caribbean (the Cayman Islands and the BVI), and The Gambia. These courts are designed to accommodate foreign litigants and transnational litigation—and inevitably, conflicts of laws.

One may assume that these judges largely resemble arbitrators (as was likely intended for the BIBC). But whereas studies show arbitrators are mostly white, male lawyers from "developed" countries that may be based in the common law or civil law tradition, traveling judges are even more likely to be white and male, vastly more likely to have prior judicial experience and common-law legal training, and are overwhelmingly from the UK and its former dominion colonies. In the subset of commercially focused courts in our study, just over half of the traveling judges were from England and Wales specifically. Nearly two-thirds had at least one law degree from a UK university.

Below is a chart showing the home jurisdiction of the judges in our study. This includes traveling judges sitting on the BVI commercial division, Hong Kong Court of Final Appeal, Dubai International Financial Centre (DIFC) Courts, Qatar International Court, Cayman Islands Financial Services Division, Singapore International Commercial Court, Abu Dhabi Global Market (ADGM) Courts, and Astana International Financial Centre (AIFC) Courts as of June 2021.

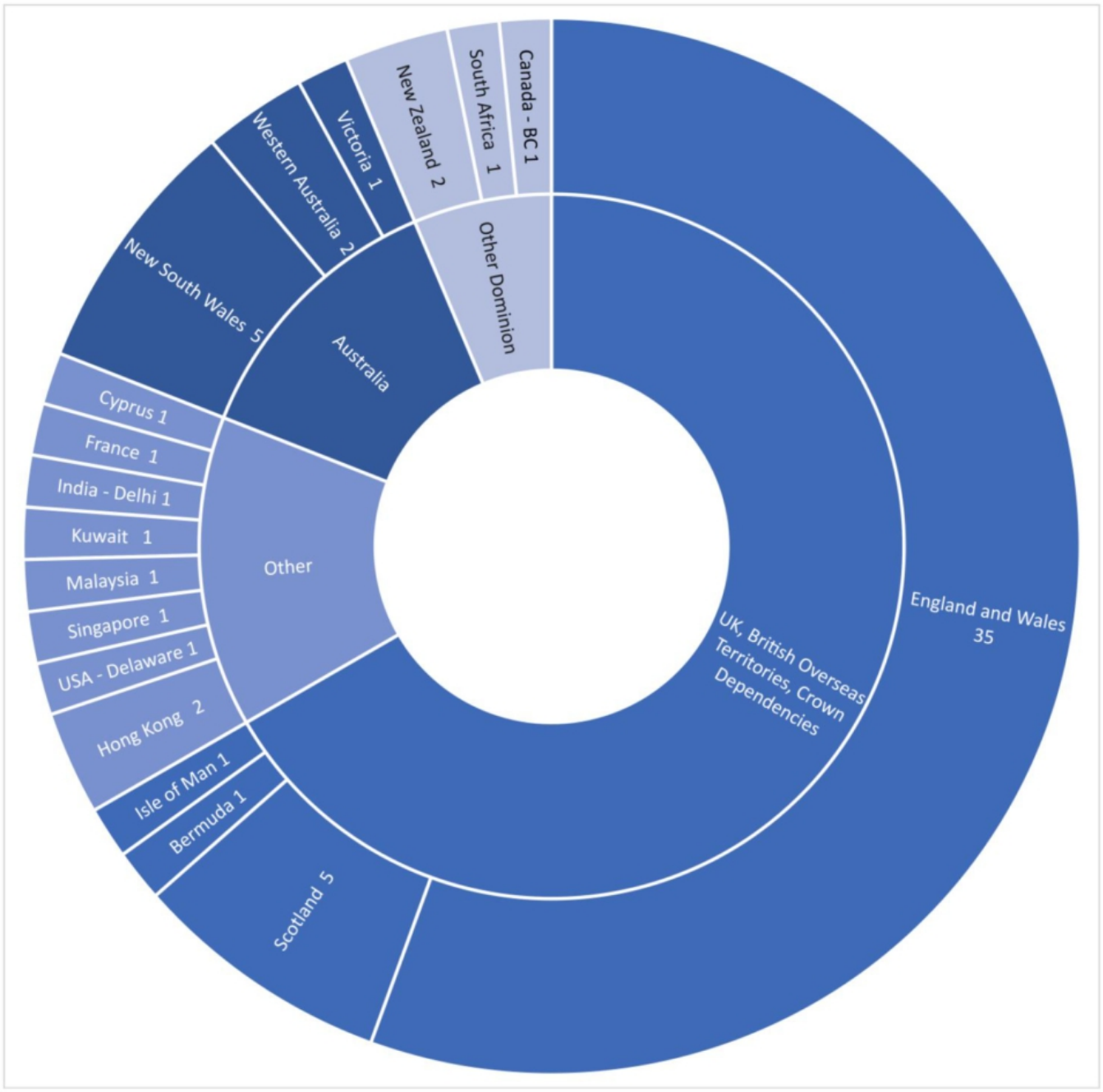


Figure 2. Traveling Judges by Home Jurisdiction Excluding Non-Commercial ECSC and The Gambia—June 2021

A look at traveling judges' backgrounds suggests that traveling judges might be a phenomenon limited to common-law countries, but only half of hiring jurisdictions are in common law states. Almost all hiring *jurisdictions*, however, are common law jurisdictions. Moreover, almost all are or aspire to be market-dominant small jurisdictions (MDSJ). For example, the DIFC Courts are located in a common law jurisdiction within a non-common-law state that has been identified as a MDSJ.

Traveling judges are a phenomenon rooted not only in the rise of international commercial arbitration, but also in the history of the British colonial judicial

service. Today, traveling judges may be said to bring their expertise and knowledge of best practices in international commercial dispute resolution. But traveling judges also offer hiring jurisdictions a method of transplanting well-respected courts, like London's commercial court, on their shores. In doing so, judges reveal these jurisdictions' efforts to harness business preferences for English common law into their domestic court systems. They also provide further opportunities for convergence on global civil procedure norms, or at least common law ones. Many courts have adopted some version of the English Civil Procedure Rules, looking for something international lawyers find familiar and reliable. Judges also report learning from each other's approaches.

Our article suggests that traveling judges are a nearly entirely common law phenomenon—only a handful of judges were from mixed jurisdictions and only one was a civil law judge. Common law courts may be especially amenable to traveling judges. In contrast to judges in continental civil law systems, common law judges are not career bureaucrats. They come to the judiciary late, usually after having built successful litigation practices. Moreover, the sociologist, and judge, Antoine Garapon observes that common law style-judging can be more personalized, with more room for individual authority rather than that of the office. All these differences are a matter of degree, with exceptions that come readily to mind. Still, as a result, common law judges are more likely have reputations independent of the office they serve. That reputation, in turn, is valuable to hiring governments eager to demonstrate their commercial law bona fides.

These efforts to harness English common law contrast with the efforts to build international commercial courts in the Netherlands or Belgium. The NCC advertises itself as an English-language court built on the foundation of the Dutch judiciary's strong reputation. As such, it has no need for foreign judges or common law experience. The BIBC likely also would not have relied as heavily on retired English judges, both because its designers envisioned more lay adjudicators (not retired judges) and likely a greater civil law influence. In that sense, its roster of judges might have more closely resembled that of the new international commercial court in Bahrain.

The Dutch, Belgian, and Bahraini examples do share something else in common with the network of courts profiled in *Traveling Judges*, however. Despite their apparent similarities to arbitration, these courts are domestic courts, and they

exist in significantly different political environments. The differences between Dutch and Belgian national politics influenced the NCC's success in being established and the BIBC's failure. In Belgium, for instance, the BIBC was maligned as a "caviar court" for foreign companies and the Belgian Parliament ultimately decided against the proposal. As one of us recounts in a related article on arbitration-court hybrids, similar arguments were raised in the Dutch Parliament, but they did not win the day. Several courts in our study, such as those established in the special economic zones in the UAE, did not face such constraints. But they may face others, such as how local courts will recognize and cooperate with a new court operating according to a different legal system and in a different language. The new court in Bahrain overcame local obstacles to its establishment, but it may face yet another set of political constraints and pressures as it proceeds to hear its first cases. Wherever traveling judges travel, local politics will affect both hiring jurisdictions' ability to achieve their goals and traveling judges' ability to judge in the way they are accustomed.

American Society of International Law Newsletter and Commentaries on Private International Law

American Society of International Law Private International Law Interest Group is pleased to publish the newest Newsletter and Commentaries on Private International Law (Vol. 5, Issue 1) on PILIG webpage. The primary purpose of our Newsletter is to communicate global news on PIL. It attempts to transmit information on new developments on PIL rather than provide substantive analysis, in a non-exclusive manner, with a view of providing specific and concise information that our readers can use in their daily work. These updates on developments on PIL may include information on new laws, rules, and regulations; new judicial and arbitral decisions; new treaties and conventions;

new scholarly work; new conferences; proposed new pieces of legislation; and the like.

This issue has three sections. Section one contains Highlights on cultural heritage protection and applicable law in the US and recognition and enforcement of foreign judgments in China. Section two reports on the recent developments on PIL in Africa, Asia, Europe, North America, Oceania, and South America. Section Three overviews global development.

China's 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments

Written by Dr Meng Yu and Dr Guodong Du, co-founders of China Justice Observer

Key takeaways:

- Despite the fact that the elaboration of a judicial interpretation appears to have been put on hold, China's Supreme People's Court has now resorted to conference summaries, which are not legally binding but have a practical impact, to express its views in recognition and enforcement of foreign judgments.
- As a landmark judicial policy issued by China's Supreme People's Court, the 2021 Conference Summary provides a detailed guideline for Chinese courts to review foreign judgment-related applications, including examination criteria, refusal grounds, and an ex ante internal approval mechanism.

- The 2021 Conference Summary enables an ever greater number of foreign judgments to be enforced in China, by making substantial improvements on both the issues of "threshold" and "criteria". The threshold addresses whether foreign judgments from certain jurisdictions are enforceable, whereas the criteria deal with whether the specific judgment in an application before Chinese courts can be enforced.
- The 2021 Conference Summary significantly lowers the threshold by liberalizing the reciprocity test, while providing a much clearer standard for Chinese judges to examine applications for recognition and enforcement of foreign judgments.
- The existence of a "treaty or reciprocity" remains to be the threshold (precondition) for Chinese courts to review applications.
- In terms of reciprocity, new reciprocity tests are introduced to replace the previous de facto reciprocity test and presumptive reciprocity. The new reciprocity criteria include three tests, namely, de jure reciprocity, reciprocal understanding or consensus, and reciprocal commitment without exception, which also coincide with possible outreaches of legislative, judicial, and administrative branches. Chinese courts need to examine, on a case-by-case basis, the existence of reciprocity, on which the Supreme People's Court has the final say.

China has published a landmark judicial policy on the enforcement of foreign judgments in 2022, embarking on a new era for judgment collection in China.

The judicial policy is the "Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide" (hereinafter the "2021 Conference Summary") issued by the China's Supreme People's Court (SPC) on 31 Dec. 2021. The 2021 Conference Summary makes it clear for the first time that applications for enforcing foreign judgments will be examined subject to a much more lenient standard.

Since 2015, the SPC has consistently disclosed in its policy that it wishes to be more open to applications for the recognition and enforcement of foreign judgments, and encourages local courts to take a more amicable approach to foreign judgments within the scope of established judicial practice.

Admittedly, the threshold for enforcing foreign judgments was set too high in judicial practice, and Chinese courts have never elaborated on how to enforce

foreign judgments in a systematic manner. As a result, despite the SPC's enthusiasm, it is still not appealing enough for more judgment creditors to apply for recognition and enforcement of foreign judgments with Chinese courts. However, this situation is now changed.

In January 2022, the SPC published the 2021 Conference Summary with regard to cross-border civil and commercial litigation, which addresses a number of core issues concerning the recognition and enforcement of foreign judgments in China. Just to be clear, in the Chinese legal system, the conference summary is not a legally binding normative document as the judicial interpretation, but only represents the consensus reached by Chinese judges nationwide, similar to the "prevailing opinion" (herrschende Meinung) in Germany, which will be followed by all judges in future trials. In other words, conference summaries serve as guidance for adjudication. On one hand, as a conference summary is not legally binding, the courts cannot invoke it as the legal basis in judgments, but on the other hand, the courts can make the reasoning on the application of law according to the conference summary in the "Court Opinion" part.

The 2021 Conference Summary makes substantial improvements in two aspects, i.e. the "threshold" and "criteria".

The threshold aspect refers to the first obstacle applicants will face when applying for recognition and enforcement of a foreign judgment in China, that is, whether foreign judgments from certain countries are enforceable. Countries reaching the threshold now include most of China's major trading partners, which is huge progress compared with the prior 40 countries or so. If the country where the judgment is rendered reaches the threshold, criteria will then be used by the Chinese courts in reviewing whether the specific judgment in the application can be enforced in China. Now a clearer threshold and criteria enable applicants to have more reasonable expectations about the likelihood of a foreign judgment being enforced in China.

1. **Threshold: the threshold for enforcing judgments of most foreign countries in China has been significantly lowered.**

The 2021 Conference Summary significantly lowers the threshold for the recognition and enforcement of foreign judgments in China, making a breakthrough in existing practice. According to the 2021 Conference Summary,

the judgments of most of China's major trading partners, including almost all common law countries as well as most civil law countries, can be enforceable in China.

Specifically, the 2021 Conference Summary states that the judgment can be enforced in China if the country where the judgment is rendered satisfies the one of the following circumstances:

(*a) The country has concluded an international or bilateral treaty with China in respect of recognition and enforcement of foreign judgments.*

Currently, 35 countries meet this requirement, including France, Italy, Spain, Belgium, Brazil, and Russia.

The List of China's Bilateral Treaties on Judicial Assistance in Civil and Commercial Matters (Enforcement of Foreign Judgments Included) is available here. Authoritative texts in Chinese and other languages are now available.

(b) The foreign country has a de jure reciprocal relationship with China.

This means that where a civil or commercial judgment rendered by a Chinese court can be recognized and enforced by the court of the foreign country according to the law of the said country, a judgment of the said country may, under the same circumstances, be recognized and enforced by the Chinese court.

In accordance with the criteria of de jure reciprocity, the judgments of many countries can be included in the scope of enforceable foreign judgments in China. For common law countries, such as the United States, the United Kingdom, Canada, Australia, and New Zealand, their attitude towards applications for recognition and enforcement of foreign judgments is open, and in general, such applications meet this criterion. For civil law countries, such as Germany, Japan, and South Korea, many of them also adopt a similar attitude to the above-mentioned de jure reciprocity, so such applications also meet this criterion to a great extent.

It is noteworthy that in March 2022, Shanghai Maritime Court ruled to recognize and enforce an English judgment in *Spar Shipping v Grand China Logistics* (2018) Hu 72 Xie Wai Ren No.1, marking the first time that an English monetary judgment has been enforced in China based on reciprocity. This decision has

previously been highlighted here. One key to ensuring the enforcement of English judgments is the reciprocal relationship between China and England (or the UK, if in a wider context), which, under the de jure reciprocity test (one of the new three tests), was confirmed in this case.

(c) The foreign country and China have promised each other reciprocity in diplomatic efforts or reached a consensus at the judicial level.

The SPC has been exploring cooperation in mutual recognition and enforcement of judgments with other countries in a lower-cost way in addition to signing treaties, such as a diplomatic commitment or a consensus reached by the judiciaries. This can achieve functions similar to that of treaties without being involved in the lengthy process of treaty negotiation, signing, and ratification.

China has started similar cooperation with Singapore. A good example of judicial outreach is the Memorandum of Guidance Between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments In Commercial Cases (available here). It is thus fair to say that the 2021 Conference Summary has substantially lowered the threshold by liberalizing the reciprocity test.

2. **Criteria: Clearer standard for Chinese judges to examine each application for recognition and enforcement of foreign judgments**

The 2021 Conference Summary makes it clear under what circumstances Chinese courts may refuse to recognize and enforce a foreign judgment and how the applicants may submit the applications, which undoubtedly enhances feasibility and predictability.

Pursuant to the 2021 Conference Summary, a foreign judgment can be recognized and enforced in China if there are no following circumstances where:

(a) the foreign judgment violates China's public policy;

(b) the court rendering the judgment has no jurisdiction under Chinese law;

(c) the procedural rights of the Respondent are not fully guaranteed;

(d) the judgment is obtained by fraud;

(e) parallel proceedings exist, and

(f) punitive damages are involved (specifically, where the amount of damages award significantly exceeds the actual loss, a Chinese court may refuse to recognize and enforce the excess).

Compared with most countries with liberal rules in recognition and enforcement of foreign judgments, the above requirements of Chinese courts are not unusual. For example:

- The above items (1) (2) (3) and (5), are also requirements under the German Code of Civil Procedure (Zivilprozessordnung).
- Item (4) is consistent with the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.
- Item (6) reflects the legal cultural tradition on the issue of compensation in China.

In addition, the 2021 Conference Summary also specifies what kind of application documents should be submitted to the court, what the application should contain, and how parties can apply to the Chinese court for interim measures when applying for enforcing foreign judgments.

In short, a gradual relaxation of Chinese courts' attitude can be seen towards applications for recognition and enforcement of foreign judgments since 2018. Recently the 2021 Conference Summary has finally made a substantial leap forward.

We hope to see such breakthroughs in rules be witnessed and developed by one case after another in the near future.

For a more detailed interpretation, together with the original Chinese version of the 2021 Conference Summary and its English translation, please read 'Breakthrough for Collecting Judgments in China Series' (available here).

For the PDF version of 'Breakthrough for Collecting Judgments in China Series', please click here.

Giustizia consensuale (Consensual Justice): Report on the Journal's Inaugural Conference

This report was kindly prepared by Federica Simonelli, a research fellow funded by the P.O.N. UNI4Justice project at the University of Trento, Italy, and a member of the editorial staff of Giustizia consensuale *(Consensual Justice).*

On 10 June 2022, the University of Trento, Faculty of Law celebrated the first anniversary of the launch of ***Giustizia consensuale***, founded and edited by Professor Silvana Dalla Bontà and Professor Paola Lucarelli.

In recent years, the debate surrounding consensual justice and party autonomy has received increasing attention in the national and international arenas and has raised a broad array of questions. What is the very meaning of consensual justice? Is the idea of consensual justice feasible? What is its role in a globalized world increasingly characterized by cross-border disputes? The rationale behind *Giustizia consensuale* lies in the pressing need to observe this phenomenon from different perspectives.

For those who did not have the opportunity to attend this informative event, this report offers a succinct overview of the topics and ideas exchanged during this well-attended, hybrid conference.

First session

Opening the symposium with an incisive preamble, Professor **Silvana Dalla Bontà** (University of Trento, Italy), editor-in-chief of *Giustizia consensuale* and chair of the first session, provided a context for the reasoning behind this new

editorial project and some of the research areas it intends to focus on. Notably, with the aim of meeting the needs of an increasingly complicated and multi-faceted society, *Giustizia consensuale* endeavours to investigate the meaning of consensual justice, its relationship with judicial justice, and the potential for integrating, rather than contrasting, these two forms of justice.

Professor Dalla Bontà's introductory remarks were followed by Professor **Paola Lucarelli** (University of Florence, Italy), co-editor of the *Giustizia consensuale*, on the topic of *Mediating conflict: a generous push towards change,* strongly reaffirming the importance of promoting and strengthening consensual justice instruments, not only to reduce the judicial backlog but also to empower the parties to self-tailor the solution of their conflict, by fostering responsibility, self-determination, awareness, and trust.

Professor **Francesco Paolo Luiso** (University of Pisa, Italy – Academician of the *Order of Lincei*) then proceeded to effectively illustrate the essential role played by lawyers in changing the traditional paradigm of dispute resolution which sees court adjudication as the main (if not, the sole) way of settling disputes. Conversely, the judicial function is a precious resource, and its use must be limited to instances where the exercise of the judge's adjudicatory powers is strictly necessary, thus directing all other disputes toward amicable, out-of-court dispute resolution mechanisms. Hence, lawyers are in the privileged position of presenting clients with a broad array of avenues to resolve disputes and guiding them to the choice of the most appropriate dispute resolution instrument.

Professor **Antonio Briguglio** (University of Rome Tor Vergata, Italy) then continued with an interesting focus on the relationship between conciliation and arbitration within the overall ADR system. After examining when and how conciliation is attempted during the course of the arbitral proceedings, he shed light on the interesting, and often unknown to the public, 'conciliatory' dynamics which often occur amongst members of arbitral tribunals in issuing the arbitration award. In an attempt to find common ground between different viewpoints, conciliatory and communicative skills of arbitrators play a decisive role, in particular in international commercial arbitrations on transnational litigation.

Procedure, Party agreement, and Contract was the focus of a very thorough presentation by Professor **Neil Andrews** (University of Cambridge, UK) who

underlined that consensual justice is a highly stimulating and significant meeting point between substance and procedure, as well as being an important perspective within technical procedural law. He stated that there are three points of interaction between agreement and procedure. Firstly, the parties are free to agree to self-impose preliminary 'negotiation agreements' and/or mediation agreements. Secondly, the parties can take a further step to specify or modify the elements of the relevant formal process, albeit court proceedings or arbitration. Thirdly, parties can dispose of or narrow the dispute through a settlement.

The first session concluded with an insightful presentation from Professor **Domenico Dalfino** (University of Bari Aldo Moro, Italy) who explored the long-debated issue of which party bears the burden of initiating the mandatory mediation in proceedings opposing a payment order. While expressing his criticism towards mandatory mediation, he maintained that voluntariness is the very essence of mediation and the promise of its success.

Second session

The event continued with a second session chaired by Professor **Paola Lucarelli**. From the perspective of the Brazilian legal system, Professor **Teresa Arruda Alvim** (Pontifical Catholic University of São Paulo, Brazil) began the session by illustrating that in the last few decades, ADR has afforded parties the possibility to self-tailor a solution to their conflict while significantly diminishing the case overload of the judiciary. Nevertheless, the obstacles to the growth of ADR are multiple, ranging from the lack of preparation of mediators to the traditional adversarial approach of attorneys. She concluded by stating that legal systems must invest, on the one hand, in training highly qualified mediators while on the other, providing new educational paths for attorneys to acquire new negotiation and mediation skills.

The session proceeded to address Online Dispute Resolution (ODR), examining the strengths and weaknesses of using new technologies to solve disputes. Professor **Silvia Barona Vilar** (University of Valencia, Spain) highlighted the positive and negative aspects of the increasing use of ODR in our digital and algorithmic society. While ODR devices are considered as ensuring access to justice and favouring social peace and citizens' satisfaction, there are also complex issues around the use of Artificial Intelligence and algorithms such as their accountability, accurate assessment, and transparency.

The relationship between the use of technology and access to justice was explored in depth by Professor **Amy J. Schmitz** (The Ohio State University, USA), who based her presentation on a thorough empirical study of ODR as a means to advance access to justice for poor or vulnerable individuals who would otherwise be unable to have their 'day in court.'

Potential applications of new technologies used in resolving disputes were then examined by Professor **Colin Rule** (Stanford Law School, USA), who highlighted that ODR, originally created to help e-commerce companies build trust with their users, is now being integrated into the courts to expand access to justice and reduce costs. While admitting there are many questions that still need to be answered, Rule predicted that ODR will play a major role in the justice systems of the future through the expansion of Artificial Intelligence and machine learning.

Showing a more critical approach Professor **Maria Rosaria Ferrarese** (National School of Administration, Italy) shed light on the threat posed by the use of digital technologies in resolving disputes, after having edited the Italian version of a book by Antoine Garapon and Jean Lassègue – *Justice digital. Révolution graphique et rupture anthropologique* (Digital Justice. Graphic Revolution and Anthropologic Disruption). While acknowledging that Artificial Intelligence and algorithms can deliver a fast and cheap justice, she underlines that justice is not only about settling a case in a rapid and inexpensive way but also about reinforcing values of a given society and ensuring a creative application of the law.