Anti-enforcement injunction granted by the New Zealand court

For litigants embroiled in cross-border litigation, the anti-suit injunction has become a staple in the conflict of laws arsenal of common law courts. Its purpose being to restrain a party from instituting or prosecuting proceedings in a foreign country, it is regularly granted to uphold arbitration or choice of court agreements, to stop vexatious or oppressive proceedings, or to protect the jurisdiction of the forum court. However, what is a party to do if the foreign proceeding has already run its course and resulted in an unfavourable judgment? Enter the anti-enforcement injunction, which, as the name suggests, seeks to restrain a party from enforcing a foreign judgment, including, potentially, in the country of judgment.

Decisions granting an anti-enforcement injunction are "few and far between" (*Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231, [118]). Lawrence Collins LJ (as he then was) described it as "a very serious matter for the English court to grant an injunction to restrain enforcement in a foreign country of a judgment of a court of that country" (*Masri v Consolidated Contractors International (UK) Ltd (No. 3)* [2008] EWCA Civ 625, [2009] QB 503 at [93]). There must be a good reason why the applicant did not take action earlier, to prevent the plaintiff from obtaining the judgment in the first place. The typical scenario is where an applicant seeks to restrain enforcement of a foreign judgment that has been obtained by fraud.

This was the scenario facing the New Zealand High Court in the recent case of *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881. The Court granted an (interim) anti-enforcement injunction in relation to a default judgment worth USD136,290,994 obtained in Kentucky (note that the order was made last year but the judgment has only now been released). The decision is noteworthy not only because anti-enforcement injunctions are rarely granted, but also because the injunction was granted in circumstances where the foreign proceeding was not also brought in breach of a jurisdiction agreement. Previously, the only example of a court having granted an injunction in the absence of a breach of a jurisdiction agreement was the case of *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 (see Tiong Min Yeo "Foreign

Judgments and Contracts: The Anti-Enforcement Injunction" in Andrew Dickinson and Edwin Peel *A Conflict of Laws Companion – Essays in Honour of Adrian Briggs* (OUP, 2021) 254).

Kea Investments Ltd v Wikeley Family Trustee Limited involves allegations of "a massive global fraud" perpetrated by the defendants – a New Zealand company (Wikeley Family Trustee Ltd), an Australian resident with a long business history in New Zealand (Mr Kenneth Wikeley), and a New Zealand citizen (Mr Eric Watson) – against the plaintiff, Kea Investments Ltd (Kea), a British Virgin Islands company. Kea alleges that the US default judgment is based on fabricated claims intended to defraud Kea. Its substantive proceeding claims tortious conspiracy and a declaration that the Kentucky judgment is not recognised or enforceable in New Zealand. Applying for an interim injunction, the plaintiff argued that "the New Zealand Court should exercise its equitable jurisdiction now to prevent a New Zealand company … from continuing to perpetrate a serious and massive fraud on Kea" (at [27]) by restraining the defendants from enforcing the US judgment.

The judgment is illustrative of the kind of cross-border fraud that private international law struggles to deal with effectively: here, alleged fraudsters using the Kentucky court to obtain an illegitimate judgment and, apparently, frustrate the plaintiff's own enforcement of an earlier (English) judgment, in circumstances where the Kentucky court is unwilling (or unable?) to intervene because Kea was properly served with the proceeding in BVI.

Gault J considered that the case was "very unusual" (at [68]). Kea had no connection to Kentucky, except for the defendants' allegedly fabricated claim involving an agreement with a US choice of court agreement and a selection of the law of Kentucky. Kea also did not receive actual notice of the Kentucky proceedings until after the default judgement was obtained (at [73]). In these circumstances, the defendants were arguably "abusing the process of the Kentucky Court to perpetuate a fraud", with the result that "the New Zealand Court's intervention to restrain that New Zealand company may even be seen as consistent with the requirement of comity" (at [68]).

One may wonder whether the Kentucky Court agrees with this assessment – that a foreign court's injunction restraining enforcement of its judgment effectively amounts to an act of comity. In fact, Kea had originally advanced a cause of action

for abuse of process, claiming that the alleged fraud was an abuse of process of the Kentucky Court. It later dropped the claim, presumably due to a recent English High Court decision (*W Nagel (a firm) v Chaim Pluczenik* [2022] EWHC 1714) concluding that the tort of abuse of process does not extend to foreign proceedings (at [96]). The English Court said that extending the tort to foreign proceedings "would be out of step with [its] ethos", which is "the Court's control of its own powers and resources" (at [97]). It was not for the English court "to police or to second guess the use of courts of or law in foreign jurisdictions" (at [97]).

Since Gault J's decision granting interim relief, the defendants have protested the Court's jurisdiction, arguing that Kea is bound by a US jurisdiction clause and that New Zealand is not the appropriate forum to determine Kea's claims. The Court has set aside the protest to jurisdiction (*Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466). The Court also ordered that the interim orders continue, although the Court was not prepared to make a further order that the defendants consent to the discharge of the default judgment and withdraw their Kentucky proceedings. This, Gault J thought, was "a bridge too far" at this interim stage (at [98]).

Invitation to Private International Law Career Talk: Faces in Private International Law

As the American Society of International Law Annual Meeting approaches, the ASIL Private International Law Interest Group (PILIG) warmly invites you to a career talk featuring professional development in Private International Law.

- **2:00 PM-3:00 PM ET, Thursday 30 March**

Venue: Embassy, Washington Hilton, 1919 Connecticut Ave NW, Washington, DC 20009

Neale Bergman, Attorney-Adviser, Office of the Legal Adviser (L/EB), U.S. Department of State
Milana Karayanidi, Counsel, Orrick
James Nafziger, Professor of Law, Vice-Chair, International Law Association (ILA)
Rekha Rangachari, Secretary-General, New York International Arbitration Center
David Stewart, Professor from Practice, Georgetown Law

This panel of seasoned experts will share their experiences and offer advice concerning career paths in international and particularly private international law fields, in areas such as research, government related work, dispute resolution, international development, and legal information. A short networking session will be offered to participants to further engage with speakers after the panel discussion.

In addition, we invite PILIG members, PILIG newsletter editors, and PILIG friends to join us for a casual happy hour gathering at the McClellan's Sports Bar located at the Washington Hilton. Please find event details below:

- **Happy Hour**

4:00 PM- 5:00 PM ET, Thursday 30 March
Social & Networking Event
McClellan's Sports Bar

No Host Bar
We hope to celebrate with you the conclusion of "pandemic years" while you enjoy ASIL's excellent conference programs. We look forward to learning any PIL (and non-PIL) inspirations from you for the more exciting years to come. Everyone is welcome to stop by.

- **PILIG newsletter editors recruiting**

We also invite scholars, practitioners, and students to contact us to become a PILIG newsletter editor.

ASIL Private International Law Interest Group Co-Chairs

Shu Shang <sshang@cpp.edu>

Jeanne Huang <jeanne.huang@sydney.edu.au>

Dicey, Morris & Collins on the Conflict of Laws

The latest edition of Dicey, Morris & Collins on the Conflict of Laws, jointly edited by The Rt Hon. the Lord Collins of Mapesbury and Professor Jonathan Harris KC (Hon.), was published by Sweet & Maxwell in September 2022. First published in 1896, Dicey, Morris & Collins on the Conflict of Laws is in its 16th edition. The publisher provides the following description for this pre-eminent treatise on private international law.

> Dicey, Morris & Collins on the Conflict of Laws is renowned worldwide as the foremost authority on private international law. It explains the rules, principles and practice that determine how the law of England & Wales relates to other legal systems. Its commentary, Rules and illustrations, with detailed reference to international conventions, legislation and case law, ensures it remains an indispensable tool for practitioners engaged in cross-border matters.
> Across two volumes and a Companion Volume, it contains high-quality and detailed analysis. Volume 1 deals with general principles, the effects of withdrawal by the United Kingdom from the European Union, foreign affairs and the conflict of laws, procedural issues relating to international litigation, jurisdiction, recognition and enforcement of foreign judgments and arbitration. Volume 2 deals with a number of specific areas of law. It addresses family law, property law, succession and trusts, corporations and insolvency and the law of obligations. A Companion Volume considers in greater detail the transitional issues arising from the United Kingdom's withdrawal from the European Union and the relevant EU legislation in a number of key areas.
> Key Features
>
> - Explains the rules, principles and practice that determine how the law of England and Wales relates to other legal systems.

- Volume 1 deals with general principles the effects of the withdrawal by the United Kingdom from the European Union, foreign affairs law, protective measures and international judicial cooperation, jurisdiction of English courts, recognition and enforcement of foreign judgments and international arbitration.
- Volume 2 covers family law, property law, succession and trusts, corporations and bankruptcy, contracts, torts, unjust enrichment and equitable claims, and foreign currency obligations.
- Includes a new Part containing detailed analysis of Foreign Affairs and the Conflict of Laws, including expanded coverage of important developments in this area.
- Includes detailed treatment of the Hague Convention on Choice of Court Agreements 2005.
- Family law coverage includes important developments in respect of same-sex marriages, civil partnerships and surrogacy.
- A Companion Volume explains in detail the transitional provisions relating to the withdrawal by the United Kingdom from the European Union and the relevant EU legislation in areas where those transitional issues will remain relevant for the foreseeable future, including on *lis pendens*, recognition and enforcement of foreign judgments, family law and insolvency.

New material in the Sixteenth edition:
The new edition addresses all key developments, international conventions, legislation and case law since publication of the 15th edition in 2012. It includes the following significant developments

- Full analysis of the effects of the withdrawal by the United Kingdom from the European Union.
- Detailed coverage of the Hague Convention on Choice of Court Agreements 2005.
- Analysis of domestic legislation, including the Private International Law (Implementation of Agreements) Act 2020, important amendments to the Civil Jurisdiction and Judgments Act 1982 and a number of key statutory instruments.
- A new Part containing detailed analysis of Foreign Affairs and the Conflict of Laws, including expanded coverage of important developments in this area.

- Covers important developments in family law, including in respect of same-sex marriages, civil partnerships and surrogacy.
- Detailed analysis of the many decisions of the Supreme Court, Privy Council, Court of Appeal and High Court and in other parts of the United Kingdom, Commonwealth and other jurisdictions.

Companion to the Sixteenth Edition

The Companion Volume explains in detail the effects of the withdrawal by the United Kingdom from the European Union. It analyses the relevant transitional provision in the Withdrawal Agreement concluded between the United Kingdom and the European Union, as well as domestic legislation on transitional issues. It analyses the relevant EU law in areas likely to remain relevant for the foreseeable future, including in relation to lis pendens and the recognition and enforcement of judgments from EU Member States. It considers the relevant family legislation in the Brussels IIa and Maintenance Regulations. The Companion Volume also includes detailed coverage of relevant provisions of the recast Insolvency Regulation.

Further information is available here.

New Private International Law Article in Current Legal Problems

The journal, *Current Legal Problems* yesterday, *inter alia,* published an open access article on private international law:

Alex Mills, "The Privatisation of Private (and) International Law"

Privatisation is much studied and debated as a general phenomenon, including in relation to its legal effects and the challenges it presents to the boundaries of public and private law. Outside the criminal context there has however been relatively limited focus on privatisation of the governmental functions which are perhaps of most interest to lawyers—law making, law enforcement and dispute resolution—or on the international legal implications of privatisation. This article argues that modern legal developments in the context of private law and cross-

border private legal relations—generally known as party autonomy in private international law—can be usefully analysed as two distinct forms of privatisation. First, privatisation of certain allocative functions of public and private international law, in respect of both institutional and substantive aspects of private law regulation, through the legal effect given to choice of court and choice of law agreements. Second, privatisation of the institutional and substantive regulation of private legal relationships themselves, through arbitration and the recognition of non-state law. Together, these developments have established a global marketplace of state and non-state dispute resolution institutions and private laws, which detaches private law authority from its traditional jurisdictional anchors. Analysing these developments through the lens of privatisation highlights a number of important critical questions which deserve greater consideration—this article further examines in particular whether this form of privatisation in fact increases efficiency in either private international law decision-making or private law dispute resolution, as well as its distributive and regulatory effects.

The Fourth Private International Law Conference for Young Scholars in Vienna

Written by Alessa Karlinski and Maren Vogel (both Free University Berlin).

On February 23rd and 24th, 2023, young scholars came together at the Sigmund Freud University, Vienna, to discuss different views on private international law under the theme of "Deference to the foreign – empty phrase or guiding principle of private international law?". Continuing the success of the previous three German-Speaking Conferences of Young Scholars in PIL from previous years in Bonn, Würzburg and Hamburg, this year's conference was hosted in Austria by Martina Melcher and Florian Heindler who organized the event together with Andreas Engel, Katharina Kaesling, Ben Köhler, Bettina Rentsch, Susanna

Roßbach and Johannes Ungerer.

As keynote speaker, ***Professor Horatia Muir Watt (Sciences Po Paris)*** borrowed from the often-used metaphor of the "dismal swamp" to present an "ecosophical" approach to private international law. For this purpose, she engaged anthropological and philosophical insights of Western and indigenous origin on the meaning of law and the regulatory functions of private international law in particular.

Vanessa Grifo (University of Heidelberg) presented possible insights from the theory of the post-migrant society for international family law. Based on sociological accounts of "post-migrant" identities, *Grifo* discussed that a person's cultural identity can form "hybrid" solidarity to different legal systems and oppose the collective national identity of the country of immigration. While previously, according to *Kegel*, connecting factors were understood to build upon certain generally neutral conflict-of-laws interests, cultural identity is becoming a relevant aspect of party interests, which she demonstrated with the help of different recent judgement of the German Federal Court of Justice. This paradigm, *Grifo* argued, shows a shift from the system of the traditional German understanding of connecting factors following Kegel.

Victoria Garin (European University Institute, Florence) examined the connection between private international law and the concept of Relativism. The basis of her analysis is the contemporary private international law attempting to coordinate conflicting regulatory claims of several legal systems. *Garin* identified extraterritoriality, difference and equivalence as assumptions used in private international law to solve this conflict. These assumptions, *Garin* argued, are premised on Relativism in its forms as descriptive and normative theory. Through the lens of Relativism a critical examination of private international law, especially regarding current developments in literature, was made. *Garin* explained to what extent the criticism of Relativism can be applied to private international law theory.

Dr Shahar Avraham-Giller (Hebrew University Jerusalem) presented two seemingly contradictory developments in private international law. First *Avraham-Giller* pointed out, that legal questions are increasingly restrictively categorised as procedural questions in the EU and in common law states which leads to a broader application of foreign law as the *lex causae*. The application of

the *lex fori* to procedural questions can itself be understood as an overriding mandatory provision of the forum. On the other hand, as *Avraham-Giller* projected, an increased recourse of courts to the means of other overriding mandatory provisions to safeguard national public interests can be observed. In her opinion, these seemingly contradictory developments can be explained as an answer to the development of a more "private" understanding of civil proceedings, seeking primarily peaceful settlement of private disputes, while enforcing other values and public goals through mandatory overriding provisions at the same time.

Raphael Dummermuth (University of Fribourg) then shed light on deference to the foreign in the context of the interpretation of the Lugano Convention. First, he addressed the question of the implementation of the objective of taking into account the case law of the ECJ by non-EU courts, as stated in Art. 1(1) Protocol 2 Lugano Convention. The application of the Lugano Convention, he pointed out, requires a double consideration of the foreign: the court must consider standards or judgments that are outside the Lugano Convention and in doing so apply a foreign methodology. Nonetheless, the one-sided duty of consideration is limited where the results of interpretation are decisively based on principles of EU law. He came to the conclusion, that precedent effect should therefore only be given to results that are justifiable within the scope of the classical methodology.

The first day of the conference closed with a panel discussion between ***Professor Dietmar Czernich, Professor Georg Kodek*** *and* ***Dr Judith Schacherreiter*** on deference to the foreign in private international legal practice and international civil procedure. The discussants shared numerous insights: from the appointment of expert opinions on foreign law, to deference to the foreign in international commercial arbitration and the practice of legal advice.

Selina Mack (LMU Munich) opened the second day of the conference examining the *ordre public* in the field of succession law using the example of the right to a compulsory portion in Austria and Germany. *Mack* began by comparing similar regulations in Germany and Austria with the so-called family provision in England. She then contrasted a decision of the Supreme Court of Austria (OGH) with a decision of the German Federal Court of Justice (BGH), both of which deal with the *ordre public* according to Art. 35 of the European Inheritance Regulation when applying English law. The *ordre public* clause under Art. 35 is to be applied restrictively. While the OGH did not consider the *ordre public* to be infringed, the

BGH, on the other hand, assumed an infringement. *Mack* concluded that this is a fundamental disrespect of the foreign by the BGH.

Tess Bens (MPI Luxembourg) examined methods of enforcing foreign judgments under the Brussels Ia Regulation. Said Regulation does not, in principle, harmonise enforcement law. She presented the enforcement mechanism as applying the enforcement law of the enforcing state by means of substitution or, insofar as the order or measure was unknown to the enforcement law, by means of transposition. Due to structural differences in the enforcement law of the Member States, as *Bens* outlines, practical problems can nevertheless arise. Especially since the abolition of the exequatur procedure in the case of insufficient concretisation of the enforcement order, the Brussels Ia Regulation does not provide a procedure. Finally, she discussed that these frictions might be mitigated by anticipating differences and requirements of the enforcing by the courts, nonetheless limited due to the difficulty of predictability.

Afterwards, the participants were able to discuss various topics in a small group for one hour in three parallel groups, each introduced by two impulse speeches.

The first group looked at the factor of nationality in private international law. ***Stefano Dominelli (Università di Genova)*** introduced into the current debate on the connecting factor of nationality in matters concerning the personal status. In his opinion, it is debateable whether a shift towards the application of local law really strengthens deference to the foreign. ***Micheal Cremer (MPI Hamburg)*** looked at the handling of so-called golden passports in the EU. He pointed out, that European conflict of laws regularly does not take the purchased nationality into account, being in line with most of the theoretical approaches to the nationality principle.

The second group focused on the influence of political decisions on the application of foreign law. ***Dr Adrian Hemler (University of Konstanz)*** presented the concept of distributive justice as a reason for applying foreign law. He emphasised, that the difference between purely national and foreign constellations makes the application of foreign law necessary. In his presentation, ***Felix Aiwanger (LMU Munich)*** looked at different standards of control with regard to foreign law. He argued that legal systems that can be considered as reliable are subject to a simplified content review.

The third group discussed the treatment of foreign institutions in international family law. ***Dr Lukas Klever (JKU Linz)*** presented the recognition of decisions on personal status in cases of surrogacy carried out abroad. He discussed differences and possible weaknesses in the recognition under the Austrian conflict of laws and procedural law. ***Aron Johanson (LMU Munich)*** then provided a further perspective with a look at the institute of polygamy. He explained, that while in Germany a partial recognition can be possible, Sweden had switched to a regular refusal of recognition. Subsequently the question of a duty of recognition arising from the free movement of persons as soon as one member state recognises polygamy was asked.

Dr Tabea Bauermeister (University of Hamburg) devoted her presentation to the conflict of laws dimension of the claim for damages in Art. 22 of the European Commission's proposal for a directive on corporate sustainability due diligence (CSDDD), paragraph 5 of which compels the member states to design it as an overriding mandatory provision. She outlined, that regulatory goals can also be achieved through mutual conflict-of-laws provisions. An example of this is the codification of international cartel offence law. *Bauermeister* concluded, that the use of mandatory overriding provisions instead of special conflict-of-laws provisions expresses a distrust of the foreign legislature's competence or willingness to regulate and therefore represents a disregard of the foreign.

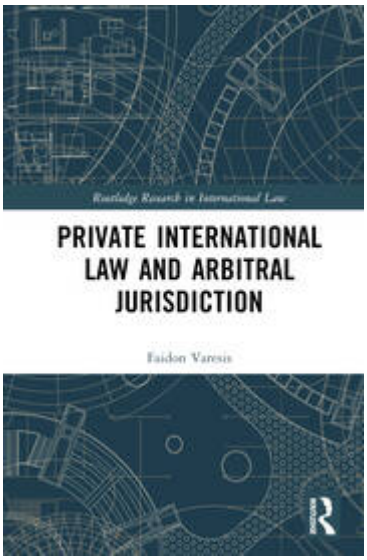
Dr Sophia Schwemmer (Heidelberg University) then examined private enforcement under the CSDDD vis-à-vis third-state companies. She stated, that while third-state companies were included in the scope of application insofar as they are active in the EU internal market, the applicability of the CSDDD could normally not be achieved using the classic conflict-of-laws rules. The CSDDD resorts to an overriding mandatory provision for this purpose. However, *Schwemmer* concluded that a different approach, e.g. an extended right of choice of law for the injured party, was also imaginable and preferable.

As last speaker, ***Dr Lena Hornkohl (University of Vienna/Heidelberg University)*** addressed the effects of EU blocking regulations on private law. She stated that the application of EU blocking statutes as a reaction to extraterritorial third-country regulations can lead to almost irresolvable conflicts in private law relationships. *Hornkohl* then critically examined the ECJ case law that postulates the direct applicability of the Blocking Regulation in private law relationships. Binding private parties to the Blocking Regulation, she concluded, leads to the

instrumentalisation of private law at the expense of private parties with the aim of enforcing foreign policy objectives.

A conference volume will be published by Mohr Siebeck Verlag later this year. The next PIL Young Researchers Conference will take place in Heidelberg in 2025.

Out now: Private International Law and Arbitral Jurisdiction by Faidon Varesis



Ever since the infamous West Tankers saga, if not before, the interplay between the international jurisdiction of national courts and arbitral tribunals has been subject to a constant stream of publications. Writing a monograph on this topic that is both fundamental and innovative in this field is therefore no small feat – making this book by Faidon Varesis, which has come out at the beginning of the year and is based on his Cambridge dissertation, all the more impressive.

The book is organized in three parts (which are not evident from the Table of Contents). Varesis first discusses the importance of commercial disputes in a globalized world, focusing on the private and regulatory interests involved. He then looks more closely at the issue of jurisdiction and the interplay between litigation and arbitration at what he identifies as "jurisdictional intersections" (referring to a range of different situations in which state courts or arbitral tribunals need to resolve questions of adjudicative jurisdiction), before discussing the concept of party autonomy and its expression in an arbitration agreement. In the second part, Varesis then develops a theoretical model for the distribution of

jurisdiction between arbitration and litigation that puts the arbitration agreement at its centre. In the third and final part, the author then tests this model against the current legal framework in England and Wales and demonstrates how it would enable courts and arbitral tribunals alike to solve questions arising at the aforementioned jurisdictional intersections in a global-law spirit.

Arguably the most significant contribution of this book to existing scholarship and debates is its attempt to construct a system around a "horizontal" (rather than hierarchical) relationship between arbitration and litigation as two equivalent yet interdependent modes of dispute resolution. How much appetite there is for such an approach in the wake of Katharina Pistor's Code of Capital and other critical accounts of corporations seemingly using the law to create and (re-)distribute capital and wealth behind closed doors is obviously open to debate; but this does not make Varesis' attempt to reconstruct a horizontal system of jurisdiction, arbitral or adjudicatory, that reconciles the distribution of regulatory competence with the need for substantial fairness any less of an intellectually stimulating exercise.

New Publication in Journal of International Dispute Settlement

On 13 March 2023, the *Journal of International Dispute Settlement* published a private international law article:

G Antonopoulou, "The 'Arbitralization' of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts"

International commercial arbitration is the most preferred dispute resolution method in cross-border commercial disputes. It has been, however, claimed that arbitration has lost its flexibility by becoming increasingly formal and by incorporating litigation practices. In academic literature, this trend has been termed the 'judicialization' of international commercial arbitration. This article

argues that while arbitration is becoming progressively judicialized, international commercial courts evidence an opposite, less studied trend; namely, the 'arbitralization' of courts. Through a comparative analysis of different international commercial courts, the article explores how the competition with arbitration has prompted the establishment of these courts, and how arbitration has served as the inspiration for some of their most innovative features. The article concludes that while the incorporation of arbitration features could improve court proceedings, some of international commercial courts' arbitration features undermine procedural justice and the role of courts as public institutions and therefore hit the limits of arbitralization.

ICC Institute Prize | 9th Edition | Deadline: 3 April 2023

For more than 40 years, the ICC Institute of World Business Law has been enhancing ties between the academic world and practising lawyers.

Launched in 2007, the Institute created the Institute Prize as a means to encourage focused research on legal issues affecting international business. Contributing to the understanding and progress of international commercial law around the world, the Institute Prize recognises legal writing excellence.

The Institute Prize is open to anyone 40 years of age or under as of deadline date who submits a doctoral dissertation or long essay (minimum of 150 pages) drafted in French or English on the subject of international commercial law, including arbitration.

Rules and deadlines concerning the next Prize edition in 2023 are finally out. The works submitted for the Prize should be sent to the Secretariat of the Institute at the contact address indicated below: iccprize@iccwbo.org by 3 April 2023 at the latest.

It goes without saying that CoL is proud that one of its former editors, Brooke

Marshall, was named laureate of the 2021 ICC Institute of World Business Law Prize for her thesis on ‘Asymmetric Jurisdiction Clauses’. And the round before, it was our current editor Tobias Lutzi who won the Prize for his thesis on ‘Regulating the Internet through Private International Law’. We keep our fingers crossed that perhaps again someone from the global CoL community will be successful.

First view of second issue of ICLQ for 2023

The first view of the second issue of *ICLQ* for 2023 contains a private international law article that was published online just recently:

S Matos, Arbitration Agreements and the Winding-Up Process: Reconciling Competing Values

Courts in a number of jurisdictions have attempted to resolve the relationship between winding-up proceedings and arbitration clauses, but a unified approach is yet to appear. A fundamental disagreement exists between courts which believe that the approach of insolvency law should be applied, and those which prefer to prioritise arbitration law. This article argues that a more principled solution emerges if the problem is understood as one of competing values in which the process of characterisation can offer guidance. This would allow both a more principled approach in individual cases, and a more coherent dialogue between courts which take different approaches to the issue.

A New Court Open for International Business Soon: The Commercial Court in Cyprus

Written by Georgia Antonopoulou (Birmingham Law School) & Xandra Kramer (Erasmus University/Utrecht University; research funded by an NWO Vici grant, www.euciviljustice.eu).

We are grateful to Nicolas Kyriakides (University of Nicosia) for providing us with very useful information.

The Novel Commercial Court and Admiralty Court in Cyprus

New courts geared to dealing with international commercial disputes have been established in Europe, the Middle East and Asia, as has also been reported in earlier blogposts in particular on Europe (see, among others, here and here). They have various distinctive features such as the focus on cross-border commercial disputes and the use of the English language as the language of court proceedings. It seems that Cyprus will soon be joining other European countries that have established such courts in recent years, including France, the Netherlands, and Germany.

In May 2022, the House of Representatives in Cyprus passed Law 69(I)/2022 on the Establishment and Operation of the Commercial Court and Admiralty Court. The law creates two new specialised courts, namely the Commercial Court and Admiralty Court, focusing on commercial and maritime law disputes respectively. The courts were planned to open their doors on 1 January 2023. However, the Supreme Court of Cyprus, which is responsible for administrative matters, requested an extension and the courts are expected to be operational in July 2023 (see here).

According to the preamble to this Law, the establishment of these specialised courts aims at expediting the resolution of disputes and improving the efficiency of the administration of justice. In addition, the Courts' establishment is expected to enhance the competitiveness of Cyprus, attract foreign investment, and contribute to its overall economic development. Similar arguments have been put

forward in other European countries, notably in the Netherlands (Kramer & Antonopoulou 2022).

The Cypriot Commercial Court shall have jurisdiction to determine at first instance any type of commercial dispute, provided that the amount in dispute or the value of the dispute exceeds 2,000,000 Euros. The law defines commercial disputes broadly and offers an indicative list of such disputes for which the court has jurisdiction. The Commercial Court shall also have jurisdiction over competition law disputes, intellectual property law disputes, and arbitration related matters irrespective of the value of the dispute. The Commercial Court shall have territorial jurisdiction over disputes that have arisen, in part or wholly in Cyprus, as well as over defendants residing in Cyprus. In cross-border disputes parties can agree on the court's jurisdiction in a choice of court agreement. Typically, the Brussels I-bis Regulation would apply to determine the validity of such clause. At the request of at least one party and in the interest of justice, the court shall accept procedural documents in English and shall conduct hearings and publish judgements in English. The Commercial Court will consist of five judges drawn from the Cypriot judiciary based on their expertise in commercial law disputes and practices and their English language skills.

A Genuine International Commercial Court for Cyprus?

While the definition of an international commercial court is open to interpretation and there are different types of international commercial courts (Bookman 2020; Dimitropoulos 2022), the Commercial Court's specialised focus on high-value commercial disputes as well as the option to litigate in English suggest that Cyprus has just added itself to the growing number of countries that have established an international commercial court in recent years (see also Kramer & Sorabji 2019). This possibility of English-language court proceedings is a key feature of these new courts. However, the degree to which this is possible differs per country. The Netherlands Commercial Court (NCC) uses English throughout the proceedings apart from cassation at the Supreme Court. Due to the lack of a relevant constitutional provision, the use of the English language in NCC court proceedings was made possible by including a new provision in the Dutch Code of Civil Procedure. By contrast, the German Chambers for International Commercial Disputes and the Paris International Chambers limit the use of English in court to documentary evidence or oral submissions and on the basis of a lenient interpretation of existing rules. Cyprus is the first country in Europe that

amended its constitution with a view to permitting the use of the English language in court proceedings. The new Article 4(3)(b) provides that the Commercial Court and the Admiralty Court as well as the higher courts ruling on appeals may allow the use of English in court including oral and written submissions, documentary evidence, witness statements and the pronouncement of judgements or orders. In addition, unlike other international commercial courts established as chambers or divisions within existing courts the Commercial Court in Cyprus is structured as a self-standing court. Its jurisdiction is not exclusively limited to cross-border disputes but extends to domestic disputes with territorial links to Cyprus. The court's focus on both cross-border and domestic disputes might be explained by the objective to accelerate trials and increase the efficiency of public court proceedings especially with regard to disputes related to the financial crisis and its aftermath.

The Reasons for Creating the Cypriot Commercial Court

The establishment of international commercial courts in Europe and in Asia has been thus far mainly driven by access to justice and economic considerations. International commercial courts aim at improving commercial dispute resolution by offering litigating parties specialised, faster, and therefore better court proceedings. It has been also underpinned by the aim of improving the business climate, attracting foreign investment, and creating litigation business.

In line with these considerations, Law 68(I)/2022 reiterates the benefits of a specialised commercial court both for the Cypriot civil justice system and the economy. Despite these similarities between the reasons driving the worldwide proliferation of international commercial courts and the establishment of a commercial court in Cyprus, the Cypriot context is slightly different. The financial crisis suggests that the Cypriot international commercial court is also part of a broader array of measures aimed at meeting the particular dispute resolution demands following the crisis (see also Mouttotos 2020). The establishment of the Commercial Court in Cyprus therefore indicates that international commercial courts might no longer be seen as a luxury available to the few countries willing and able to participate in a global competition of courts, but also as an essential measure for countries aiming to recover from a financial crisis. Yet, whether specialised courts bring about direct economic benefits or if they only indirectly benefit national economies by signalling to foreign investors a well-functioning justice system remains open to debate (among others Farber 2002; Coyle 2012).