Venezuela: Negative choice and UNIDROIT Principles in determining Law applicable to bill of exchange

by Claudia Madrid Martínez

On 17 March 2023, the Civil Chamber of the Supreme Court of Justice issued a decision whereby it annulled a judgment on appeal and decided the merits of the case, which concerned a bill of exchange issued in Curaçao, binding Venezuelan citizens domiciled in Venezuela.

The interesting thing about this judgment is that the Civil Chamber set aside the reasoning of the court of appeals according to which, since there are no international treaties in force between Venezuela and Curaçao, and there are no rules on bills of exchange in the Venezuelan Act on Private International Law, the Inter-American Convention on Conflicts of Laws concerning Bills of Exchange, Promissory Notes and Invoices should be applied by analogy and, consequently, "the Law of the place where the obligation was contracted" (art. 1), i.e., the Law of Curaçao, should be applied to the bill of exchange.

It should be noted that, on the one hand, the only Conventions in force for Venezuela regarding bills of exchange are the Inter-American Convention on Conflicts of Laws regarding Bills of Exchange, Promissory Notes and Invoices, and the Bustamante Code. On the other hand, the Act on Private International Law does not establish rules on International Commercial Law, since —as stated in the Explanatory Memorandum— this matter must be developed within the Commercial Law itself in accordance with the general principles set forth in the Act on Private International Law.

In addition, Article 1 of the Act on Private International Law provides two tools to integrate the gaps in the Act and, in general, the gaps in the Venezuelan Private International Law system. This rule refers to analogy and to the generally

accepted principles of Private International Law.

In the past, case law has admitted the application of treaties in force for Venezuela, but not for the other States involved in a specific case, either by analogy (Supreme Court of Justice, Political Administrative Chamber, judgment of 23 February 1981), or on the understanding that their solutions can be characterized as generally accepted principles of Private International Law (Second Court of First Instance in Commercial Matters of the Federal District and Miranda State, judgments of 29 February 1968 and 12 March 1970). Therefore, in this case, the arguments used by the court of appeal in analogically applying the Inter-American Convention were not erroneous.

The Civil Cassation Chamber, however, had another idea when it understood that the judge of appeal erred in the application of the Law of Curaçao to settle the case. Thus, the Chamber began by reaffirming the existence of "relevant foreign elements, such as the place of issuance of the bill of exchange, i.e., Curaçao, and the domicile of the parties involved in Venezuela". The latter criterion, in fact, is not a foreign element, since it is located in the forum.

The Chamber then cites Article 1 of the Act on Private International Law, and concludes that there are no treaties in force, applicable to the case since Curaçao has not ratified any of the aforementioned treaties, and proceeds to the application of the domestic rules of Private International Law.

In particular, the Civil Chamber intends to determine, in the first place, the Law applicable to the form of the bill of exchange, which is why it resorts, rightly, to Article 37 of the Act on Private International Law, a rule that governs the form of all kinds of legal acts, which is perfectly applicable to bills of exchange, and also, as is well known, it establishes the *locus regit actum* principle in an alternative manner. Indeed, the rule allows the judge to choose between the Law of the place of conclusion of the act, which governs the substance of the act, and the Law of the domicile of the person doing the act, or of the common domicile of the persons doing the act.

Under Article 37, the choice of the connecting factor applicable to the specific case will depend on the *favor validitatis*principle, i.e., the judge must determine the Law applicable in order to favor the formal validity of the act. In this case, the Civil Chamber decided to apply the domicile criterion, without explaining why,

although, basically, the reason can be intuited from the fact that the judge ended up applying Venezuelan law.

The Civil Chamber then begins its examination of the Law applicable to the merits and, in this regard, "finds it pertinent to bring up the provisions of Article 30 of the Act on Private International Law", a rule that establishes the Law applicable to international contracts in cases where the parties have not chosen it. The nature of a bill of exchange can certainly be discussed, but it is not a contract.

In any case, the Civil Chamber does not justify its action, that is to say, it does not indicate the reason why a rule governing contracts should be applied to a bill of exchange. However, I do not know if this was consciously done, but it did leave out a series of points that are of great interest in the field of international contracts. Let us see.

The first thing the Chamber does is to identify, in accordance with Article 30 of the Law, the objective and subjective elements of the relationship, in order to determine with which Law the bill of exchange is more closely related and assumes for this purpose —although it does not quote it— the opinion expressed by Professor Fabiola Romero in her work "Derecho aplicable al contrato internacional" (in: Liber Amicorum, Homenaje a la Obra Científica y Académica de la profesora Tatiana B. de Maekelt, Caracas, Facultad de Ciencias Jurídicas y Políticas, UCV, Fundación Roberto Goldschmidt, 2001, Volume I, pp. 203 ss.), understanding that the subjective elements refer to the parties and the objective ones to the relationship itself.

Thus, the Civil Chamber includes in the subjective elements the nationality and domicile of the parties —all located in Venezuela—; and, within the objective elements, the place of subscription of the bill of exchange —Curaçao—, the place of payment —understanding as such the place indicated next to the name of the drawee and located in Curaçao—, and the fact that the bill is intended to be enforced and performed in Venezuela.

Then, in accordance with the last part of Article 30 of the Act on Private International Law, according to which the judge "shall also take into account the general principles of International Commercial Law recognized by international organizations", the Civil Chamber analyzes such principles. And it does so considering their so-called conflictual function, since in this case they will be

used, not to settle the merits, but to search for the Law applicable.

However, the principles sought by the Civil Chamber are contained in international treaties. Firstly, the 1980 Rome Convention on the Law Applicable to International Contracts —now absorbed by the 2008 Rome I Regulation—, which refers to the closest links, but based rather on the questioned criterion of the characteristic performance. Secondly, Article 9 of the Inter-American Convention on the Law Applicable to International Contracts, rule that inspired the solution of Article 30 of the Act on Private International Law.

After reaffirming the application of the Law with which the bill of exchange is most closely connected, the Civil Chamber refers Article 31 of the Act on Private International Law, and understands that "in the event of a dispute regarding the Law to be applied, in the case of a contract or obligation of international origin, in the absence of a choice of Law by the parties or when it is ineffective, the judge shall apply '…when appropriate…', that is, according to the specific case, the *Lex mercatoria*, which includes the usages, customs and commercial practices of general international acceptance".

This rule leads the Chamber to consider the UNIDROIT Principles and it decides to apply them on the basis of the so-called negative choice —a discussed solution in the world of arbitration—, admitted by the Preamble of the Principles. Indeed, the Principles may be applied "when the parties have not chosen any law to govern their contract".

Thus, the Civil Chamber ends up understanding that, in the absence of indication by the parties, in case of a monetary obligation, the place of performance will be "at the obligee's place of business" (art. 6.1.6[1][a]).

"Now, considering the objective and subjective elements that are directly linked to the referred bill of exchange, as well as the general principles of International Commercial Law accepted by international organizations, the customs and manners of international trade, known as *Lex mercatoria*, according to Articles 30 and 31 of the Act on Private International Law, it is concluded that the Law applicable to the performance of the bill of exchange shall be the Law of the place of performance, it is concluded that the Law applicable to resolve the merits of the case is Venezuelan Law, given that the parties are Venezuelans, their domicile is in the Bolivarian Republic of Venezuela and the commercial instrument,

although signed in Curaçao, is intended to be enforceable in the Bolivarian Republic of Venezuela. It is hereby declared".

The Civil Chamber applied Venezuelan Law to both the form and the substance of the bill of exchange. But there is more, when deciding on the merits, instead of following the solution of the UNIDROIT Principles and calculating interest according to the Law of the State of the currency of payment (art. 7.4.9), it did so instead "at the rate of five percent (5%) per annum, according to Article 456, ordinal 2° of the Venezuelan Commercial Code… for which the conversion into bolivars must be made at the rate established by the Central Bank of Venezuela for the day of payment, all this through a complementary expert opinion, in accordance with Article 249 of the Code of Civil Procedure and **not as erroneously requested by the plaintiff**, that is to say, calculated at the legal interest rates that have been fixed for each semester by the Central Bank for Curaçao and St. Martin (Centrale Bank Curaçao en Sint Maarten)" (bold in the original).

There are undoubtedly some noteworthy aspects of this decision that hopefully will be taken into account in the future in cases related to international contracting. Others, such as the characterization of a bill of exchange as a contract, the disregard of the possibility of applying international treaties by analogy or as general principles, and the calculation of interest on an international obligation, denominated in foreign currency, in accordance with Venezuelan Law, could rather be forgotten.

Translated by the author from her original post in Spanish.

Second Issue of ICLQ for 2023

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

S Camilleri, “Sense and Separability”:

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

International commercial courts for Germany?

This post is also available via the EAPIL blog.

On 25 April 2023 the German Federal Ministry of Justice *(Bundesministerium der Justiz – BMJ)* has published a bill relating to the establishment of (international) commercial courts in Germany. It sets out to strengthen the German civil justice system for (international) commercial disputes and aims to offer parties an attractive package for the conduct of civil proceedings in Germany. At the same time, it is the aim of the bill to improve Germany's position vis-à-vis recognized litigation and arbitration venues – notably London, Amsterdam, Paris and Singapore. Does this mean that foreign courts and international commercial arbitration tribunals will soon face serious competition from German courts?

English-language proceedings in all instances

Proposals to improve the settlement of international commercial disputes before German courts have been discussed for many years. In 2010, 2014, 2018 and 2021, the upper house of the German Federal Parliament *(Bundesrat)* introduced bills to strengthen German courts in (international) commercial disputes. However, while these bills met with little interest and were not even discussed in the lower house of Parliament *(Bundestag)* things look much brighter this time: The coalition agreement of the current Federal Government, in office since 2021, promises to introduce English-speaking special chambers for international commercial disputes. The now published bill of the Federal Ministry of Justice can, therefore, be seen as a first step towards realizing this promise. It heavily builds on the various draft laws of the Bundesrat including a slightly expanded version that was submitted to the Bundestag in 2022.

The bill allows the federal states *(Bundesländer)* to establish special commercial chambers at selected regional courts *(Landgerichte)* which shall, if the parties so wish, conduct the proceedings comprehensively in English. Appeals and complaints against decisions of these chambers shall be heard in English before English-language senates at the higher regional courts *(Oberlandesgerichte)*. If the value in dispute exceeds a threshold value of 1 million Euros and if the parties

so wish, these special senates may also hear cases in first instance. Finally, the Federal Supreme Court *(Bundesgerichtshof)* shall be allowed to conduct proceedings in English. Should the bill be adopted – which seems more likely than not in light of the coalition agreement – it will, thus, be possible to conduct English-language proceedings in at least two, maybe even three instances. Compared to the status quo, which limits the use of English to the oral hearing (cf. Section 185(2) of the Court Constitution Act) and the presentation of English-language documents (cf. Section 142(3) of the Code of Civil Procedure) this will be a huge step forward. Nonetheless, it seems unlikely that adoption of the bill will make Germany a much more popular forum for the settlement of international commercial disputes.

Remaining disadvantages vis-à-vis international commercial arbitration

To begin with, the bill – like previous draft laws – is still heavily focused on English as the language of the court. Admittedly, the bill – following the draft law of the Bundesrat of March 2022 – also proposes changes that go beyond the language of the proceedings. For example, the parties are to be given the opportunity to request a verbatim record of the oral proceedings. In addition, business secrets are to be better protected. However, these proposals cannot outweigh the numerous disadvantages of German courts vis-à-vis arbitration. For example, unlike in arbitration, the parties have no influence on the personal composition of the court. As a consequence, they have to live with the fact that their – international – legal dispute is decided exclusively by German (national) judges, who rarely have the degree of specialization that parties find before international arbitration courts. In addition, the digital communication and technical equipment of German courts is far behind what has been standard in arbitration for many years. And finally, one must not forget that there is no uniform legal framework for state judgments that would ensure their uncomplicated worldwide recognition and enforcement.

Weak reputation of German substantive law

However, the bill will also fail to be a resounding success because it ignores the fact that the attractiveness of German courts largely depends on the attractiveness of German law. To be sure, German courts may also apply foreign law. However, their real expertise – and thus their real competitive advantage especially vis-à-vis foreign courts – lies in the application of German law, which,

however, enjoys only a moderate reputation in (international) practice. Among the disadvantages repeatedly cited by practitioners are, on the one hand, the numerous general clauses (e.g. §§ 138, 242 of the German Civil Code), which give the courts a great deal of room for interpretation, and, on the other hand, the strict control of general terms and conditions in B2B transactions. In addition – and irrespective of the quality of its content – German law is also not particularly accessible to foreigners. Laws, decisions and literature are only occasionally available in English (or in official English translation).

Disappointing numbers in Amsterdam, Paris and Singapore

Finally, it is also a look at other countries that have set up international commercial courts in recent years that shows that the adoption of the bill will not make German courts a blockbuster. Although some of these courts are procedurally much closer to international commercial arbitration or to the internationally leading London Commercial Court, their track record is – at least so far – rather disappointing.

This applies first and foremost to the Netherlands Commercial Court (NCC), which began its work in Amsterdam in 2019 and offers much more than German courts will after the adoption and implementation of the bill: full English proceedings both in first and second instance, special rules of procedure inspired by English law on the one hand and international commercial arbitration law on the other, a court building equipped with all technical amenities, and its own internet-based communication platform. The advertising drum has also been sufficiently beaten. And yet, the NCC has not been too popular so far: in fact, only 14 judgments have been rendered in the first four years of its existence (which is significantly less than the 50 to 100 annual cases expected when the court was set up).

The situation in Paris is similar. Here, a new chamber for international commercial matters (chambre commerciale internationale) was established at the Cour d'appel in 2018, which hears cases (at least in parts) in English and which applies procedural rules that are inspired by English law and international arbitration. To be sure, the latter cannot complain about a lack of incoming cases. In fact, more than 180 cases have been brought before the new chamber since 2018. However, the majority of these proceedings are due to the objective competence of the Chamber for international arbitration, which is independent of

the intention of the parties. In contrast, it is not known in how many cases the Chamber was independently chosen by the parties. Insiders, however, assume that the numbers are “negligible” and do not exceed the single-digit range.

Finally, the Singapore International Commercial Court (SICC), which was set up in 2015 with similarly great effort and ambitions as the Netherlands Commercial Court, is equally little in demand. Since its establishment, it has been called upon only ten times by the parties themselves. In all other cases in which it has been involved, this has been at the instigation of the Singapore High Court, which can refer international cases to the SICC under certain conditions.

No leading role for German courts in the future

In the light of all this, there is little to suggest that the bill, which is rather cautious in its substance and focuses on the introduction of English as the language of proceedings, will lead to an explosion – or even only to a substantial increase – in international proceedings before German courts. While it will improve – even though only slightly – the framework conditions for the settlement of international disputes, expectations regarding the effect of the bill should not be too high.

Note: Together with Yip Man from Singapore Management University Giesela Rühl is the author of a comparative study on new specialized commercial courts and their role in cross-border litigation. Conducted under the auspices of the International Academy of Comparative Law (IACL) the study will be published with Intersentia in the course of 2023.

First Issue for Journal of Private

International Law for 2023

The first issue for the *Journal of Private International Law* for 2023 was just published today. It contains the following articles:

D McClean, “The transfer of proceedings in international family cases”

There is general agreement that jurisdiction over issues concerning children or vulnerable adults should lie with the court of their habitual residence. There are particular circumstances in which that is not wholly satisfactory and four international instruments have provided, using rather different language, the possibility of jurisdiction being transferred to a court better placed to decide the case. They include Brussels IIb applying in EU Member States since August 2022 and the Hague Child Protection Convention of growing importance in the UK. This paper examines that transfer possibility with a detailed comparison of the relevant instruments.

M Lehmann, “Incremental international law-making: The Hague Jurisdiction Project in context”

The Hague Conference on Private International Law is currently working towards a new instrument on jurisdiction and parallel proceedings. But critics ask if we need another instrument, in addition to the Hague Choice of Court Convention of 2005 and the Hague Judgments Convention of 2019. This article gives reasoned arguments for a “yes” and explores possibilities for the substantive content of the new instrument. It does so by looking back and contextualising the new instrument with regard to the two preceding Conventions, and by looking forward to what is still to come, ie the interpretation and application of all three instruments. On this basis, it argues that a holistic approach is required to avoid the risk of a piecemeal result. Only such a holistic approach will avoid contradictions between the three instruments and allow for their coherent interpretation. If this advice is heeded, incremental law-making may well become a success and perhaps even a model for future negotiations.

B Köhler, “Blaming the middleman? Refusal of relief for mediator misconduct under the Singapore Convention”

The discussion surrounding the Singapore Convention on Mediation 2018 has gathered steam. In particular, the refusal of enforcement based on mediator misconduct as prescribed in Article 5(1)(e) and (f) has been the focus of debate and is widely perceived to be the Convention’s Achilles heel. These two provisions, already highly controversial in the drafting process, have been criticised as ill-suited to a voluntary process and likely to provoke ancillary dispute. This article defends these grounds for refusal, arguing that they play an indispensable role in guaranteeing the legitimacy of mediated settlements enforced under the Convention. It addresses some of the interpretative challenges within Article 5(1)(e) and (f) before discussing the tension between the provisions on mediator misconduct and the confidentiality of the mediation. The article then offers some guidance on how parties may limit the effects of the provisions, concluding with a brief outlook for the future.

A Yekini, “The effectiveness of foreign jurisdiction clauses in Nigeria: an empirical inquiry”

Business entities do not often include terms in commercial agreements unless those terms are relevant and are designed to maximise the gains of the parties to the agreement. To realise their reasonable and legitimate expectations, they expect that contractual terms and promises would be respected by the parties and courts. There is a growing body of literature suggesting that Nigerian courts are not giving maximum effects to foreign jurisdiction clauses (FJC). What is largely missing from the scholarly contributions is that no one has worked out a principled solution to overcome this conundrum. This article significantly contributes to the existing literature through an empirical analysis of Nigerian appellate court decisions on FJCs with a view to gaining deeper insights into the attitude of Nigerian courts to FJCs. Compared to the US where the national average of enforcement is 74%, a 40% rate for Nigeria does not project Nigeria as a pro-business forum. This outlook can potentially disincentivise cross-border trade and commerce between Nigeria and the rest of the world. To address this

problem, the paper proceeds by presenting a normative framework, built principally on economic and contract theories, for enforcing FJCs. As most of the cases are B2B transactions, the paper invites the courts to treat FJCs and arbitration clauses equally and to replace forum non conveniens considerations with a more principled approach which limits non-enforcement to overriding policy, and a strong cause that is defined by reasonableness and foreseeability.

MM Kabry & A Ansari, "The enforcement of jurisdiction agreements in Iran"

Parties to a contract may designate the court or courts of a particular country to decide their disputes which have arisen or may arise from a particular legal relationship. Many countries give party autonomy its binding effect in selecting the competent court and enforcing jurisdiction agreements. There is complete silence in Iranian law regarding the enforcement of jurisdiction agreements. The current study examines the enforcement of jurisdiction agreements under Iranian law. This study investigates whether parties in international disputes can agree to confer jurisdiction to Iranian non-competent courts and whether they can agree to exclude the jurisdiction of competent Iranian courts in favour of foreign courts. The study contends that parties can agree to grant jurisdiction to Iran's non-competent courts unless the excluded foreign court has exclusive jurisdiction to hear the dispute. On the other hand, parties may agree to exclude the jurisdiction of the competent Iranian courts in favour of foreign courts unless the Iranian courts assert exclusive jurisdiction over the dispute.

A A Kostin & DD Kuraksa, "International treaties on assistance in civil matters and their applicability to recognition of foreign judgments on the opening of insolvency proceedings (reflections regarding the Russian national and international experience)"

The article examines the question of admissibility of recognition of foreign judgments on commencement of bankruptcy proceedings on the basis of international treaties on legal assistance. It examines the background of these international treaties, as well as the practice of their application in respect of this category of foreign judgments. The authors conclude that foreign court decisions on opening of insolvency (bankruptcy) proceedings should be regarded as

“judgments in civil matters” for the purpose of the international treaties on legal assistance. This category of foreign judgments should be recognised on the basis of international treaties in the Russian Federation, despite the existing approach of Russian courts (including the Judgment of the Arbitrazh (Commercial) Court of the Ural District of 09.10.2019 in case No. A60-29115/2019).

The University of Bologna Summer School on Transnational Litigation: what you should know about its 2023 edition

[This post has been prepared by Ms. Francesca Albi, J.D. Candidate | Università degli Studi di Verona]

The Summer School on Transnational Litigation has been organized since 2019 within the Ravenna Program on Cross-Border Disputes by the University of Bologna, Department of Juridical Sciences – Ravenna Campus (Italy), under the direction of Prof. Michele Angelo Lupoi.

The organization of its 2023 edition confirms the success this projects continues to enjoy among participants from all over the world, who, over the years, are contributing to build a promising network of Private International Law enthusiasts. Indeed, this project has proven to be a building-bridges catalyst to connect people with the same interests in Private International Law issues: in this sense, this multi-year Summer School actively contributes to the sharing and spread of knowledges and views, which go beyond borders in every possible sense.

In 2023, the Summer School will take place from Monday 17 to Saturday 22 July,

both in person at the Faculty of Law (Via Oberdan 1/2) in Ravenna – Italy, and online.

The title, which summarises the hot topics of the courses of this year's edition, is "*Cross-border litigation and international arbitration*". As a matter of fact, the themes dealt with will concern, on one hand, transnational litigation from a wide perspective (*i.e.*, involving climate litigation, cross-border maritime litigation, family and succession Private International Law, civil and commercial litigation), and, on the other hand, the increasingly interesting matter of international arbitration. The full schedule of classes is available and may be downloaded at https://site.unibo.it/transnational-litigation/en/program.

Participants will have the outstanding opportunity to acquire specialised knowledges on these relevant topics of growing importance directly from experts in such matters. In fact, the faculty consists of renowned scholars and legal practitioners, who will offer their experience involving diverse professional backgrounds developed in different States over the world. In detail, the lecturers in this edition are (in alphabetical order) Apostolos Anthimos, Giovanni Chiapponi, Elena D'Alessandro, David Estrin, Marco Farina, Francesca Ferrari, Chris Helmer, Albert Henke, Emma Roberts, Marco Torsello, Stefano Alberto Villata and Anna Wysocka-Bar. Their biographies and professional experience may be consulted at https://site.unibo.it/transnational-litigation/en/faculty.

Registration to the School are now open!

In order to participate, some requirements should be met: applicants must be students or graduate students of a Bachelor (three-years) or Master (five-years) Degree (or equivalent under previous systems) in Law (LMG/01), Legal Services Science (L-14), Political and International Relationships Science (L-36), International Relationships (LM52), or Political Sciences (LM62). Other candidates may also be accepted upon the presentation of the CV which should be show a connection to the topics of the Summer School. Alongside students and post-grad students, also practitioners in legal matters are invited to participate. In

this regard, it must be noticed that the Ravenna Bar Association will grant 20 formative credits to Italian lawyers who attend the Summer School.

Registration to the Summer School is possible upon the payment of a fee, whose amount is €250,00 and which does not cover expenses for the accommodation and meals (please, note that registration is considered completed only when the payment of the fee is fulfilled). Applications are open until 6 July 2023 (h 23.59 CET); it is not possible to apply beyond this deadline. The application procedure is described at https://site.unibo.it/transnational-litigation/en/fees-and-forms.

In this regard, it is worth mentioning that, in order to give to one deserving law student or law graduate, who meets specific age requirements, the opportunity to attend the Summer School online free of charge, a call for papers has been launched. It consists in the submission of an originally and previously unpublished paper on a topic concerning transnational litigation and international arbitration. A selection committee, composed by staff and faculty members of the Summer School, will evaluate the papers and will reward the author of the best one through the possibility to attend the full Summer School online without paying the ordinary registration fee. Moreover, the best three papers will be published in the Linkedin Newsletter of the Summer School on Transnational Litigation "Transnational litigation pills". Every submission is truly appreciated. Detailed information on this call for papers may be found on the website of the Summer School, especially in the section "Fees and forms".

For any question regarding the application process or logistics, the contact person is Dr. Cinzia Cortesi, Manager of Fondazione Flaminia (master@fondazioneflaminia.it; +39 0544 34345). Otherwise, in order to acquire further information on the project, courses and call for papers, it is possible to contact Prof. Michele Angelo Lupoi, Director of the Summer School (micheleangelo.lupoi@unibo.it) or Francesca Albi, Tutor (francesca.albi@unibo.it).

Further information may be found in the official website of the Summer School at https://site.unibo.it/transnational-litigation/en.

The organization team of the Summer School warmly invites everyone who meets the requirements listed above to apply for the 2023 edition courses, in order to allow as many people as possible the exciting chance to become part of a group of colleagues and friends with the common interest in Private International Law, that is larger and larger every year.

A conference to honor Professor Linda Silberman at NYU

This week a conference took place to honor Professor Linda Silberman at New York University (NYU). She is currently the Clarence D. Ashley Professor of Law Emerita at NYU. The full program is available here.

Anyone who has had the privilege of taking Linda Silberman's classes would agree with me that she is an outstanding scholar and professor. Someone who takes the art of teaching to another level, a very kind and brilliant person who truly enjoys building the legal minds of the lawyers and academics of the future. In my view, nothing in the academic world compares to taking the "international litigation" class with her. Thus, this is more than a well-deserved event.

The conference flyer indicates the following:

"When Professor Linda Silberman came to NYU in 1971, she was the *first woman* hired for the NYU Law tenure-track faculty. In 1977, she became the *first tenured female professor on the NYU Law faculty*. Although she took emerita status in September 2022, she continues as the Co-Director of the NYU Center on

Transnational Litigation, Arbitration, and Commercial Law. For over 30 years, Professor Silberman taught hundreds of first-year students Civil Procedure and she is the co-author of a leading Civil Procedure casebook that starts with her name. Throughout her career, Professor Silberman also taught Conflict of Laws and in the past twenty-five years branched out to teach Comparative Procedure, Transnational Litigation, and International Arbitration. Professor Silberman is a prolific scholar and her articles have been cited by numerous courts in the United States, including the Supreme Court, and also by foreign courts. Professor Silberman has been active in the American Law Institute as an Advisor on various ALI projects, including serving as a co-Reporter on a project on the recognition of foreign country judgments. She has also been a member of numerous U.S. State Department delegations to the Hague Conference on Private International Law. In 2021, Professor Silberman gave the general course on Private International Law at the Hague Academy of International Law."

Below I include some of the publications of Professor Silberman (an exhaustive list is available here):

Books

- Civil Procedure: Theory and Practice (Wolters Kluwer 6th ed., 2022; 5th ed., 2017; 4th ed., 2013; 3d ed., 2009; 2d ed., 2006; 1st ed., 2001) (with Allan R. Stein, Tobias Barrington Wolff and Aaron D. Simowitz)
- Recognition and Enforcement of Foreign Judgments (Edward Elgar Publishing, 2017) (ed. with Franco Ferrari)
- Civil Litigation in Comparative Context (West Academic Publishing 2d ed., 2017; 1st ed., 2007) (with Oscar G. Chase, Helen Hershkoff, John Sorabji, Rolf Stürner et al.)
- Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (American Law Institute, 2006) (with Andreas F. Lowenfeld)
- The Hague Convention on Jurisdiction and Judgments: Records of the Conference held at New York University School of Law on the Proposed Convention (Juris, 2001) (ed. with Andreas F. Lowenfeld)

Articles

- "Nonparty Jurisdiction," 55 Vand. J. Transnat'l L. 433 (2022) (with Aaron

D. Simowitz)

- "Introductory Note to Monasky v. Taglieri (U.S. Sup. Ct.)," 59 Int'l Legal Materials 873 (2020)
- "Misappropriation on a Global Scale: Extraterritoriality and Applicable Law in Transborder Trade Secrecy Cases," 8 Cybaris Intell. Prop. L. Rev. 265 (2018) (with Rochelle C. Dreyfuss)
- "Lessons for the USA from the Hague Principles," 22 Uniform L. Rev. 422 (2017)
- "The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts," 27 Duke J. Compar. & Int'l L. 405 (2017) (with Nathan D. Yaffe)
- "The US Approach to Recognition and Enforcement of Awards After Set-Asides: The Impact of the Pemex Decision," 40 Fordham Int'l L.J. 799 (2017) (with Nathan Yaffe)
- "Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?" 91 N.Y.U. L. Rev. 344 (2016)(with Aaron Simowitz)
- "The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States," 19 Lewis & Clark L. Rev. 675 (2015)
- "Limits to Party Autonomy at the Post-Award Stage," in Limits to Party Autonomy in International Commercial Arbitration (Juris 2016)(with Maxi Scherer)
- "United States Supreme Court Hague Abduction Decisions: Developing a Global Jurisprudence," 9 J. Comp. L. 49 (2014);
- "The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign County Judgments," 26th Sokol Colloquium (2014)
- "Civil Procedure Meets International Arbitration: A Tribute to Hans Smit," 23 Am Rev. Int. Arb. 439 (2012)
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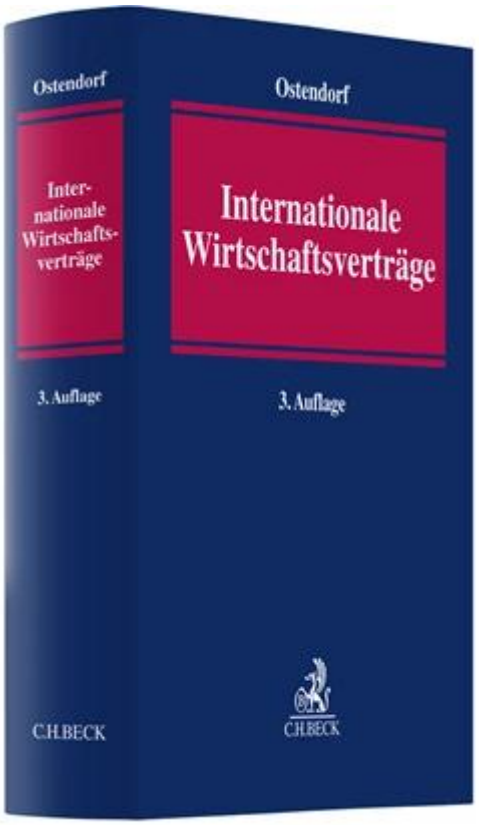
Out Now: 3rd Edition of Ostendorf, Internationale Wirtschaftsverträge



Internationale Wirtschaftsverträge edited by Patrick Ostendorf (Berlin University of Applied Sciences) but otherwise exclusively written by practitioners occupies a unique position with the German literature on international transactions. It is undeniably aimed at practitioners, featuring a great number of check lists, English sample clauses, and practical tips. Accordingly, most of the book is structured around specific elements of international contracts such as penalties (ch. 6), indemnities (ch. 7), limitations of liability (ch. 8), *force majeure* (ch. 10), choice of law (ch. 13) and so on. In addition, the book features a number of cross-cutting chapters dedicated to particular types of contracts (ch. 18–23). But despite this hands-on approach, the book's authors reflect on, and draw from, a wealth of academic material, which they condense into immediately applicable guidance.

Although coming out a mere five years after the previous edition, the third editions contains significant updates to most chapters in light of Brexit, Covid 19, Russia's attack on Ukraine, the updates to Incoterms (2020) and the ICC Arbitration Rules (2021), and some significant legislative activity in Germany and Europe, e.g. with regard to international supply chains. Of course, these rapid

developments make the book all the more useful for German lawyers navigating the high seas of international transactions.

China’s Draft Law on Foreign State Immunity Would Adopt Restrictive Theory

Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.

On the question of foreign state immunity, the world was long divided between countries that adhere to an absolute theory and those that adopted a restrictive theory. Under the absolute theory, states are absolutely immune from suit in the courts of other states. Under the restrictive theory, states are immune from suits based on their governmental acts (acta jure imperii) but not from suits based on their non-governmental acts (acta jure gestionis).

During the twentieth century, many countries adopted the restrictive theory. (Pierre-Hugues Verdier and Erik Voeten have a useful list of the dates on which countries switched on the last page of this article.) Russia and China were the most prominent holdouts. Russia joined the restrictive immunity camp in 2016 when its law on the jurisdictional immunity of foreign states went into effect. That left China. In December 2022, Chinese lawmakers published a draft law on foreign state immunity, an English translation of which has recently become available. If adopted, this law would move China to into the restrictive immunity camp as well.

China’s draft law on foreign state immunity has important implications for other states, which would now be subject to suit in China on a range of claims from which they were previously immune. The law also contains a reciprocity clause in Article 20, under which Chinese courts may decline to recognize the immunity of a foreign state if the foreign state would not recognize China’s immunity in the

same circumstances. Chinese courts could hear expropriation or terrorism claims against the United States, for example, because the U.S. Foreign Sovereign Immunities Act (FSIA) has exceptions for expropriation and terrorism.

In this post, the first of two, I look at the draft law's provisions on foreign state immunity from suit from a U.S. perspective. In the second post, I will examine the law's provisions on the immunity of a foreign state's property from attachment and execution, its provisions on service and default judgments, and its potential effect on the immunity of foreign officials.

It is clear that China's draft law has been heavily influenced by the provisions of the U.N. Convention on Jurisdictional Immunities of States and Their Property, which China signed in 2005 but has not yet ratified. But the purpose of the draft law is not simply to prepare China for ratification. Indeed, Article 21 of the law provides that when a treaty to which China is a party differs from the law, the terms of the treaty shall govern. Rather, the purpose of the law appears to be to extend the basid rules of the U.N. Convention, which is not yet in effect, to govern the immunity of *all* foreign countries when they are sued in Chinese courts, including countries like the United States that are unlikely ever to join the Convention.

China's Adherence to the Absolute Theory of Foreign State Immunity

The People's Republic of China has long taken the position that states and their property are absolutely immune from the jurisdiction of the courts of other states. The question rose to the level of diplomatic relations in the early 1980s. China was sued in federal court for nonpayment of bonds issued by the Imperial Government of China in 1911, did not appear to defend, and suffered a default judgment. After much back and forth, the State Department convinced China to appear and filed a statement of interest asking the district court to set aside the judgment and consider China's defenses. "The PRC has regarded the absolute principle of immunity as a fundamental aspect of its sovereignty, and has forthrightly maintained its position that it is absolutely immune from the jurisdiction of foreign courts unless it consents to that jurisdiction," the State Department noted. "China's steadfast adherence to the absolute principle of immunity results, in part, from its adverse experience with extraterritorial laws

and jurisdiction of western powers." In the end, the district court set aside the default, held that the FSIA did not apply retroactively to this case, and held that China was immune from suit. The Eleventh Circuit subsequently affirmed.

In 2005, China signed the U.N. Convention on Jurisdictional Immunities of States and Their Property. The Convention (available in each of the U.N.'s official languages here) adopts the restrictive theory, providing exceptions to foreign state immunity for commercial activities, territorial torts, etc. Although China has not ratified the Convention and the Convention has not yet entered into force—entry into force requires 30 ratifications, and there have been only 23 so far—China's signature seemed to signal a shift in position.

The question arose again in *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (2011), in which the Hong Kong Court of Final Appeal had to decide whether to follow China's position on foreign state immunity. During the litigation, China's Ministry of Foreign Affairs wrote several letters to the Hong Kong courts setting forth its position, which the Court of Final Appeal quoted in its judgment. In 2008, the Ministry stated:

> *The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent.*

In 2009, the Ministry wrote a second letter explaining its signing of the U.N. Convention. The diverging practices of states on foreign state immunity adversely affected international relations, it said, and China had signed the Convention "to

express China's support of the … coordination efforts made by the international community." But the Ministry noted that China had not ratified the Convention, which had also not entered into force. "Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues." "After signature of the Convention, the position of China in maintaining absolute immunity has not been changed," the Ministry continued, "and has never applied or recognized the so-called principle or theory of 'restrictive immunity.'"

The Draft Law on Foreign State Immunity

China's draft law on foreign state immunity would fundamentally change China's position, bringing China into alignment with other nations that have adopted the restrictive theory. The draft law begins, as most such laws do, with a presumption that foreign states and their property are immune from the jurisdiction of Chinese courts. Article 3 states: "Unless otherwise provided for by this law, foreign states and their property shall be immune from the jurisdiction of the courts of the People's Republic of China."

Article 2 defines "foreign state" to include "sovereign states other than the People's Republic of China," "institutions or components of … sovereign states," and "natural persons, legal persons and unincorporated organisations authorised by … sovereign states … to exercise sovereign powers on their behalf and carry out activities based on such authorization." Article 18(1) provides that Chinese courts will accept the Ministry of Foreign Affairs' determination of whether a state constitutes a sovereign state for these purposes.

These provisions of the draft law generally track Article 2(1)(b) of the U.N. Convention, which similarly defines "State" to include a state's "organs of government," "agencies or instrumentalities" exercising "sovereign authority," and "representatives of the State acting in that capacity." The draft law differs somewhat from the U.S. FSIA, which determines whether a corporation is an "agency or instrumentality" of a foreign state based on ownership and which does not apply to natural persons.

Exceptions to Immunity from Suit

Waiver Exception

China's draft law provides that a foreign state may waive its immunity from suit expressly or by implication. Article 4 states: "Where a foreign state expressly submits to the jurisdiction of the courts of the People's Republic of China in respect of a particular matter or case in any following manner, that foreign state shall not be immune." A foreign state may expressly waive its immunity by treaty, contract, written submission, or other means.

Article 5 provides that a foreign state "shall be deemed to have submitted to the jurisdiction of the courts of the People's Republic of China" if it files suit as a plaintiff, participates as a defendant "and makes a defence or submits a counterclaim on the substantive issues of the case," or participates as third party in Chinese courts. Article 5 further provides that a foreign state that participates as a plaintiff or third party shall be deemed to have waived its immunity to counterclaims arising out of the same legal relationship or facts. But Article 6 provides that a foreign state shall *not* be deemed to have submitted to jurisdiction by appearing in Chinese court to assert its immunity, having its representatives testify, or choosing Chinese law to govern a particular matter.

These provisions closely track Articles 7-9 of the U.N. Convention. The U.S. FSIA, § 1605(a)(1), similarly provides that a foreign state shall not be immune in any case "in which the foreign state has waived its immunity either explicitly or by implication." Section 1607 also contains a provision on counterclaims. In contrast to China's draft law, U.S. courts have held that choosing U.S. law to govern a contract constitutes an implied waiver of foreign state immunity (a position that has been rightly criticized).

Commercial Activities

China's draft law also contains a commercial activities exception. Article 7 provides that a foreign state shall not be immune from proceedings arising from commercial activities when those activities "take place in the territory of the People's Republic of China or take place outside the territory of the People's Republic of China but have a direct impact in the territory of the People's

Republic of China." Article 7 defines "commercial activity" as "any transaction of goods, services, investment or other acts of a commercial nature otherwise than the exercise of sovereign authority." "In determining whether an act is a commercial activity," the law says, "the courts of the People's Republic of China shall consider the nature and purpose of the act." Unlike the FSIA, but like the U.N. Convention, the draft law deals separately with employment contracts (Article 8) and intellectual property cases (Article 11).

In extending the commercial activities exception to activities that "have a direct impact" in China, the draft law seems to have borrowed from the commercial activities exception in the U.S. FSIA. Section 1605(a)(2) of the FSIA applies not just to claims based on activities and acts in the United States, but also to activities abroad "that act cause[] a direct effect in the United States."

The draft law's definition of "commercial activity," on the other hand, differs from the FSIA. Whereas the draft law tells Chinese courts to consider both "the nature and purpose" of the act," § 1603(d) of the FSIA says "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." (Article 2(2) of the U.N. Convention makes room for both approaches.) Considering the purpose of a transaction would make it easier for a government to argue that certain transactions, like issuing government bonds or buying military equipment are not commercial activities and thus to claim immunity from claims arising from such transactions.

Territorial Torts

Article 9 of the draft law creates an exception to immunity "for personal injury or death, or for damage to movable or immovable property, caused by that foreign state within the territory of the People's Republic of China." This exception corresponds to Article 12 of the U.N. Convention and § 1605(a)(5) of the U.S. FSIA. Unlike § 1605(a)(5), China's draft law contains no carve-outs maintaining immunity for discretionary activities and for malicious prosecution, libel, misrepresentation, interference with contract rights, etc.

The English translation of the draft law does not make clear whether it is the tortious act, the injury, or both that must occur within the territory of China. The FSIA's territorial tort exception has been interpreted to require that the "entire

tort" occur within the United States. Article 12 of the U.N. Convention does not. This question has become particularly important with the rise of spyware and cyberespionage. As Philippa Webb has discussed at TLB, U.S. courts have dismissed spyware cases against foreign governments on the ground that the entire tort did not occur in the United States, whereas English courts have rejected this requirement and allowed such cases to go forward. If the Chinese version of the draft law is ambiguous, it would be worth clarifying the scope of the exception before the law is finalized.

Property

Article 10 of the draft law creates an exception to immunity for claims involving immoveable property in China, interests in moveable or immoveable property arising from gifts, bequests, or inheritance, and interests in trust property and bankruptcy estates. This provision closely parallels Article 13 of the U.N. Convention and finds a counterpart in § 1605(a)(4) of the FSIA.

Arbitration

The draft law also contains an arbitration exception. Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from suit with respect to "the effect and interpretation of the arbitration agreement" and "the recognition or annulment of arbitral awards." Like Article 17 of the U.N. Convention, the arbitration exception in the draft law is limited to disputes arising from commercial activities but extends to investment disputes. The arbitration exception in § 1605(a)(6) of the FSIA, by contrast, extends to disputes "with respect to a defined legal relationship, whether contractual or not."

Reciprocity Clause

One of the most interesting provisions of China's draft law on state immunity is Article 20, which states: "Where the immunity granted by a foreign court to the People's Republic of China and its property is inferior to that provided for by this Law, the courts of the People's Republic of China may apply the principle of reciprocity." Neither the U.N. Convention nor the U.S. FSIA contains a similar provision, but Russia's law on the jurisdictional immunities of foreign states does in Article 4(1). Argentina's law on immunity also includes a reciprocity clause specifically for the immunity of central bank assets, apparently adopted by

Argentina at the request of China.

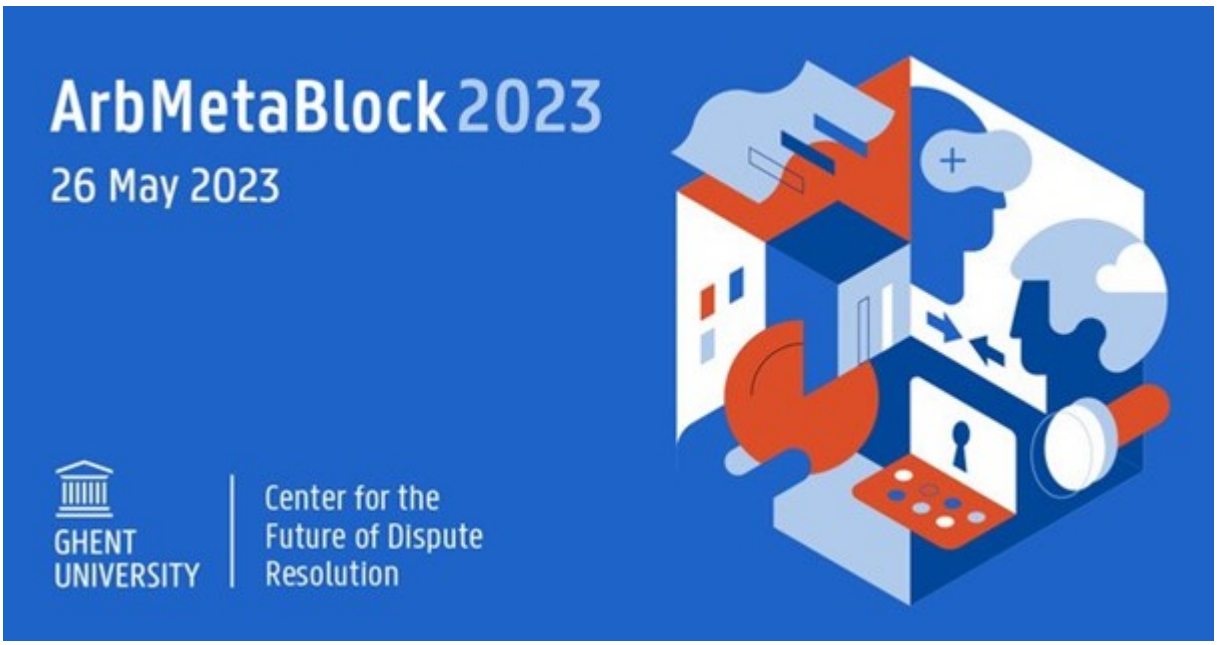
The reciprocity clause in the draft law means that Chinese courts would be able to exercise jurisdiction over the United States and its property in any case where U.S. law would permit U.S. courts to exercise jurisdiction over China and its property. The FSIA, for example, has an exception for expropriations in violation of international law in § 1605(a)(3) and exceptions for terrorism in § 1605A and § 1605B. Although China's draft law does not contain any of these exceptions, its reciprocity clause would allow Chinese courts to hear expropriation or terrorism claims against the United States. The same would be true if Congress were to amend the FSIA to allow plaintiffs to sue China over Covid-19, as some members of Congress have proposed.

Conclusion

China's adoption of the draft law would be a major development in the law of foreign state immunity. For many years, advocates of the absolute theory of foreign state immunity could point to China and Russia as evidence that the restrictive theory's status as customary international law was still unsettled. If China joins Russia in adopting the restrictive theory, that position will be very difficult to maintain.

[This post is cross-posted at Transnational Litigation Blog.]

ArbMetaBlock2023 Conference, Ghent, 26 May 2023



At the ArbMetaBlock2023 Conference leading experts in technology and dispute resolution will discuss the impact of blockchain, the Metaverse, and Web3 on arbitration. These concepts have become part of the conversation in the arbitration community, but few understand their true significance and potential impact.

Panelists will discuss the impact of blockchain and the Metaverse on arbitration, the changing role of lawyers and arbitration institutions, and the effect of new technology on arbitration fundamentals during our full-day event.

Confirmed speakers include Mihaela Apostel, Pedro Arcoverde, Elizabeth Chan, Paul Cohen, Dirk De Meulemeester, David Earnest, Elizabeth Zoe Everson, Anna Guillard Sazhko, Wendy Gonzales, Emily Hay, Cemre Kadioglu Kumptepe, Creguta Leaua, Matthias Lehman, Niamh Leinwather, Aija Lejniece, Maud Piers, Colin Rule, Sean McCarthy, Sophie Nappert, Ekaterina Oger Grivnova, Pietro Ortolani, Amy Schmitz, Takashi Takashima, David Tebel, Leandro Toscano, and Dirk Van Gerven.

The event is organized by the Center for the Future of Dispute Resolution at the University of Ghent in collaboration with leading organizations, including ArbTech, Arbitrate.com, Cepani, Cepani40 CyberArb, MetaverseLegal, and UNCITRAL.

See here for more information and registration.

Update: Repository HCCH 2019 Judgments Convention

In preparation of the Conference on the HCCH 2019 Judgments Convention on 9/10 June 2023, taking place on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

Update of 4 April 2023: New entries are printed bold.

Please also check the "official" Bibliography of the HCCH for the instrument.

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III. Recordings of Events Related to the HCCH 2019 Judgments Convention

ASADIP; HCCH	“Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras”, 3 December 2020 (full recording available here and here)
ASIL	“The Promise and Prospects of the 2019 Hague Convention”, 25-26 June 2020 (full recording available here and here)
CILC; HCCH; GIZ; UIHJ	“HCCH 2019 Judgments Convention: Prospects for the Western Balkans”, Regional Forum 2022, 30 June-1 July 2022 (short official video available here)
CIS Arbitration Forum	“CIS-related Disputes: Treaties, Sanctions, Compliance and Enforcement, Conference, Keynote 2: Russia’s accession to the Hague Convention on Recognition and Enforcement of Foreign Judgments”, 25-26 May 2021 (recording available here)
CUHK	“Latest Development of Hague Conference on Private International Law and the Hague Judgments Convention”, Online Seminar by Prof. Yun Zhao, 25 March 2021 (full recording available here)
Department of Justice Hong Kong; HCCH	“Inaugural Global Conference – 2019 HCCH Judgments Convention: Global Enforcement of Civil and Commercial Judgments”, 9 September 2019 (recording available here)
GIAS	“Arbitration v. Litigation: Can the Hague Foreign Judgments Convention Change the Game?, Panel 2, 10th Annual International Arbitration Month, Commercial Arbitration Day”, 25 March 2022 (full recording available here)
HCCH	“HCCH a|Bridged: Innovation in Transnational Litigation – Edition 2021: Enabling Party Autonomy with the HCCH 2005 Choice of Court Convention”, 1 December 2021 (full recording available here)

HCCH	"22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention", 2 July 2020 (short documentary video available here)
JPRI; HCCH; UNIDROIT; UNCITRAL	"2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments", 12 November 2020 (recording available here)
Lex & Forum Journal; Sakkoula Publications SA	« The Hague Conference on Private International Law and the European Union – Latest developments », 3 December 2021 (full recording available here)
UIHJ; HCCH	"3rd training webinar on the Hague Conventions on service of documents (1965) and recognition and enforcement of judgements (2019)", 15/18 March 2021 (full recording available here in French and here in English)
University of Bonn; HCCH	"Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries", 29 October 2020 (full recording available here)