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.

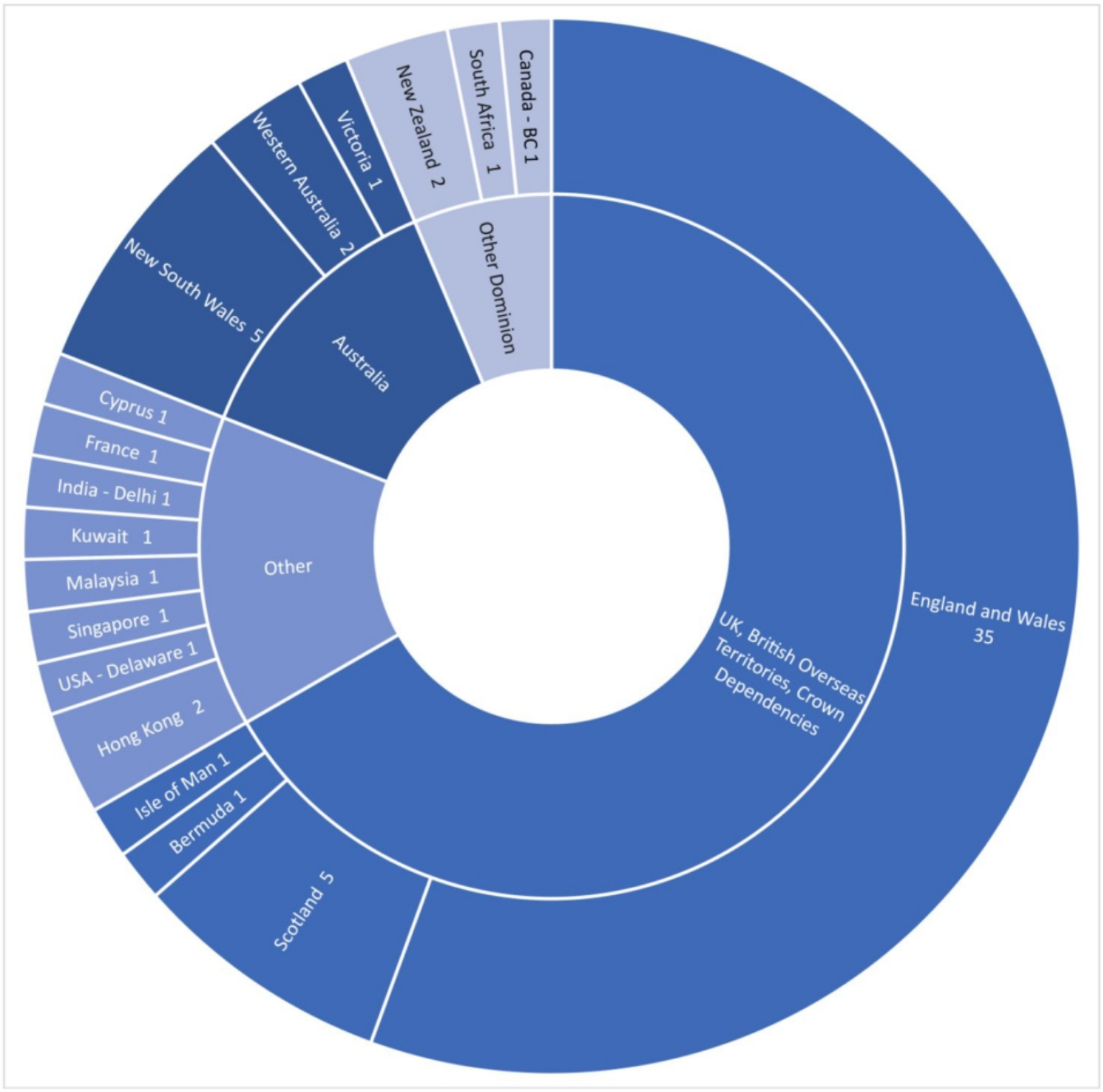


Figure 2. Traveling Judges by Home Jurisdiction Excluding Non-Commercial ECSC and The Gambia—June 2021

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.

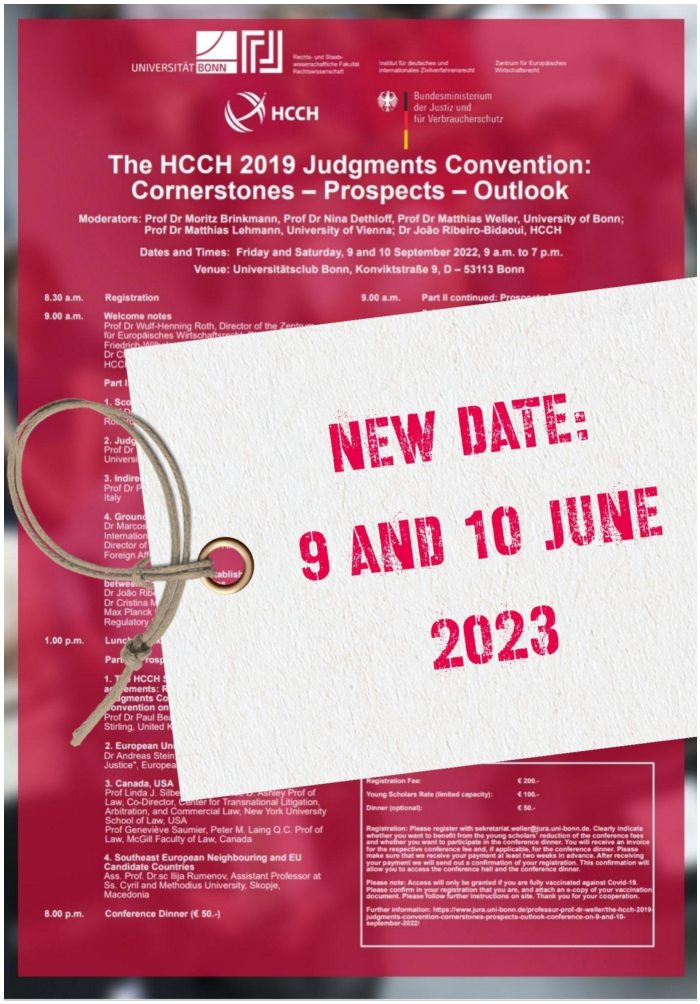
The relationship between the use of technology and access to justice was explored in depth by Professor **Amy J. Schmitz** (The Ohio State University, USA), who based her presentation on a thorough empirical study of ODR as a means to advance access to justice for poor or vulnerable individuals who would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

Conference on "The HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook"

– Rescheduled to 9 and 10 June 2023



Dear Friends and Colleagues,

Due to a conflicting conference on the previously planned date (9 and 10 September 2022) and with a view to ongoing developments on the subject-matter in the EU, we have made the decision to reschedule our Conference to **Friday and Saturday, 9 and 10 June 2023.** This new date should bring us closer to the expected date of accession of the EU and will thus give the topic extra momentum. Stay tuned and register in time (registration remains open)!

On 23 June 2022, the European Parliament by adopting JURI Committee Report A9-0177/2022 gave its consent to the accession of the European Union to the HCCH 2019 Judgments Convention. The Explanatory Statement describes the convention with a view to the "growth in international trade and investment flows" as an "instrument […] of outmost importance for European citizenz ans businesses" and expressed the hope that the EU's signature will set "an example

for other countries to join". However, the Rapporteur, Ms. Sabrina Pignedoli, also expresses the view that the European Parliament should maintain a strong role when considering objections under the bilateralisation mechanism provided for in Art. 29 of the Convention. Additionally, some concerns were raised regarding the protection of employees and consumers under the instrument. For those interested in the (remarkably fast) adoption process, the European Parliament's vote can be rewatched here. Given these important steps towards accession, June 2023 should be a perfect time to delve deeper into the subject-matter, and the Conference is certainly a perfect opportunity for doing so:

The list of speakers of our conference includes internationally leading scholars, practitioners and experts from the most excellent Universities, the Hague Conference on Private International Law (HCCH), the United Nations Commission on International Trade Law (UNCITRAL), and the European Commission (DG Trade, DG Justice). The Conference is co-hosted by the Permanent Bureau of the HCCH.

The Organizers kindly ask participants to contribute with EUR 200.- to the costs of the event and with EUR 50.- to the conference dinner, should they wish to participate. There is a limited capacity for young scholars to contribute with EUR 100.- to the conference (the costs for the dinner remain unchanged).

Please register with sekretariat.weller@jura.uni-bonn.de. Clearly indicate whether you want to benefit from the young scholars' reduction of the conference fees and whether you want to participate in the conference dinner. You will receive an invoice for the respective conference fee and, if applicable, for the conference dinner. Please make sure that we receive your payment at least two weeks in advance. After receiving your payment we will send out a confirmation of your registration. This confirmation will allow you to access the conference hall and the conference dinner.

Please note: Access will only be granted if you are fully vaccinated against Covid-19. Please confirm in your registration that you are, and attach an e-copy of your vaccination document. Please follow further instructions on site, e.g. prepare for producing a current negative test, if required by University or State regulation at that moment. We will keep you updated. Thank you for your cooperation.

Dates and Times:

Friday, 9 June 2023, and Saturday, 10 September 2023, 9 a.m. to 7 p.m.

Venue:

Universitätsclub Bonn, Konviktstraße 9, D – 53113 Bonn

Registration:

sekretariat.weller@jura.uni-bonn.de

Registration fee: EUR 200.-

Programme

Friday, 9 June 2023

8.30 a.m. Registration

9.00 a.m. Welcome notes

Prof Dr Wulf-Henning Roth, Director of the Zentrum für Europäisches Wirtschaftsrecht, Rheinische Friedrich-Wilhelms-Universität Bonn, Germany

Dr Christophe Bernasconi, Secretary General of the HCCH

Part I: Cornerstones

1. Scope of application

Prof Dr Xandra Kramer, Erasmus University Rotterdam, Netherlands

2. Judgments, Recognition, Enforcement

Prof Dr Wolfgang Hau, Ludwig-Maximilians-Universität Munich, Germany

3. Indirect jurisdiction

Prof Dr Pietro Franzina, Catholic University of Milan, Italy

4. Grounds for refusal

Dr Marcos Dotta Salgueiro, Adj. Professor of Private International Law, Law Faculty, UR, Uruguay; Director of International Law Affairs, Ministry of Foreign

Affairs, Uruguay

5. Trust management: Establishment of relations between Contracting States

Dr João Ribeiro-Bidaoui, First Secretary, HCCH / Dr Cristina Mariottini, Senior Research Fellow at the Max Planck Institute for International, European and Regulatory Law Luxemburg

1.00 p.m. Lunch Break

Part II: Prospects for the World

1. The HCCH System for choice of court agreements: Relationship of the HCCH Judgments Convention 2019 to the HCCH 2005 Convention on Choice of Court Agreements

Prof Dr Paul Beaumont, University of Stirling, United Kingdom

2. European Union

Dr Andreas Stein, Head of Unit, DG JUST – A1 "Civil Justice", European Commission

3. Canada, USA

Prof Linda J. Silberman, Clarence D. Ashley Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law, USA

Prof Geneviève Saumier, Peter M. Laing Q.C. Professor of Law, McGill Faculty of Law, Canada

4. Southeast European Neighbouring and EU Candidate Countries

Ass. Prof. Dr.sc Ilija Rumenov, Assistant Professor at Ss. Cyril and Methodius University, Skopje, Macedonia

8.00 p.m. Conference Dinner (EUR 50.-)

Saturday, 10 June 2023

9.00 a.m. Part II continued: Prospects for the World

5. Middle East and North Africa (including Gulf Cooperation Council)

Prof Dr Béligh Elbalti, Associate Professor at the Graduate School of Law and Politics at Osaka University, Japan

6. Sub-Saharan Africa (including Commonwealth of Nations)

Prof Dr Abubakri Yekini, University of Manchester, United Kingdom

Prof Dr Chukwuma Okoli, University of Birmingham, United Kingdom

7. Southern Common Market (MERCOSUR)

Prof Dr Verónica Ruiz Abou-Nigm, Director of Internationalisation, Senior Lecturer in International Private Law, School of Law, University of Edinburgh, United Kingdom

8. Association of Southeast Asian Nations (ASEAN)

Prof Dr Adeline Chong, Associate Professor of Law, Yong Pung How School of Law, Singapore Management University, Singapore

9. China (including Belt and Road Initiative)

Prof Dr Zheng (Sophia) Tang, University of Newcastle, United Kingdom

1.00 p.m. Lunch Break

Part III: Outlook

1. Lessons from the Genesis of the Judgments Project

Dr Ning Zhao, Senior Legal Officer, HCCH

2. International Commercial Arbitration and Judicial Cooperation in civil matters: Towards an Integrated Approach

José Angelo Estrella-Faria, Principal Legal Officer and Head, Legislative Branch, International Trade Law Division, Office of Legal Affairs, United Nations; Former Secretary General of UNIDROIT

3. General Synthesis and Future Perspectives

Hans van Loon, Former Secretary General of the HCCH

First Instance where a Mainland China Civil Mediation Decision has been Recognized and Enforced in New South Wales, Australia

I Introduction

Bank of China Limited v Chen [2022] NSWSC 749 (‘*Bank of China v Chen*’), decided on the 7 June 2022, is the first instance where the New South Wales Supreme Court (‘NSWSC’) has recognised and enforced a Chinese civil mediation decision.

II Background

This case concerned the enforcement of two civil mediation decisions obtained from the People’s Court of District Jimo, Qingdao Shi, Shandong Province China (which arose out of a financial loan dispute) in Australia.[1]

A foreign judgement may be enforced in Australia either at common law or

pursuant to the *Foreign Judgements Act 1991*(Cth).[2] As the People's Republic of China is not designated as a jurisdiction of substantial reciprocity under the *Foreign Judgements Regulation 1992* (Cth) schedule 1, the judgements of Chinese courts may only be enforced at common law.[3]

For a foreign judgement to be enforced at common law, four requirements must be met:[4] (1) the foreign court must have exercised jurisdiction in the international sense; (2) the foreign judgement must be final and conclusive; (3) there must be identity of parties between the judgement debtor(s) and the defendant(s) in any enforcement action; and (4) the judgement must be for a fixed, liquidated sum. The onus rests on the party seeking to enforce the foreign judgement.[5]

Bank of China Ltd ('plaintiff') served the originating process on Ying Chen ('defendant') pursuant to r 11.4 and Schedule 6(m) of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') which provides that an originating process may be served outside of Australia without leave of the court to recognise or enforce any 'judgement'.[6] Central to this dispute was whether a civil mediation decision constituted a 'judgement' within the meaning of schedule 6(m).

III Parties' Submission

A *Defendant's Submission*

The defendant filed a notice of motion seeking for (1) the originating process to be set aside pursuant to rr 11.6 and 12.11 of the UCPR, (2) service of the originating process on the defendant to be set aside pursuant to r 12.11 of the UCPR and (3) a declaration that the originating process had not been duly served on the defendant pursuant to r 12.11 of the UCPR.[7]

The defendant argued that the civil mediation decisions are not 'judgements' within the meaning of UCPR Schedule 6(m).[8] Moreover, the enforcement of foreign judgment at common law pre-supposes the existence of a foreign judgement which is absent in this case.[9]

The defendant submitted that the question that must be asked in this case is whether the civil mediation decisions were judgements as a matter of Chinese law which is a question of fact.[10] This was a separate question to whether, as a matter of domestic law, the foreign judgements ought to be recognised at common law.[11]

B *Plaintiff's Submission*

In response, the plaintiff submitted that all four common law requirements were satisfied in this case.[12] Firstly, there was jurisdiction in the international sense as the defendant appeared before the Chinese Court by her authorised legal representative.[13] The authorised legal representative made no objection to the civil mediation decisions.[14] Secondly, the judgement was final and conclusive as it was binding on the parties, unappealable and can be enforced without further order.[15] Thirdly, there was an identity of parties as Ying Chen was the defendant in both the civil mediation decisions and the enforcement proceedings.[16] Fourthly, the judgement was for a fixed, liquidated sum as the civil mediation decisions provided a fixed amount for principal and interest.[17]

In relation to the defendant's notice of motion, the plaintiff argued that the question for the court was whether the civil mediation decisions fell within the meaning of 'judgement' in the UCPR, that is, according to New South Wales law, not Chinese law (as the defendant submitted).[18] On this question, there was no controversy.[19] While the UCPR does not define 'judgement', the elements of a

‘judgement’ are well settled according to Australian common law and Chinese law expert evidence supports the view that civil mediation decisions have those essential elements required by Australian law.[20]

Under common law, a judgement is an order of Court which gives rise to res judicata and takes effect through the authority of the court.[21] The plaintiff relied on Chinese law expert evidence which indicated that a civil mediation decision possesses those characteristics, namely by establishing res judicata and having mandatory enforceability and coercive authority.[22] The expert evidence noted that a civil mediation decision is a type of consent judgement resulting from mediation which becomes effective once all parties have acknowledged receipt by affixing their signature to the Certificate of Service.[23] The Certificate of Service in respect of the civil mediation decisions in this case had been signed by the legal representatives of the parties on the day that the civil mediation decisions were made.[24] While a civil mediation decision is distinct to a civil judgement,[25] a civil mediation decision nonetheless has the same binding force as a legally effective civil judgement and can be enforced in the same manner.[26]

The expert evidence further noted that Mainland China civil mediation decisions have been recognised and enforced as foreign judgements in the Courts of British Columbia, Hong Kong and New Zealand.[27] The factors which characterise a ‘judgement’ under those jurisdictions are the same factors which characterise a ‘judgement’ under Australian law.[28]This supports the view that the same recognition should be afforded under the laws of New South Wales.[29]Accordingly, the plaintiff submitted the a civil mediation decision possesses all the necessary characteristics of a ‘judgement’ under Australian law such that service could be effected without leave under schedule 6(m).[30]

IV Resolution

Harrison AsJ noted that the judgements of Chinese courts may be enforceable at common law and found that all four requirements was satisfied in this case.[31] There was jurisdiction in the international sense as the defendant's authorised legal representative appeared before the People's Court on her behalf, the parties had agreed to mediation, the representatives of the parties came to an agreement during the mediation, and this was recorded in a transcript.[32] The parties' representatives further signed the transcript and a civil mediation decision had been issued by the people's courts.[33] Moreover, the civil mediation decision was final and binding as it had been signed by the parties.[34] The third and fourth requirements were also clearly satisfied in this case.[35]

In relation to the central question of whether the civil mediation decisions constituted 'judgements' in the relevant sense, Harrison AsJ found in favour of the plaintiff.[36] Harrison AsJ first noted that this question should not be decided on the arbitrary basis of which of the many possible translations should be preferred.[37] Moreover, the evidence of the enforcement of civil mediation decisions as judgements in the jurisdictions of British Columbia, Hong Kong and New Zealand was helpful, though also not determinative.[38]

Rather, this question must be determined by reference to whether civil mediation decisions constituted judgements under Australian law as opposed to Chinese law, accepting the plaintiff's submission.[39] The civil mediation decisions were enforceable against the defendant immediately according to their terms in China without the need for further order or judgement of the People's Court.[40] The parties could not vary or cancel the civil mediation decisions without the permission of the Jimo District Court.[41] The civil mediation decisions also had the same legal effects as a civil judgement.[42] Therefore, Harrison AsJ concluded that the civil mediation decisions were judgements for the purposes of Australian law as they established res judicata and were mandatorily enforceable and had coercive authority.[43] It then followed that the civil mediation decisions fell within the scope of UCPR schedule 6(m) and did not require leave to be served.[44]

V Orders

In light of the analysis above, Harrison AsJ held that the Chinese civil mediation decisions were enforceable and dismissed the defendant's motion.[45] Costs were further awarded in favour of the plaintiff.[46]

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Supervised by Associate Professor Jeanne Huang, Sydney Law School

References:

[1] *Bank of China Limited v Chen* [2002] NSWSC 749, [1], [16].

[2] Ibid [8]; citing *Bao v Qu; Tian* (No 2) [2020] NSWSC 588, [23]-[29].

[3] Ibid [8].

[4] Ibid.

[5] Ibid.

[6] Ibid [9] – [11].

[7] Ibid [6].

[8] Ibid [57].

[9] Ibid [59], [84].

[10] Ibid [61].

[11] Ibid.

[12] Ibid [25].

[13] Ibid [18].

[14] Ibid.

[15] Ibid [20].

[16] Ibid [22].

[17] Ibid [24].

[18] Ibid [27].

[19] Ibid [28].

[20] Ibid.

[21] Ibid [37].

[22] Ibid [38].

[23] Ibid [39].

[24] Ibid.

[25] Ibid [41].

[26] Ibid [42].

[27] Ibid [49].

[28] Ibid [50].

[29] Ibid [51].

[30] Ibid [52].

[31] Ibid [83], [90].

[32] Ibid [86].

[33] Ibid.

[34] Ibid [87].

[35] Ibid [88]-[89].

[36] Ibid [105].

[37] Ibid [91]-[92].

[38] Ibid [93].

[39] Ibid [96].

[40] Ibid [103].

[41] Ibid.

[42] Ibid.

[43] Ibid [105].

[44] Ibid [106].

[45] Ibid [107]-[108].

[46] Ibid [109]-[112].

Golan v. Saada – a case on the HCCH Child Abduction Convention: the Opinion of the US Supreme Court is now available

Written by Mayela Celis, UNED

Yesterday (15 June 2022) the US Supreme Court rendered its Opinion in the case of Golan v. Saada regarding the HCCH Child Abduction Convention. The decision was written by Justice Sotomayor, click here. For our previous analysis of the

case, click here.

This case dealt with the following question: whether upon finding that return to the country of habitual residence places a child at grave risk, a district court is *required* to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding. (our emphasis)

In a nutshell, the US Supreme Court answered this question in the negative. The syllabus of the judgment says: "A court is not categorically required to examine all possible ameliorative measures [also known as undertakings] before denying a Hague Convention petition for return of a child to a foreign country once the court has found that return would expose the child to a grave risk of harm." The Court has also wisely concluded that "Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion" (however, this is different in the European Union context where a EU regulation complements the Child Abduction Convention).

While admittedly not everyone will be satisfied with this Opinion, it is a good and well-thought through decision that will make a great impact on how child abduction cases are decided in the USA; and more broadly, on the way we perceive what the ultimate goal of the treaty is and how to strike a right balance between the different interests at stake and the need to act expeditiously.

In particular, the Court stresses that the Convention "does not pursue return exclusively or at all costs". And while the Court does not make a human rights analysis, it could be argued that this Opinion is in perfect harmony with the current approaches taken in human rights law.

In my view, this is a good decision and is in line with our detailed analysis of the case in our previous post. In contrast to other decisions (see recent post from Matthias Lehmann), for Child Abduction – and human rights law in general – this is definitely good news from Capitol Hill.

Below I include a few excerpts of the decision (our emphasis, we omit footnotes):

"In addition, the court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the Convention and ICARA. ***The Second Circuit's rule, by instructing district courts to order return "if at all possible," improperly elevated return above the***

Convention's other objectives. Blondin I, 189 F. 3d, at 248. ***The Convention does not pursue return exclusively or at all costs***. Rather, the Convention "is designed to protect the interests of children and their parents," Lozano, 572 U. S., at 19 (ALITO , J., concurring), and children's interests may point against return in some circumstances. Courts must remain conscious of this purpose, as well as the Convention's other objectives and requirements, which constrain courts' discretion to consider ameliorative measures
in at least three ways.

"First, ***any consideration of ameliorative measures must prioritize the child's physical and psychological safety***. The Convention explicitly recognizes that the child's interest in avoiding physical or psychological harm, in addition to other interests, "may overcome the return remedy." Id., at 16 (majority opinion) (cataloging interests). ***A court may therefore decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave***. Sexual abuse of a child is one example of an intolerable situation. See 51 Fed. Reg. 10510. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated***. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed***. See, e.g., Walsh v. Walsh, 221 F. 3d 204, 221 (CA1 2000) (providing example of parent with history of violating court orders).

"Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute. The Convention and ICARA prohibit courts from resolving any underlying custody dispute in adjudicating a return petition. See Art. 16, Treaty Doc., at 10; 22 U. S. C. §9001(b)(4). Accordingly, ***a court ordering ameliorative measures in making a return determination should limit those measures in time and scope to conditions that would permit safe return***, without purporting to decide subsequent custody matters or weighing in on permanent arrangements.

"Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts "act expeditiously in proceedings for the return of children." Art. 11, Treaty Doc., at 9. Timely resolution of return petitions is important in part because return is a "provisional" remedy to enable final

custody determinations to proceed. Monasky, 589 U. S., at ___ (slip op., at 3) (internal quotation marks omitted). The Convention also prioritizes expeditious determinations as being in the best interests of the child because "[e]xpedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child." Chafin v. Chafin, 568 U. S. 165, 180 (2013). ***A requirement to "examine the full range of options that might make possible the safe return of a child," Blondin II, 238 F. 3d, at 163, n. 11, is in tension with this focus on expeditious resolution***. In this case, for example, it took the District Court nine months to comply with the Second Circuit's directive on remand. Remember, the Convention requires courts to resolve return petitions "us[ing] the most expeditious procedures available," Art. 2, Treaty Doc., at 7, and to provide parties that request it with an explanation if proceedings extend longer than six weeks, Art. 11, id., at 9. Courts should structure return proceedings with these instructions in mind. Consideration of ameliorative measures should not cause undue delay in resolution of return petitions.

"***To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate***. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention. A district court's compliance with these requirements is subject to review under an ordinary abuse-of-discretion standard."

U.S. Supreme Court Restricts Discovery Assistance to International Arbitral Tribunals

Written by Matthias Lehmann, University of Vienna (Austria)

On 13 June 2022, the U.S. Supreme Court ruled that U.S. courts may not help arbitral tribunals sitting abroad in the taking of evidence. This is because in the opinion of the Court, such an arbitral tribunal is not a „foreign or international tribunal" in the sense of 28 U.S.C. § 1782, which allows federal district courts to order the production of evidence for use in proceedings before such tribunals.

The decision concerned an institutional and an ad-hoc arbitration. The first, ZF v. Luxshare, was a commercial arbitration between two companies under the rules of the German Arbitration Institution (DIS). The second, AlixPartners v. Fund for Protection of Investors' Rights in Foreign States, was an investment arbitration involving a disgruntled Russian investor and a failed Lithuanian bank; it was conducted under the UNCITRAL Arbitration Rules.

The opinion, written by Amy Coney Barrett, rejects assistance by U.S. courts in both cases, whether in the pre-arbitration phase or in the main arbitration proceedings. It was unanimously adopted by the Court.

The Supreme Court first relies on a dubious literal interpretation of § 1782. While it does not dispute that arbitral tribunals may be "tribunals", this would change by the addition of the adjectives "foreign or international", as this would require that one or several nations have imbued the tribunal with governmental authority. Alas, the drafters of the New York Convention on recognition and enforcement of "foreign" arbitral awards were wrong, and so apparently were the signatories – among them the U.S. As for the term "international", numerous treatises on "international commercial arbitration" will now supposedly have to be rewritten or newly titled.

The opinion further argues that the "animating purpose" of § 1782 would be "comity" with other nations, and that it would be "difficult to see how enlisting district courts to help private bodies would help that end". Yet other nations also

have an interest in efficient arbitration proceedings, as evidenced by the New York Convention. This is even particularly clear for investment arbitration because of the involvement of a state party, but it is also true in commercial arbitration. What is decisive from the point of view of many countries is that arbitration as a dispute resolution method is equivalent to litigation, and should not be treated less favourably.

The Supreme Court further argues that if § 1782 were to be extended to commercial arbitral "panels", it would cover everything, including even a university's student disciplinary tribunal. Yet the absurdity of this *argumentum ad absurdum* lies not in the inclusion of arbitration in § 1782 but in the extension made by the Court, which was only asked about the former and not about the latter. If need be, it would have been easy to distinguish commercial and investment arbitral tribunals established under national or international rules and covered by international agreements such as the New York Convention from student disciplinary "tribunals" (rather: panels).

Finally, the Court notes that allowing district courts to proffer evidence to a foreign arbitral tribunal would create a mismatch with the Federal Arbitration Act (FAA), which does not foresee such assistance for domestic arbitral tribunals. Yet the solution of this mismatch should have better been left to the legislator, who could either extend the FAA to discovery or exclude foreign and international arbitral tribunals from the scope of § 1782. At any rate, the worse situation of domestic arbitral tribunals does not seem a sufficient justification to also deprive arbitral tribunals abroad, who may have particular difficulties in gathering evidence in the U.S., of assistance by U.S. courts.

All in all, this is disappointing news from Capitol Hill for international arbitration. Whether on arbitration or abortion, the current Supreme Court seems to be willing to upend legal precedent and to question customary legal terminology. At least for arbitration, the consequences will not be life-threatening, because the practice will be able to adapt. But one can already see the next questions coming to the Supreme Court. How about this one: Are ICSID tribunals imbued with governmental authority?

ECJ on the interpretation of the European Succession Regulation in relation to cross-border declarations of waiver, Judgment of 2 June 2022, C-617/20 – T.N. et al. ./. E.G.

On 2 June 2022, the ECJ delivered its judgment in the case of T.N. et al. ./. E.G., C-617/20, on the interpretation of the ESR in relation to cross-border declarations of waiver of succession (on the facts of the case and AG Maciej Szpunar's Opinion in this case see our previous post).

The Court followed the AG's Opinion and concluded (para. 51) that

"*Articles 13 and 28 of Regulation No 650/2012 must be interpreted as meaning that a declaration concerning the waiver of succession made by an heir before a court of the Member State of his or her habitual residence is regarded as valid as to form in the case where the formal requirements applicable before that court have been complied with, without it being necessary, for the purposes of that validity, for that declaration to meet the formal requirements of the law applicable to the succession*".

This conclusion was based on a EU-law specific approach rather than by discussing, let alone resorting to, fundamental concepts of private international law (compare Question 1 by the referring national court, the Higher Regional Court of Bremen, Germany, on a potential application of the concept of substitution; compare the AG's considerations on characterisation of the issue as "substance" or "form", see Opinion, paras. 34 et seq.). Rather, the Court reformulates the question functionally (para. 32):

"*The present reference for a preliminary ruling concerns the conditions which must be satisfied in order for a declaration concerning the waiver of succession, within the meaning of Articles 13 and 28 of Regulation No 650/2012, made before the court of the State of the habitual residence of the party waiving succession, to be regarded as valid. In that regard, the referring court asks, in particular, whether and, if so, when and how such a declaration must be notified to the court having jurisdiction to rule on the succession*".

Textual as well as systematic arguments (Article 13 as part of Chapter II, Article 28 as part of Chapter III of the ESR), paras. 36 et seq., supported by Recital 32 (simplification of procedures), para. 41, as well as the general effet utile of the ESR in light of Recital 7, para. 42, lead the Court to the result that

"*as the Advocate General stated in point 64 of his Opinion, compliance with the objective of Regulation No 650/2012, which is to enable heirs to make declarations concerning the waiver of succession in the Member State of their habitual residence, implies that those heirs are not required to take further formal actions before the courts of other Member States other than those provided for by the law of the Member State in which such a declaration is made, in order for such declarations to be regarded as valid*".

Whether this result occurs, technically speaking, as a substitution – and thus by a kind of "recognition", or as a matter of characterisation of the issue as "form", is not directly spelled out, but based on the general approval of the AG's approach, the latter is certainly more likely than the former.

Additionally, in furthering the effet utile, the Court adds on the issue of communication of and time limits for a waiver declared according to the conditions of the law of the habitual residence (paras. 49 et seq.) that compliance with "formal requirements" before the court of the habitual residence must suffice as long as the court seised with the succession "has become aware of the existence of that declaration". And the threshold for this awareness seems to be very low, but "in the absence of a uniform system in EU law providing for the communication of declarations" of the kind in question here, must be brought about by the declaring person (para. 48). As a further element of effet utile, this person is not bound by any formal requirements under the *lex successionis*, para. 48: "if those steps [by the declaring person] are not taken within the time limit prescribed by the law applicable to the succession, the validity of such a

declaration cannot be called into question" (emphasis added). The only factual time limit therefore is that the court becomes aware before it takes its decision. Appeal, therefore, cannot be grounded directly on the fact that the court was not made aware in time, even though the declaration had existed before the court's decision. Appeal may be available on other grounds and then the declaration may be introduced as a *novum*, if the *lex fori processualis* allows it.

Speaking of the *lex fori processualis*: As there is now an autonomous time limit, the question became irrelevant whether making the court aware of the declaration of waiver depends on any language requirements. In the concrete case, the persons declaring the waiver before a Dutch court, obviously in Dutch language, informed the German court first by submitting Dutch documents and only later with translations, but at any rate before the court's decision. Principally speaking, however, if the court's language is e.g. German, any kind of communication must be conducted in that language (see section 184 German *Gerichtsverfassungsgesetz*). In addition, according to the Court's decision, only "formal requirements of the law applicable to the succession" are irrelevant. The need for translations, however, is a matter of the *lex fori processualis.* It will be an interesting question of "language law" within the EU whether the effet utile of the ESR (and comparable regulations in other instruments) might overcome principal language requirements according to the *lex fori processualis*. And on a general level it may be allowed to state the obvious: questions of characterisation (and others of general PIL methodology) will never disappear.