The Visible College of International Lawyers and the HCCH 2019 Judgments Convention – Conference in Bonn

The HCCH 2019 Judgments Convention has been the subject of an ever-growing body of academic research and discussion ever since it was signed; but due to the pandemic, almost all of it had to happen in writing. Just in time for its entry into force, though, and thus perfectly timed, the first international conference on the HCCH 2019 Judgments Convention Cornerstones – Prospects – Outlook took place a week ago at the University of Bonn, hosted by **Matthias Weller** together with **Moritz Brinkmann** and **Nina Dethloff**, in cooperation with the Permanent Bureau of the HCCH, and with the support of the German Federal Ministry of Justice.

The conference brought together much of the aforementioned discussion between a range of academics, practitioners and policymakers, including the contributors to the book of the same title, edited by **Matthias Weller**, **João Ribeiro-Bidaoui**, **Moritz Brinkmann**, and **Nina Dethloff**, for which the conference doubled as a launch event. It accordingly followed the same structure, organized into seven panels overall that were split into three larger blocks.

The first of those ("Cornerstones") focused on some of the core concepts underpinning the Convention. **Wolfgang Hau** (LMU Munich) discussed the meaning of 'judgments', 'recognition', and 'enforcement'; **Pietro Franzina** (Catholic University of Milan) focused on the jurisdictional filters (with an emphasis on contractual obligations, i.e. Art. 5(1)(g)); and **Marcos Dotta Salgueiro** (University of the Republic of Montevideo) discussed the grounds for refusal. After some lively discussion, the block continued with papers on the Convention's much-discussed Art. 29 (**Cristina Mariottini** (Luxembourg)) and on its interplay with the 2005 Choice of Court Convention (**Paul Beaumont** (University of Stirling)).

Also in light of some less nuanced recent interventions, Cristina Mariottini's paper was particularly welcome to dispel some myths surrounding Art. 29. The speaker rightly pointed out that the mechanism is not only very different from the much-criticized bilateralization requirement of the 1971 Convention but can also be found, in one form or another, in a range of other instruments, including the rather successful 1970 Evidence and 1980 Child Abduction Conventions.

A much wider angle was then taken in the second block ("Prospects for the World"), which brought together perspectives from the European Union (**Andreas**

Stein (European Commission)), the US (**Linda Silberman** (NYU)), Canada (**Geneviève Saumier** (McGill University)), the Balkan Peninsula (**Ilja Rumenov** (Skopje University)), Arab countries (Béligh Elbalti (University of Osaka)), Africa (**Abubakri Yekini** (University of Manchester) and **Chukwuma Okoli** (University of Birmingham)), the MERCOSUR Region (**Verónica Ruiz Abou-Nigm** (University of Edinburgh)), the ASEAN countries (**Adeline Chong** (SMU)), and China (**Zheng (Sophia) Tang** (Wuhan University)) in four consecutive panels. While the first block had already highlighted some of the compromises that had to be made during the drafting of the Convention and at the diplomatic conference, it became even clearer that the Convention (or, more precisely, the prospect of its ratification) may be subject to vastly different obstacles and objections in different parts of the globe. While some countries may not consider the Convention to be ambitious enough, others may consider it too much of an intrusion into their right to refuse the recognition and enforcement of foreign judgments – or raise even more fundamental concerns regarding the implementation of the Convention, its interplay with existing bilateral treaties (seemingly a particularly pertinent problem for Arab countries), or with multilateralism in recognition and enforcement more generally. The conference gave room to all of those concerns and provided important context through some truly impressive comparative research, e.g. on the complex landscape of bilateral agreements in and between most Arab states.

The different threads of discussion that had been started throughout the event were finally put together in a closing panel ("Outlook"). **Ning Zhao** (HCCH) recounted the complicated genesis of the Convention and reflected on the lessons that could be learned from them, emphasizing the need for bridging differences through narrowing down the scope of projects and offering opt-out mechanisms, and for enhancing mutual trust, including through post-convention work. She also provided an update on the ongoing jurisdiction project; **José Angelo Estrella Faria** (UNIDROIT) advocated a holistic approach to judicial cooperation and international commercial arbitration; and **Hans van Loon** (HCCH) finally summarized the conference as a whole, putting the emphasis both on the significant achievement that the convention constitutes and the need to put further work into its promotion.

The conference had set out to identify the cornerstones of the 2019 Convention, to discuss its prospects, and to provide an outlook into the future of the

Convention. It has clearly achieved all three of these goals. It included a wide range of perspectives on the Convention, highlighted its achievements without shying away from discussing its present and future obstacles, and thus provided ample food for thought and discussion for both the proponents and the critics of the Convention.

At the end of the first day, **Burkhard Hess** (MPI Luxembourg) gave a dinner speech and reflected on the current shape of the notorious 'invisible college of international lawyers' in private international law. As evidenced by the picture above, the college certainly was rather visible in Bonn.

Review of Choice of Law in International Commercial Contracts

While doing research on a choice of law article, I found it necessary to consult a book generally co-edited by Professors Daniel Girsberger, Thomas Graziano, Jan Neels on *Choice of Law in International Commercial Contracts* ('Girsberger et al'). The book was officially published on 22 March 2021. I began reading sections of the book related to tacit choice of law sometime in December 2022 and found the work truly global and compelling. At the beginning of June this year, I decided to read the whole book and finished reading it today. It is 1376 pages long!

To cut the whole story short, the book is the bible on choice of law in international commercial contracts. It covers over 60 countries, including regional and supranational bodies' rules on choice of law. Professor Symoen Symeonides had previously written a single authored award winning book on *Codifying Choice of Law Around the World*, but that work did not cover as much as Girsberger et al's

book in terms of the number of countries, and regional and supranational instruments (or principles) covered.

The book arose from the drafting of the Hague Principles on Choice of Law in International Commercial Contracts, headed by Professor Girsberger and commissioned by Professor Marta Partegas. The central aim of the Hague Principles is to promote party autonomy, as the Hague Principles does not touch on the law applicable in the absence of choice.

The book starts with a general comparative outline of choice of law around the world and its comparison to the Hague Principles. This outline is derived from the works of many other scholars that contributed to the book. In other preliminary chapters, there are discussions devoted to party autonomy, provenance of the Hague Principles, roadmap to promoting the Hague Principles, international commercial arbitration, and perspectives from UNIDROIT and UNCITRAL.

The essential part of the book focuses on regional and national reports of countries around the world, with a focus on comparison to the Hague Principles. The format used is consistent, and easy to follow for all the reports in this order: introduction and preamble, scope of the principles, freedom of choice, rules of law, express and tacit choice of law, formal validity of the choice of law, agreement on the choice of law and battle of forms, severability, exclusion of renvoi, scope of the chosen law, assignment, overriding mandatory rules and public policy, establishment, law applicable in the absence of choice, and international commercial arbitration.

The Hague Principles has been successful so far given the regional or supranational bodies such as Asia,[1] and Latin America[2] that have endorsed it.

From 31st May to 3 June 2023, the Research Centre for Private International Law in Emerging Countries in University of Johannesburg held a truly Pan-African Conference on the African Principles on Choice of Law in International Commercial Contracts.[3] Many African scholars (including myself) and some South African government officials were present and spoke in this very successful conference. The African Principles also draws some inspiration from the Hague Principles, which involved the participation of African scholars like Professors Jan Neels and Richard Frimpong Oppong.

Girsberger et al's book and the Hague Principles success so far may be due to the

more inclusive approach it took, rather than other Hague Conventions that are not fully representative of countries around the world, especially African stakeholders.

More please.

[1] Asian Principles on Private International Law 2018.

[2] Guide of the Organization of American States on the Applicable Law to International Commercial Contracts 2019

[3] See generally JL Neels and EA Fredericks, "An Introduction to the African Principles of Commercial Private International Law"(2018) 29 Stellenbosch Law Review 347; JL Neels, 'The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment' (2021) 25 Uniform Law Review 426, 431; JL Neels and EA Fredericks, 'The African Principles of Commercial Private International Law and the Hague Principles' in Girsberger et al paras 8.09-8.11.

Lancaster Workshop on Challenges in Contemporary International Litigation – 21 June 2023

The University of Lancaster has organised a workshop on **Challenges in Contemporary International Litigation** on **Wednesday, 21 June 2023, 12.30 – 5 pm UK time** (in person and online via Teams). Some well established and emerging experts will discuss cutting edge issues of practical significance in private international law (broadly understood).

The programme for the workshop is as follows:
12.30 pm

Welcome remarks by Dr Mukarrum Ahmed and Professor David Milman (Co-chairs – University of Lancaster)

Professor Paul Beaumont FRSE (University of Stirling), 'HCCH Jurisdiction Project'

Professor Paul Torremans (University of Nottingham), 'CJEU case law on Article 7.2 Brussels I Regulation and its application to online copyright cases'

Dr Kirsty Hood KC (Discussant)

1.45 pm – 3.00 pm

Professor Zheng Sophia Tang (Wuhan University), 'The challenge of emerging technology to International litigation'

Professor Veronica Ruiz Abou-Nigm (University of Edinburgh), 'Sustainability and Private International Law'

Dr Mihail Danov (University of Exeter), 'Private International Law and Competition Litigation in a Global Context'

3.00 pm – 3.15 pm Break

3.15 pm – 5.00 pm

Dr Jayne Holliday (University of Stirling), 'The non-recognition of transnational divorces'

Dr Chukwuma Okoli (University of Birmingham), 'Implied Jurisdiction Agreement in International Commercial Contracts'

Dr Michiel Poesen (University of Aberdeen), 'The interaction between UK private international law and liability arising out of the use of artificial intelligence'

Mr Denis Carey (University of Lancaster), 'The Consultation on the Reform of the Arbitration Act 1996'

The workshop is free to attend, but registration is required via email. A Teams

link will be provided for remote attendees.

English Court Judgment refused (again) enforcement by Dubai Courts

In a recent decision, the Dubai Supreme Court (DSC) confirmed that enforcing foreign judgments in the Emirate could be particularly challenging. In this case, the DSC ruled against the enforcement of an English judgment on the ground that the case had already been decided by Dubai courts by a judgment that became final and conclusive (*DSC, Appeal No. 419/2023 of 17 May 2023*). The case presents many peculiarities and deserves a closer look as it reinforces the general sentiment that enforcing foreign judgments – especially those rendered in non-treaty jurisdictions – is fraught with many challenges that render the enforcement process very long … and uncertain. One needs also to consider whether some of the recent legal developments are likely to have an impact on the enforcement practice in Dubai and the UAE in general.

The case

1) Facts

The case's underlying facts show that a dispute arose out of a contractual relationship concerning the investment and subscription of shares in the purchase of a site located in London for development and resale. The original English decision shows that the parties were, on the one hand, two Saudi nationals (defendants in the UAE proceedings; hereinafter, "Y1 and 2"), and, on the other hand, six companies incorporated in Saudi Arabia, Anguilla, and England (plaintiffs in the UAE proceedings, hereinafter "X *et al.*"). The English decision also indicates that it was Y1 and 2 who brought the action against X *et al.* but lost

the case. According to the Emirati records, in 2013, X *et al.* were successful in obtaining (1) a judgment from the English High Court ordering Y1 and 2 to pay a certain amount of money, including interests and litigation costs, and, in 2015, (2) an order from the same court ordering the payment of the some additional accumulated interests (hereinafter collectively "English judgment"). In 2017, X *et al*. sought the enforcement of the English judgment in Dubai.

2) The Enforcement Odyssey…

a) First Failed Attempt

i) Dubai Court of First Instance (DCFI)

First, X *et al.* brought an action to enforce the English judgment before the DCFI in accordance with the applicable rules in force at the time of the action (former art. 235 of the 1992 Federal Civil Procedure Act ["1992 FCPA"]). Based on well-established case law, the DCFI rules as follows: (i) in the absence of an applicable treaty, reciprocity should be established (interestingly, *in casu*, the DCFI considered that the UAE-UK bilateral convention on judicial assistance could not serve as a basis for enforcement since it lacked provisions on mutual recognition and enforcement); (ii) reciprocity can be established by showing that the enforcement requirements in the rendering State are "the same (identical) or less restrictive" compared to those found in the UAE; (iii) it was incumbent on the party seeking enforcement to submit proof of the content of the foreign law pursuant to the methods of proof admitted in the UAE so that the court addressed could compare the enforcement requirements in both countries. Considering that X *et al*. had failed to establish reciprocity with the United Kingdom (UK), the DCFI refused the enforcement of the English judgment (*DCFI, Case No. 574/2017 of 28 November 2017*).

X *et al.* appealed to the Dubai Court of Appeal.

ii) Dubai Court of Appeal (DCA)

Before the DCA, X *et al.* sought to establish reciprocity with the UK by submitting evidence on the procedural rules applicable in England. However, the DCA dismissed the appeal on the ground that the English court did not have

jurisdiction. The DCA started first by confirming a longstanding position of Dubai courts, according to which the foreign court's jurisdiction should be denied if it is established that the UAE courts had international jurisdiction, even when the jurisdiction of the rendering court could be justified based on its own rules; and that any agreement to the contrary should be declared null and void. Applying these principles to the case, the DCA found that Y1 and 2 were domiciled in Dubai. Therefore, since the international jurisdiction of Dubai courts was established, the DCA found that the English court lacked indirect jurisdiction (*DCA, Appeal No. 10/2018 of 27 November 2018*).

Dissatisfied with the result, X et al. appealed to the Supreme Court.

iii) Dubai Supreme Court (DSC)

Before the DSC, X *et al.* argued that English courts had jurisdiction since the contractual relationship originated in England; the case concerned contracts entered into and performed in England; the parties had agreed on the exclusive jurisdiction of English court and that it was Y1 and 2 who initially brought the action against them in England. However, the DSC, particularly insensitive to the arguments put forward by X *et al.*, reiterated its longstanding position that the rendering court's indirect jurisdiction would be denied whenever the direct jurisdiction of UAE courts could be justified on any ground admitted under UAE law (*DSC, Appeal No. 52/2019 of 18 April 2019*).

b) Second Failed Attempt

The disappointing outcome of the case did not discourage X *et al.* from trying their luck again, knowing that the enforcement regime had since been (slightly) amended. Indeed, in 2018, the applicable rules – originally found in the 1992 FCPA – were moved to the 2018 Executive Regulation No. 57 of the 1992 FCPA (as subsequently amended notably by the 2021 Cabinet Decision No. 75. Later, the enforcement rules were reintroduced in the new FCPA enacted in 2022 and entered into effect in January 2023 ["2022 FCPA"]). The new rules did not fundamentally modify the existing enforcement regime but introduced two important changes.

The first concerns the enforcement procedure. According to old rules (former Art. 235 of the 1992 FCPA), the party seeking to enforce a foreign judgment needed to bring an ordinary action before the DCFI. This procedure was replaced by a more expeditious one consisting in filing a petition for an "order on motion" to the newly created Execution Court (Art. 85(2) of the 2018 Executive Regulation, now the new Art. 222(2) of the 2022 FCPA).

The second concerns indirect jurisdiction. According to the old rules (former Art. 235 of the 1992 FCPA), the enforcement of a foreign judgment should be denied if (1) UAE courts had *international jurisdiction* over the dispute; and (2) the rendering court did not have jurisdiction according to (a) its own rules of international jurisdiction *and* (b) its rules on domestic/internal jurisdiction. Now, Art. 85(2)(a) of the 2018 Executive Regulation (new Art. 222(2)(a) of the 2022 FCPA) explicitly provides that the enforcement of the foreign judgment will be refused if the UAE courts have "exclusive" jurisdiction.

Based on these new rules, X *et al.* applied in 2022 to the Execution Court for an order to enforce the English judgment, but the application was rejected. X *et al.* appealed before the DCA. However, unexpectedly, the DCA ruled in their favour and declared the English judgment enforceable. Eventually, Y1 and 2 appealed to DSC. They argued, *inter alia*, that X *et al.* had already brought an enforcement action that was dismissed by a judgment that is no longer subject to any form of appeal. The DSC agreed. It considered that X *et al.* had already brought the same action against the same parties and having the same object and that the said action was dismissed by an irrevocable judgment. Therefore, X *et al.* should be prevented from bringing a new action, the purpose of which was the re-examination of what had already been decided (*DSC, Appeal No. 419/2023 of 17 May 2023*).

Comments

1) The case is interesting in many regards. *First,* it demonstrates the difficulty of enforcing foreign judgments in the UAE in general and Dubai in particular. Indeed, UAE courts (notably Dubai courts) have often refused to enforce foreign judgments, in particular those rendered in non-treaty jurisdictions, based on the following grounds:

i) Reciprocity (see, e.g., *DSC, Appeal No. 269/2005 of 26 February 2006* [English judgment]; *DSC, Appeal No. 92/2015 of 9 July 2015* [Dutch judgment (custody)]; *DSC, Appeal No. 279/2015 of 25 February 2016* [English judgment (dissolution of marriage)]; *DSC, Appeal No. 517/2015 of 28 August 2016* [US. Californian judgment]);

ii) Indirect jurisdiction (see, e.g., *DSC, Appeal No. 114/1993 of 26 September 1993* [Hong Kong judgment]; *DSC, Appeal No. 240/2017 of 27 July 2017* [Congo judgment]); and

iii) Public policy, especially in the field of family law, and usually based on the incompatibility of the foreign judgment with Sharia principles (see, e.g., *DSC, Appeal No. 131/2020 of 13 August 2020* [English judgment ordering the distribution of matrimonial property based on the principle of community of property]. See also, *Federal Supreme Court, Appeal No. 193/24 of 10 April 2004* [English judgment conferring the custody of a Muslim child to a non-Muslim mother]; *Abu Dhabi Supreme Court, Appeal No. 764/2011 of 14 December 2011* [English judgment order the payment of life maintenance after divorce]). Outside the field of family law, the issue of public policy was raised in particular with respect to the consistency of interests with Sharia principles, especially in the context of arbitration (see, e.g*., DSC, Appeal No. 132/2012 of 18 September 2012* finding that compound and simple interests awarded by an LCIA arbitral award did not violate Sharia. But, *c.f. Federal Supreme Court, Appeal No. 57/24 of 21 March 2006*, allowing the payment of simple interests only, but not compound interests.).

Second, the case shows that the enforcement process in the UAE, in general, and in Dubai, in particular, is challenging, and the outcome is unpredictable. This can be confirmed by comparing this case with some other similar cases. For example, in one case, the party seeking enforcement (hereinafter "X") unsuccessfully sought the enforcement of an American (Nevada) judgment against the judgment debtor (hereinafter "Y"). The DCFI first refused to enforce the American judgment for lack of jurisdiction (Y's domicile was in Dubai). The decision was confirmed on appeal, but on the ground that X failed to establish reciprocity. Instead of appealing to the DSC, X decided to bring a new action on the merits based on the foreign judgment. The lower courts (DCFI and DCA) dismissed the action on the

ground that it was, in fact, an action for the enforcement of a foreign judgment that had already been rejected by an irrevocable judgment. However, DSC quashed the appealed decision with remand, considering that the object of the two actions was different. Insisting on its position, the DCA (as a court of remand) dismissed the action again. However, on a second appeal, the DSC overturned the contested decision, holding that the foreign judgment was sufficient proof of the existence of Y's debt. The DSC finally ordered Y to pay the full amount indicated in the foreign judgment with interests (*DSC, Appeal No. 125/2017 of 27 April 2017*).

However, such an approach is not always easy to pursue, as another case concerning the enforcement of a Singaporean judgment clearly shows. In this case, X (judgment creditor) applied for an enforcement order of a Singaporean judgment. The judgment was rendered in X's favour in a counterclaim to an action brought in Singapore by Y (the judgment debtor). The Execution Court, however, refused to issue the enforcement order on the ground that there was no treaty between Singapore and the UAE. Instead of filing an appeal, X brought a new action on the merits before the DCFI, using the Singaporean judgment as evidence. Not without surprise, DCFI dismissed the action accepting Y's argument that the case had already been decided by a competent court in Singapore and, therefore, the foreign judgment was conclusive (*DCFI, Case No. 968/2020 of 7 April 2021*). Steadfastly determined to obtain satisfaction, X filed a new petition to enforce the Singaporean judgment before the Execution Court, which – this time – was accepted and later upheld on appeal. Y decided to appeal to the DSC. Before the DSC, Y changed strategy and argued that the enforcement of the Singaporean judgment should be refused on the ground that the rendering foreign court lacked jurisdiction! According to Y, Dubai courts had "exclusive" jurisdiction over the subject matter of X's counterclaim because its domicile (place of business) was in Dubai. However, the DSC rejected this argument and ruled in favour of the enforcement of the Singaporean judgment (*DSC, Appeal No. 415/2021 of 30 December 2021*).

2) From a different perspective, one would wonder whether the recent developments observed in the UAE could alleviate the rigor of the existing practice. These developments concern, in particular, (i) the standard based on which the jurisdiction of the foreign should be examined and (ii) reciprocity.

(i) Regarding the jurisdiction of the foreign court, the new article 222(2)(a) of the 2022 FCPA (which reproduces the formulation of article 85(2)(a) of the 2018 Executive Regulation introduced in 2018) explicitly states that foreign judgments should be refused enforcement if UAE courts "have *exclusive* jurisdiction over the dispute in which the foreign judgment was rendered" (emphasis added). The new wording suggests that the foreign court's indirect jurisdiction would be denied only if UAE courts claim "exclusive" jurisdiction over the dispute. Whether this change would have any impact on the enforcement practice remains to be seen. But one can be quite sceptical since, traditionally, UAE law ignores the distinction between "exclusive" and "concurrent" jurisdiction. In addition, UAE courts have traditionally considered the jurisdiction conferred to them as "mandatory", thus rendering virtually all grounds of international jurisdiction "exclusive" in nature. (See, e.g., the decision of the *Abu Dhabi Supreme Court, Appeal No. 71/2019 of 15 April 2019,* in which the Court interpreted the word "exclusive" in a traditional fashion and rejected the recognition of a foreign judgment despite the fact that the rendering court's jurisdiction was justified based on the treaty applicable to the case. But see *contra. DCFI, Case No. 968/2020 of 7 April 2021 op. cit*. which announces that a change can be expected in the future).

(ii) Regarding reciprocity, it has been widely reported that on 13 September 2022, the UAE Ministry of Justice (MOJ) sent a letter to Dubai Courts (i.e. the department responsible for the judiciary in the Emirate of Dubai) concerning the application of the reciprocity rule. According to this letter, the MOJ considered that reciprocity with the UK could be admitted since English courts had accepted to enforce UAE judgments (*de facto* reciprocity). Although this letter – which lacks legal force – has been widely hailed as announcing a turning point for the enforcement of foreign judgments in general and English judgments in particular, its practical values remain to be seen. Indeed, one should not lose sight that, according to the traditional position of Dubai courts, reciprocity can be established if the party seeking enforcement shows that the rendering State's enforcement rules are identical to those found in the UAE or less restrictive (see *DSC, Appeal No. 517/2015 of 28 August 2016, op. cit.*). For this, the party seeking enforcement needs to prove the content of the rendering Stat's law on the enforcement of foreign judgments so that the court can compare the enforcement requirement in the state of origin and in the UAE. Dubai courts usually require the submission of a complete copy of the foreign provisions applicable in the State of origin duly certified and authenticated. The submission of expert opinions (e.g.,

King's Counsel opinion) or other documents showing that the enforcement of UAE judgments is possible was considered insufficient to establish reciprocity (see *DSC, Appeal No. 269/2005 of 26 February 2006, op. cit.*). The fact that the courts of the rendering State accepted to enforce a UAE judgment does not seem to be relevant as the courts usually do not mention it as a possible way to establish reciprocity. Future developments will show whether Dubai courts will admit *de facto* reciprocity and under which conditions.

Finally, the complexity of the enforcement of foreign judgments in Dubai has led to the emergence of an original practice whereby foreign judgment holders are tempted to commence enforcement proceedings before the DIFC (Dubai International Financial Center) courts (AKA Dubai offshore courts) and then proceed with the execution of that judgment in Dubai (AKA onshore courts). However, this is a different aspect of the problem of enforcing foreign judgments in Dubai, which needs to be addressed in a separate post or paper. (On this issue, see, e.g., Harris Bor, "Conduit Enforcement", in Rupert Reed & Tom Montagu-Smith, *DIFC Courts Practice* (Edward Elgar, 2020), pp. 30 ff; Joseph Chedrawe, "Enforcing Foreign Judgments in the UAE: The Uncertain Future of the DIFC Courts as a Conduit Jurisdiction", *Dispute Resolution International*, Vol. 11(2), 2017, pp. 133 ff.)

Recent Article from Uniform Law Review

Just late yesterday, *Uniform Law Review* published an interesting article that is of significance and relevance to comparative law and conflict of laws. It is titled EE Clotilde, "The reception of OHADA Law in anglophone Cameroon: appraisals and proposals" The abstract reads as follows:

This article assesses the extent to which the law under the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) has been received in

anglophone Cameroon after 26 years of existence, with specific focus on the Fako judicial division.[1] With regard to the tenets of qualitative research, it is observed that, from the viewpoint of the legal reception technique, it is indisputable that OHADA law has been infused into the English-speaking legal system in Cameroon through legal techniques of transposition. Through the use of interviews and questionnaires as our research tools, it is revealed that this reception remains limited because most judicial actors still find it difficult to implement legislation that they have not yet mastered. Linguistic issues and the difficulties faced in accessing the Common Court of Justice and Arbitration based in Ivory Coast in Abidjan on OHADA-related matters are serious obstacles to its effective implementation. This situation has been worsened by the poor articulation of clichés that tend to radically oppose OHADA law compared to common law principles. This article tries to deconstruct the ideas received as it shows some of the similarities in the substantive law under the two systems and consequently advocates on this basis the idea that efforts be made to familiarize common law jurists with the content of OHADA law. The article recommends that linguistic issues be tackled by OHADA lawmakers right from the stage of legal drafting by using drafting techniques that will reduce the feeling that the common law is being neglected. For uniform acts yet to be translated, the translation process should associate experts in comparative law to enable the use of appropriate legal language in translation from French into English. Only such efforts will entice the common law African countries that are still hesitating to join OHADA law and, by so doing, will render investment in Africa more attractive.

Hague Academy: Centenary Celebrations on 24-26 May 2023

Today the Hague Academy of International Law begins its celebrations to mark its centenary.

As indicated on its website: "Tirelessly since 1923, the Academy works, in The Hague, rightly named the International City of Peace and Justice, on "the teaching, study, dissemination and wider appreciation of international law", to take the words of the United Nations General Assembly. After 100 years, it is time to make a short pause, at the occasion of a Solemn Sitting on 24 May, and look at what has been, what is, and also what, beyond the Centenary, must be accomplished by the Academy."

There are two main events organised:

On Wednesday 24 May a solemn sitting will take place, the agenda is available here.

On Thursday 25 May and Friday 26 May a colloquium will be held, the agenda is available here. Some of the interesting sessions in our area are "public interest in international law", "public interest in litigation", "humanization of private international law" and "the law applicable to international arbitration".

Both events will be streamed online but only accessible to registered participants.

We (and I am sure all of its alumni) rejoice with the Hague Academy in

celebrating this important milestone.

To Stamp or Not to Stamp: Critiquing the Indian Supreme Court's Judgement in N.N Global

Written by Akanksha Oak and Shubh Jaiswal, undergraduate law students at Jindal Global Law School, India.

A Constitution Bench of the Indian Supreme Court in *N.N Global* recently adjudicated the contentious issue of whether arbitration clauses in contracts that were not registered and stamped would be valid and enforceable. As two co-ordinate benches of the Supreme Court had passed conflicting opinions on this point of law, the matter was referred to a Constitution bench—who answered the question in the negative, by a 3:2 majority.

The majority posited that an insufficiently stamped arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996 (hereinafter "ACA") could not be acted upon in view of Section 35 of the Stamp Act unless following impounding and paying requisite duty. Furthermore, the bench held that the Court was bound to examine the agreement at Section 11 (appointment of arbitrators) stage itself and was duty bound to impound the agreement—if found to be unstamped.

In doing so, the Apex Court reiterated the principle cited in *SMS Tea Estates* and *Garware Wall ropes* and overturned the decision of the full bench of the same court in the 2021 *N.N Global* case. In this regard, the authors intend to critique this decision of the Constitution bench on three primary grounds-

1. **Limited review under Section 11**

The Court observed that the issue of stamping had to be looked at the very threshold, by the courts in the exercise of Section 11(6A) of the ACA, when the consideration with respect to the appointment of an arbitrator is undertaken. To that effect, it is argued that Section 11 (6A) merely allows the court to examine the "*existence of an arbitration agreement*" while dealing with the appointment of arbitrators. In fact, in *Pravin Electricals*, the court had held that the scope of review under Section 11 (6A) was confined to scrutinizing whether the contractual essentials had been fulfilled and whether the requisites under Section 7 of the ACA (which lays down the necessary particulars of arbitration agreements) had been satisfied. It is imperative to note that Section 7 does not include stamping as a necessary particular of an arbitration agreement. Moreover, in *Sanjiv Prakash,* the court had observed that Section 11 (6A) only permitted a *prima facie* review for the existence of an agreement, and a more detailed review could only be carried out by the arbitral tribunal.

Thus, it is contended that at the Section 11 stage, if the court feels that a deeper consideration is required, it must appoint an arbitral tribunal and refer the matter for their adjudication. This is in line with the cardinal principle of *Kompetenz-Kompetenz* (which allows the tribunal to decide over its own jurisdiction) that is found in Section 16 (1) of the ACA. This provision permits the tribunal to make rulings on objections with respect to the "*existence and validity*" of the arbitration agreement, thereby allowing the arbitrator to make considerations with respect to the stamping of the document. These words have been adopted from Article 16 (1) of the UNCITRAL Model Law on International arbitration, in order to ensure that the Indian Act is in conformity with international standards and practices. In fact, most international arbitration institutions like LCIA, SIAC and HKIAC also use similar terminology to encapsulate the principle of *Kompetenz-Kompetenz,* thus showcasing that such extraneous factors are always left to the tribunal's discretion globally.

Accordingly, leaving the consideration of stamping to the arbitral tribunal is the only way to harmonize Sections 11 and 16 and ensure that the purpose of Section 16 is not defeated. Such an interpretation would cement India's position as a pro-arbitration country and ensure that international parties are not deterred from choosing India as the seat of their arbitration. The court's judgement in *NN Global* dilutes the *Kompetenz- Kompetenz* principle, consequently hampering

India's position as a choice of seat for arbitrations between Indian parties or between Indian and International parties (as Section 11, by virtue of being part of Part I of the ACA, is applicable to international arbitrations seated in India).

1. **Grounds for invalidation of the arbitration agreement**

Internationally, there are two grounds on which the arbitration agreement is invalidated, namely, if the arbitration agreement is "*inoperative and incapable*" or if it is "*null and void*". The words "*inoperative or incapable*" of being performed, which are enshrined in Section 45 of the ACA, have been mirrored from Article II (3) of the New York Convention. Redfern and Hunter on International Arbitration define these terms to describe situations in which the arbitration agreement is no longer in effect, such as when it has been revoked by the parties or when the arbitration cannot be set in motion. The latter may be a possibility if the arbitration clause is ambiguously worded or if the other provisions of the contract conflict with the parties' intention to arbitrate.

The other ground where an arbitration agreement becomes invalidated is if it is "*null and void*". Albert Jan Van Dan Berg, in an article, states that the terms "*null and void*" can be defined when referring to situations in which the arbitration agreement is affected by some invalidity from the start, such as lack of consent owing to misrepresentation, duress, fraud or undue influence. An insufficiently stamped arbitration agreement does not fall under the ambit of either of these grounds as being a curable defect; non-stamping would not render the instrument null and void. Thus, it can be inferred that the Indian courts have developed a new ground for invalidation of the arbitration agreement, which is not recognised internationally.

In fact, this new ground also violates Article 5 of the UNCITRAL Model law, which has been interpreted to prohibit domestic courts from adding any extra grounds for invalidation—grounds that are not mentioned in the model law.

The implications of this judgement could hamper India's position as an unfavourable seat for International Commercial Arbitration since this new caveat is not arbitration-friendly and could invalidate an agreement if a technical procedure such as stamping is not followed.

1. **Technical advancements**

This Court cannot be oblivious to electronic improvements given that commercial transactions are moving beyond pen-and-paper agreements. The ACA's definition of arbitration agreements was amended in 2015 to recognise electronic communication, bringing the procedure in line with Article 7 of the UNCITRAL Model law, which was revised in 2006. Dr. Peter Binder in International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions notes that "*The wording in exchange of letters, telex, telegrams or other means of telecommunication indicates Model law's flexibility towards future means of communication by being geared solely at the record of the agreement rather than the strict direct signature of the agreement*." It expanded the form of the arbitration agreement to align with international contract conventions and practices. In the present times, a valid arbitration agreement includes communications via letters, telexes, telegrams, or other forms of communication, including electronic channels. From the foregoing, it follows logically that traditional laws cannot deem these new types of agreements unenforceable merely because of insufficient stamping. However, the court in *N.N Global* has failed to clarify the same, thereby rendering the validity of such agreements questionable.

In conclusion, the authors posit that it is imperative to note that the Indian ACA is based on the doctrine of *autonomie de la volonté* ("autonomy of the will"), enshrined in the policy objectives of the UNCITRAL. Accordingly, it is improper and undesirable for the courts to add a number of extra formalities that are not envisaged by the legislation. The courts' goal should be to achieve the legislative intention, and not to act as a barrier between parties and their aim of seeking an efficient, effective, and potentially cheap resolution of their dispute.

Second Issue of Lloyd's Maritime and Commercial Law Quaterly for

2023

The second issue of Lloyd's Maritime and Commercial Law Quarterly for 2023 was published today. It contains the following private international law articles, case notes, and book reviews:

PS Davies & D Foxton, "A View from Westbridge – Arbitrability in the Singapore Court of Appeal"

H Sanderson, "The Divine Comity"

P MacMahon, "Conditional Agreements and Arbitration Law's Seperability Principle"

A CY Chan & K KC Tse, "The Tort Gateway: The Missing Jigsaw Piece?"

L Zhao & Z Jing, "Conflict of Jurisdiction between the UK and China and Enforcement of Arbitral awards and Judgments"

A Briggs, Book Review of "The UNCITRAL Model Law on International Commercial Arbitration: A Commentary" by Gilles Cuniberti

A Briggs, Book Review of "Freezing Injunctions in Private International Law" by F Šaranovi?

Dutch Journal of PIL (NIPR) –

issue 2023/1

The latest issue of the Dutch Journal on Private International Law (NIPR) has been published.

NIPR 2023 issue 1

Editorial

M.H. ten Wolde / p. 1-2

A.V.M. Struycken, Arbitrages in Nederland waarop de Nederlandse rechter geen toezicht kan houden / p. 3-8

Abstract
The Code of Civil Procedure contains a chapter on arbitration. Procedures and awards rendered in the Netherlands are subject to a certain degree of scrutiny by the civil courts. This authority, however, does not extend to arbitration on litigation between private enterprises and a foreign State.
This exception applies to such awards rendered at the Peace Palace under the flag of the Permanent Court of Arbitration. This also applies to awards, if rendered in the Netherlands, based on investment treaties like the Washington Convention of 18 March 1965 which created the International Center for the Settlement of Investment Disputes (ICSID). It was correctly recognized by the Act of 1 November 1980 providing for a special rule.

A 1983 proposal to declare that awards rendered by the Iran-US Tribunal situated in The Hague are Dutch awards was not successful. The proposal was only retracted in 2000.
The Comprehensive Economic and Trade Agreement (CETA) 2016, between the EU and its Member States, on the one side, and Canada, on the other, which was approved for ratification by the Netherlands in July 2022, provides for arbitration in its Articles 27 and 28, within the framework of its investment court system. The recognition and execution of its awards in the Netherlands must still be implemented.
In arbitration based on investment treaties an issue of public international law is involved. This is ignored in Dutch caselaw, however.

N. Touw & I. Tzankova, Parallel actions in cross-border mass claims in the EU: a (comparative) lawyer's paradise? / p. 9-30

Abstract
In the context of cross-border mass harms, collective redress mechanisms aim to offer (better) access to justice for affected parties and to facilitate procedural economy. Even when national collective redress mechanisms seek to group cases together, it is likely that cross-border parallel actions will still be filed. Parallel actions risk producing irreconcilable judgments with conflicting or inconsistent outcomes and the rules of European private international law aim to reduce this risk. This contribution argues that the rules on parallel actions currently run the risk of not achieving their objective in the context of mass claims and collective redress. Given their lack of harmonization, when collective redress mechanisms with different levels of representation are used, the application of the rules on parallel actions can cause procedural chaos. In addition, judges have a great deal of discretion in applying the rules on parallel actions, whilst there is a lack of guidance on how they should use this discretion and what criteria to apply. They may be unaware of the effects on the access to justice of their decisions to stay or proceed with a parallel collective action. This contribution argues that there should be more awareness about the interaction (and sometimes perhaps even a clash) between the goals of private international law and of collective redress and of how access to justice can come under pressure in the cross-border context when the traditional rules on parallel actions are applied. A stronger focus on the training and education of judges and lawyers in comparative collective redress could be a way forward.

N. Mouttotos, Consent in dispute resolution agreements: The Pechstein case law and the effort to protect weaker parties / p. 31-50

Abstract
The unending Pechstein saga involving the German speed skater and Olympic champion Claudia Pechstein and the International Skating Union has acquired a new interesting turn with the decision of the German Federal Constitutional Court. Among the various interesting questions raised, the issue of party autonomy, especially in instances of inequality in bargaining power, and the resulting compelled consent in dispute resolution agreements is of great relevance for private international law purposes. This article deals with the part of the judgment that focuses on the consensual foundation that underpins arbitration in the sporting context, providing a systematic examination with other areas of the law where other forms of regulation have emerged to remedy the potential lack of consent. This is particularly the case when it involves parties who are regarded as having weaker bargaining power compared to their counterparty. In such cases, procedural requirements have been incorporated in order to ensure the protection of weaker parties. The legal analysis focuses on European private international law, also merging the discussion with substantive contract law and efforts to protect weaker parties by way of providing information. This last aspect is discussed as a remedy to the non-consensual foundation of arbitration in the sporting context.

CASE NOTES

A. Attaibi & M.A.G. Bosman, Forumkeuzebeding in algemene voorwaarden: de 'hyperlink-jurisdictieclausule' nader bezien. HvJ EU 24 november 2022, ECLI:EU:C:2022:923, NIPR 2022-549 (Tilman/Unilever) / p. 51-58

Abstract
Tilman v. Unilever concerns the validity of a jurisdiction clause included in the general terms and conditions contained on a website, in case the general terms and conditions are referenced via a hyperlink in a written B2B contract. The CJEU held that such a jurisdiction clause is valid, provided that the formal requirements of Article 23 Lugano Convention 2007, that ensure the counterparty's consent to the clause, are met. In this annotation the authors discuss and comment on the CJEU judgment, also in the broader context of earlier CJEU judgments on

jurisdiction clauses contained in general terms and conditions.

K.J. Saarloos, Arbitrage en de effectiviteit van de EEX-Verordening naar aanleiding van de schipbreuk van de Prestige in 2002. Hof van Justitie EU 20 juni 2022, zaak C-700/20, ECLI:EU:C:2022:488, NIPR 2022-544 (London Steam-Ship Owners' Mutual Insurance Association Ltd/Spanje) / p. 59-74

Abstract
The CJEU's ruling in the Prestige case confirms the rule from the J/H Limited case (2022) that a judgment by a court of a Member State is a judgment within the meaning of Article 2 of the EEX Regulation if the judgment is or could have been the result of adversarial proceedings. The content of the judgment is not relevant for the definition. Judgments recognising judgments by arbitrators or the courts of third countries are therefore judgments within the meaning of the EEX Regulation. The question of the definition of the term judgment must be distinguished from the material scope of the EEX Regulation. A judgment recognising an arbitral award is not covered by the EEX Regulation's rules on recognition and enforcement; however, such a judgment may be relevant for the application of the rule that the recognition of the judgment of a court of a Member State may be refused if the judgment is irreconcilable with a judgment given in the Member State addressed.
The ruling in the Prestige case also makes it clear that a judgment by a Member State court on arbitration cannot impair the effectiveness of the EEX Regulation. If it does, that judgment cannot be opposed to the recognition of an incompatible judgment from the other Member State. The CJEU thus formulates an exception to the rule that a judgment from a Member State may not be recognised if the judgment is irreconcilable with a judgment in the Member State addressed: that ground for refusal is not applied if the irreconcilable judgment in the requested Member State violates certain rules in the EEX Regulation. The ruling raises questions both in terms of substantiation and implications for the future. It is not convincing to limit a statutory limitation on the effectiveness of the EEX Regulation by invoking the same effectiveness. Moreover, the ruling creates tension with the rule that the New York Convention takes precedence over the EEX Regulation.

Chinese Journal of Transnational Law Special Issue Call for Papers

The appeal of alternative dispute resolution (ADR) mechanisms is on the rise and so is also the pull to prevent international disputes from arising altogether. In the area of cross-border commercial and investment disputes, the renewed interest in the interface between dispute prevention and alternative dispute resolution springs from a growing awareness of the need to overcome the shortcomings of arbitration. This is shown by the recent setting up of a series of new 'global labs' in international commercial resolution provided with new diversified and integrated commercial dispute resolution mechanisms linking 'mediation, arbitration and litigation' in recent years. Equally indicative of this trend is the entering into force of the UN Convention on International Settlement Agreements Resulting from Mediation (The Singapore Convention) in September 2020 and that 'dispute prevention and mitigation' has become one of the most dynamic focal points for UNCITRAL Working Group III mandated with examining the reform of investor-state dispute settlement.

However, the contemporary move towards devising more effective preventive 'cooling off' mechanisms, increasing the transnational appeal of mediation and, when feasible, sidestepping altogether the need to resort to third-party judicialized processes is not unique to international commercial and investor-state dispute resolution. At a time of backlash against international courts and tribunals, prevention and alternative dispute settlement mechanisms are gaining momentum across both established and emerging areas of public, private and economic international law.

Against this background, the inaugural issue of the Chinese Journal of Transnational Law to be published in 2024 invites submissions that engage critically with the on-going transformation of the transnational dispute settlement system in an increasingly multipolar international legal order in which a paradigm shift away from the Western-model of international adversarial legalism and towards de facto de-judicialization is arguably gaining hold.

Topics on which the contributions could focus on include, but are not limited to:
*Transnational Dispute Prevention and Settlement in international trade law
*Transnational Dispute Prevention and Settlement in emerging areas: cyberspace, outerspace etc.
* Transnational Dispute Prevention and Settlement in international environmental law
* Transnational Dispute Prevention and Settlement in international commercial disputes
*Transnational Dispute Prevention and Settlement in Investor-State dispute settlement
*Transnational Inter-State Dispute Prevention and Settlement in inter-state disputes under general public international law

Contributors may choose between: Research articles (up to 11,000 words inclusive of footnotes) or short articles (up to 6,000s inclusive of footnotes). Those interested, please submit your contribution before 31 Aug 2023 through the journal homepage.