First issue of Lloyd’s Maritime and Commercial Law Quarterly for 2023

The first issue of Lloyd’s Maritime and Commercial Law Quarterly for 2023 was just published today. It contains the following articles, case notes and book review on private international law:

S Matos, “Jurisdiction, Admissibility and Escalating Dispute Resolution Agreements”

M Phua and M Chan, “The Law Governing whether an Arbitration Agreement binds a Non-party”

Lord Hodge, “The Rule of Law, the Courts and the British Economy”

Rt Hon Sir Geoffrey Vos MR, “The Economic Value of English Law in Relation to DLT and Digital Assets”

Adrian Briggs KC, Life and Cases: Manuscript of an Autobiography. *Frederick Alexander Mann, edited by Wolfgang Ernst. V&R unipress; Bonn University Press (2021) xvi and 230pp. plus 1 p. Bibliography. Hardback £36.99.*

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, registration now open, 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 15 February 2023: New entries are printed bold.

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

I. Explanatory Reports

Garcimartín Alférez, Francisco; Saumier, Geneviève	„Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Explanatory Report", as approved by the HCCH on 22 September 2020 (available here)
Garcimartín Alférez, Francisco; Saumier, Geneviève	"Judgments Convention: Revised Draft Explanatory Report", HCCH Prel.-Doc. No. 1 of December 2018 (available here)
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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)

Giustizia consensuale No 2/2022: Abstracts

The second issue of 2022 of Giustizia Consensuale (published by Editoriale Scientifica) has just been released, and it features:

Ferruccio Auletta and **Alberto Massera**, ***Giustizia consensuale e p.a.: l'accordo bonario per i lavori, i servizi e le forniture nel quadro degli 'altri rimedi alternativi all'azione giurisdizionale'*** (*Consensual Justice and Public Administration: The Amicable Agreement for Jobs, Services and Supplies in the Framework of 'Other Alternative Remedies to Court Proceedings'*; in Italian)

> The paper examines the present state of the Amicable Agreement. Along with other alternative dispute resolution tools, such as the technical advisory board, arbitration, and negotiated settlements, the Amicable Agreement provides an alternative to litigation in the area of public procurement. Thanks to their experience in the field of public procurement within the Arbitration Chamber of public contracts of the Italian National Anticorruption Authority, the authors incorporate a practitioner's perspective into their analysis of the Amicable Agreement by referring to case law and to a broad range of doctrinal and legal sources.

Paolo Duret, ***Soft law, ADR, sussidiarietà: una triade armonica*** (*Soft Law, ADR, Subsidiarity: A Harmonic Triad*; in Italian)

> The present era is witnessing the simultaneous development of two phenomena: on the one hand, the steady increase in the use of the called soft law, which has expanded from the domain of international law to domestic legal systems; on the other hand, the widespread resort to instruments of dispute resolution that are alternative to litigation (ADR). The paper aims at assessing and examining the connection between soft law and ADR, both in a retrospective and prospective view, focusing in particular on emerging issues such as the recourse to 'nudging' and new technologies, along with forms of Online Dispute Resolution (ODR). The principle of subsidiarity acts as a common denominator between the two aforementioned phenomena. In particular, it allows shedding light on the meaning and implications of the

relationship between soft law and ADR within the framework of a novel understanding of the State and public administration.

Roberto Bartoli, ***Una breve introduzione alla giustizia riparativa nell'ambito della giustizia punitiva*** (*A Brief Introduction to Restorative Justice in the Context of Punitive Justice*; in Italian)

Restorative justice and punitive justice belong to different paradigms. Therefore, understanding this paradigm shift is key to the understanding of restorative justice itself. Through a 'close' comparison between these two paradigms, the author aims to capture the distinctive features of restorative justice in the context of criminal offences, i.e. community justice, dialogic justice, justice that attempts to heal the pain caused by criminal wrongdoing, and non-violent justice. Restorative justice has the potential to foster revolutionary change, especially in instances where restorative justice can provide a procedural tool that is complementary to punitive justice and a material alternative to punishment.

Beatrice Zuffi, *Azione di classe e ADR: un binomio in via di definizione* (*Class Action and ADR: A Pairing in the Making*; in Italian)

The paper provides a comparative review of selected legal systems (namely: the U.S.A., the Netherlands, and Belgium) which are at the forefront of fostering the use of ADR in compensatory class actions through laws and regulations. The author then analyses the Italian legislation on class action introduced by Law No 31 of 2019, focusing in particular on the solutions adopted to promote settlement agreements and assessing the feasibility of other alternative dispute resolution methods, such as mediation, negotiation, and arbitration in connection with or in lieu of the three-phase trial under Art. 840 bis ff. of the Italian Code of Civil Procedure.

Observatory on Legislation and Regulations

Mauro Bove, *I verbali che concludono la mediazione nel d.lgs. n. 149 del 2022* (*Mediation Reports under Legislative Decree No 149 of 2022*; in Italian)

The paper analyses the discipline of mediation reports under Legislative

Decree No 149 of 2022, highlighting its conformity to the provisions of Legislative Decree No 28 of 2010. The author outlines the features and scope of the procedures applicable to instances where a mediated settlement is not achieved and instances where mediation results in a settlement agreement to be included in the mediation report. In particular, the author examines the innovative regulation of mediation reports, which requires the use of digital signatures where mediation takes place online.

Alberto M. Tedoldi, *La mediazione civile e commerciale nel quadro della riforma ovvero: omeopatia del processo* (*Civil and Commercial Mediation in the Framework of the Reform: Homeopathy of the Process*; in Italian)

The essay focuses on and looks to expand the knowledge of civil and commercial mediation as regulated by Legislative Decree No 28 of 2010 amended by Legislative Decree No 149 of 2022. The legislative provisions appear to foster the use and development of mediation as a full-fledged dispute resolution process, beyond its function as a tool complementary to litigation. In this, mediation provides an appropriate and comprehensive dispute resolution instrument which addresses the legal relationship in its entirety, rather than the single components of res in judicium deducta, and allows achieving an all-round, durable settlement. 'The civil process is dead, long live the mediation!'.

Pietro Ortolani, *The Resolution of Content Moderation Disputes under the Digital Services Act*

Online content on social media platforms gives rise to a wide range of disputes. Content moderation can thus be understood as a form of online dispute resolution, whereby the platforms often balance legal entitlements against each other. This article looks at content moderation through the lens of procedural law, providing an overview of the different dispute resolution avenues under the Digital Services Act (DSA). First, the article sets the scene by describing the overall architecture of the DSA. Against this background, specific provisions are scrutinized, dealing with notice and action mechanisms, statement of reasons, internal complaint handling, and out-of-court dispute settlement. Furthermore, the article considers the interplay between the DSA and the European regime of cross-border litigation. Finally, some general conclusions are drawn regarding the DSA'S 'procedure before

substance' regulatory approach.

Observatory on Practices

Antonio Briguglio, *Conciliazione e arbitrato. Contaminazioni* (*Conciliation and Arbitration. Cross-fertilization*; in Italian)

In this paper, the author addresses the topic of the interplay between conciliation and arbitration. In spite of the former being a non-adjudicative ADR procedure and the latter a fully adjudicative ADR process, there are some aspects of cross-fertilization between the two. The author pays particular attention to 'conciliatory' elements, whose relevance is greater in arbitral awards than in judicial decisions. In the second part of the paper, the author focuses in detail on the recent Singapore Convention on International Settlement Agreements Resulting from Mediation, which introduces a different element of cross-fertilization between arbitration and conciliation. In particular, the author investigates the meaning and practical implications of the Convention, which basically puts settlement agreements on an equal footing with arbitral awards for purposes of international recognition and enforcement.

Silvana Dalla Bontà, *La (nuova) introduzione e trattazione della causa nel processo di prime cure e i poteri* lato sensu *conciliativi del giudice. Un innesto possibile?* (*The (New) Introduction and Handling of the Case in the First-Instance Proceedings and the Court's Conciliatory Powers* Lato Sensu*. A Possible Graft?*; in Italian)

After providing an overview of the new Italian regulation on pleadings and hearings in civil cases before the courts of first instance as introduced by Legislative Decree No 149 of 2022, the paper focuses on the conciliatory powers of the courts, i.e. court-ordered mediation, judicial conciliation, and judicial offer to settle. In particular, the analysis aims to explore if, when, and how these judicial conciliatory powers could be effectively exercised at the new pleading and hearing stages. While uncovering the weaknesses of the recent reform of Italian civil procedure, the author argues that the development of good practices would provide a solution to most of the issues raised by the new legislation. To that end, Civil Justice Observatories could

play a pivotal role in achieving lasting solutions through a bottom-up approach that fosters the interaction of different civil justice actors.

Carolina Mancuso and **Angela M. Felicetti, *Sistemi di* dispute resolution *per le università: primi spunti di riflessione*** (*Dispute Resolution Systems for Universities: First Considerations*; in Italian)

The paper aims to explore some innovative foreign teaching and research experiences (namely, in Spain and in the United States) concerning the dissemination of mediation, conflict management techniques and, more broadly, the culture of alternative dispute resolution in academia. The analysis intends to connect such initiatives with the vibrant Italian panorama, which is rich in experiential teaching initiatives and infused with its own developing tradition of conflict management through student ombudspersons. The ultimate goal of the investigation is to identify new directions for the dissemination of the ADR culture in Italian high education institutions.

In addition to the foregoing, this issue features the following book review by **Luciana Breggia***:* **Tommaso GRECO**, ***La legge della fiducia. Alle radici del diritto*** *(The Law of Trust. At the Roots of Law*; in Italian*),* Bari-Roma, Editori Laterza, (2021; reprint 2022), VII-XVI, 1-171.

The New Age of Dispute Resolution: Digitization & Evolving Norms

The New Age of Dispute Resolution: Digitization & Evolving Norms

Time: 18:30 – 20:30 pm

Venue: Bracewell LLP New York

When: 13 February Monday 2023

Organized with New York International Arbitration Centre, New York State Bar Association, and American Society of International Law

The event will be held in relation to UNCITRAL's project on the Stocktaking of Dispute Resolution in the Digital Economy. As part of its stocktaking activities to seek inputs from different parts of the world, the Secretariat is organising this discussion with practitioners and academics in New York on two respective issues: (1) the use of technology in arbitration; and (2) online mediation. Presenters: (Panel 1) Christina Hioureas, Emma Lindsay, Hagit Muriel Elul, Martin Guys and Sherman W. Kahn; (Panel 2) Jackie Nolan-Haley and Sherman W. Kahn.

Comparative Analysis of Doctrine of Separability between China and the UK

Written by Jidong Lin, Wuhan University Institute of International Law

1. **Background**

Separability is a world-recognized doctrine in commercial arbitration. It means that an arbitration clause is presumed to be a separate and autonomous agreement, reflecting contractual commitments that are independent and distinct from its underlying contract.[1] Such a doctrine is embraced and acknowledged by numerous jurisdictions and arbitral institutions in the world.[2]

However, there are different views on the consequences of separability. One of

the most critical divergences is the application of separability in the contract formation issue. Some national courts and arbitral tribunals held that in relatively limited cases, the circumstances giving rise to the non-existence of the underlying contract have also resulted in the non-existence of the associated arbitration agreement, which is criticized as an inadequacy of the doctrine of separability.[3] On the contrary, other courts hold the doctrine of separability applicable in such a situation, where the non-existence of the underlying contract would not affect the existence and validity of the arbitration agreement. This divergence would directly affect the interest of commercial parties since it is decisive for the existence of the arbitration agreement, which is the basis of arbitration.

Two contrary judgements were recently issued by two jurisdictions. The Chinese Supreme People's Court (hereinafter "**SPC**") issued the Thirty-Sixth Set of Guiding Cases, consisting of six guiding cases concerning arbitration. In Guiding Case No. 196 *Yun Yu v. Zhong Yun Cheng*, the SPC explains the Chinese version of separability should apply when the formation of the underlying contract is in dispute.[4] Although the SPC's Guiding Cases are not binding, they have an important persuasive effect and Chinese courts of the lower hierarchy are responsible for quoting or referring to the Guiding Cases when they hear similar cases. On the other hand, the English Court of Appeal also issued a judgement relating to separability, holding this doctrine not applicable in the contractual formation issue.[5]

2. **Chinese judgment**

The Chinese case concerns a share transfer transaction between Yun Yu Limited. (hereinafter "**YY**") and Shenzhen Zhong Yuan Cheng Commercial Investment Holding Co. Limited. (hereinafter "**ZYC**"). On 9th May 2017, YY sent the Property Transaction Agreement (hereinafter "**PTA**") and the Settlement of Debts Agreement (hereinafter "**SDA**") to ZYC. The PTA was based on the Beijing Stock Exchange (hereinafter "**BSE**") model agreement. PTA and SDA included a dispute resolution clause in which the parties agreed that the governing law should be Chinese law and the dispute should be submitted to Beijing Arbitration Commission. On 10th May 2017, ZYC returned the PTA and SDA to YY with some revisions, including a modification on the dispute resolution clause, which

changed the arbitration institution to the Shenzhen Court of International Arbitration. On 11st May 2017, YY commented on the revised version of the PTA and SDA but kept the dispute resolution clause untouched. In the accompanying email, YY stated, "Contracts confirmed by both parties would be submitted to Beijing Stock Exchange and our internal approval process. We would sign contracts only if we got approval from BSE and our parent company." On the same day, ZYC returned the PTA and SDA with its stamp to YY. On 27th October 2017, YY announced to ZYC that the negotiation was terminated. On 4th April 2018, ZYC commenced arbitration based on the dispute resolution clause in PTA and SDA.

The SPC held that separability means the arbitration agreement could be separate and independent from the main contract in its existence, validity and governing law. To support its opinion, the SPC refers to Article 19 of the People's Republic of China's Arbitration Law (hereinafter "**Arbitration Law**"), which stipulates that: "An arbitration agreement shall exist independently, the amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement." SPC submits that the expression "(t)he arbitration agreement shall exist independently" is general and thus should cover the issue of the existence of the arbitration agreement. This position is also supported by the SPC's Interpretation of Several Issues concerning the Application of Arbitration Law (hereinafter "**Interpretation of Arbitration Law**"), [6]Article 10 of which stipulates: "Insofar as the parties reach an arbitration agreement during the negotiation, the non-existence of the contract would not affect the validity of the arbitration agreement." Thus, the SPC concluded that the existence of an arbitration clause should be examined separately, independent from the main contract. Courts should apply the general rules of contractual formation, to examine whether there is consent to arbitrate. If the court found the arbitration clause formed and valid, the very existence of the main contract should be determined by arbitration, unless it is "necessary" for the court to determine this matter. The SPC concludes that the PTA and SDA sent by YY on 11st May 2017 constituted an offer to arbitrate. The stamped PTA and SDA sent by ZYC on the same day constituted an acceptance and came into effect when the acceptance reached YY. Thus, there exists an arbitration agreement between the parties. It is the arbitral tribunal that should determine whether the main contract was concluded.

3. **English judgment**

The English case concerns a proposed voyage charter between DHL Project & Chartering Limited (hereinafter "**DHL**") and Gemini Ocean Shipping Co. Limited (hereinafter "**Gemini**"). The negotiations were carried on through a broker. On 25th August 2020, the broker circulated what was described as the Main Terms Recap. It is common ground that the recap accurately reflected the state of the negotiations thus far. Within the Recap, both parties agreed that the vessel would be inspected by Rightship. This widely used vetting system aims to identify vessels suitable for the carriage of iron ore and coal cargoes. Also, both parties agreed that the dispute should be submitted to arbitration. There was an attached proforma, including a provision that the vessel to be nominated should be acceptable to the charterer. Still, that acceptance in accordance with detailed requirements set out in clause 20.1.4 "shall not be unreasonably withheld". By 3rd September, however, Rightship approval had not been obtained. DHL advised that "(p)lease arrange for a substitute vessel" and finally, "(w)e hereby release the vessel due to Rightship and not holding her any longer." In this situation, the attached proforma was not approved by DHL, and there is no "clean" fixture, [7]which means the parties did not reach an agreement. After that, Gemini submitted that there is a binding charter party containing an arbitration clause and commenced arbitration accordingly.

The Court of Appeal made a detailed analysis of separability. Combining analysis of numerous cases, including Harbour v. Kansa, [8]Fiona Trust, [9]BCY v. BCZ[10] and Enka v. Chubb, [11]and analysis of International Commercial Arbitration written by Prof. Gary Born, the Courts of Appeal concluded that separability should not be applied if the formation of the underlying contract is in dispute. Separability applies only when the parties have reached an agreement to refer a dispute to arbitration, which they intend (applying an objective test of intention) to be legally binding. In other words, disputes as to the validity of the underlying contract in which the arbitration agreement is contained do not affect the arbitration agreement unless the ground of invalidity impeaches the arbitration agreement itself. But separability is not applicable when the issue is whether an agreement to a legally binding arbitration agreement has been reached in the first place. In this case, the parties agreed in their negotiations that if a binding contract were concluded as a result of the subject being lifted, that contract

would contain an arbitration clause. However, based on the analysis of the negotiation and the commercial practice in the industry, the Court of Appeal concludes that either party was free to walk away from the proposed fixture until the subject was lifted, which it never was. Thus, there was neither a binding arbitration agreement between the parties.

4. Comments

Before discussing the scope of the application of separability, one thing needed to be clarified in advance: Separability does not decide the validity or existence of the arbitration agreement in itself. Separability is a legal presumption based on the practical desirability to get away from a theoretical dilemma. However, separability does not mean the arbitration agreement necessarily exists or is valid. It only means the arbitration agreement is separable from the underlying contract, and it cannot escape the need for consent to arbitrate.[12] Therefore, the existence of the arbitration agreement should not be considered when discussing the scope of application of the arbitration agreement.

The justification of the doctrine of separability should be considered when discussing its scope of application. The justification for the doctrine of separability can be divided into three factors: (a) The commercial parties' expectations. Parties to arbitration agreements generally "intended to require arbitration of any dispute not otherwise settled, including disputes over the validity of the contract or treaty. (b) Justice and efficiency in commerce. Without the separability doctrine, "it would always be open to a party to an agreement containing an arbitration clause to vitiate its arbitration obligation by the simple expedient of declaring the agreement void." and (c) Nature of the arbitration agreement.[13] The arbitration agreement is a procedural contract, different from the substantive underlying contract in function. If these justifications still exist in the contract formation issue, the doctrine of separability should be applied.

It is necessary to distinguish the contract formation issue and contract validity issue, especially the substantive validity issue, when discussing the applicability of those justifications. The contract formation issue concerns whether parties have agreed on a contract. The ground to challenge the formation of a contract would be that the parties never agree on something, or the legal condition for the

formation is not satisfied. The contract substantive validity issue is where the parties have agreed on a contract, but one party argue that the agreement is invalidated because the true intent is tainted. The grounds to challenge the substantive validity would be that even if the parties have reached an agreement, the agreement is not valid because of duress, fraud, lack of capacity or illegality. The formation and validity issues are two different stages of examining whether the parties have concluded a valid contract. The validity issue would only occur after the formation of the contract. In other words, an agreement can be valid or invalid only if the agreement exists.

It is argued that separability should be applicable to the formation of contract. Firstly, separability satisfies the parties expectation where most commercial parties expect a one-stop solution to their dispute, irrespective of whether it is for breach of contract, invalidity or formation. Furthermore, the application of separability would achieve justice and efficiency in commerce. Separability is necessary to prevent the party from vitiating the arbitration obligation by simply declaring a contract not concluded. In short, since the justifications still stand in the issue of contract formation, separability should also apply in such an issue.

The English Court of Appeal rejected the application of separability in the formation of contract holding the parties' challenge to the existence of the main contract would generally constitute a challenge to the arbitration clause. However, the same argument may apply for invalidity of the underlying contract. Since the arbitration agreement is indeed concluded in the same circumstances as the underlying contract the challenging to the validity of the contract may also challenge the validity of the arbitration clause, while separability still applies. On the contrary, the Chinese approach probably is more realistic. The SPC ruled that separability applies where the formation of the underlying contract is disputed. But before referring the dispute to arbitration, the SPC separately considered the formation of the arbitration clause. Only after being satisfied the arbitration clause is prima facie concluded, the court declined jurisdiction and referred the parties to arbitration.

[1] Ronan Feehily, *Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine*, 34 Arbitration International 355 (2018), p. 356.

[2] See Blackaby Niegel, Constantine Partasides et al., *Redfern and Hunter on International Arbitration*, Kluwer Law International; Oxford University Press 2015, pp. 104–107.

[3] See Gary B. Born, International Commercial Arbitration (3rd edition), Kluwer Law International 2021, pp. 492-493.

[4] The Guiding Case No. 196: Dispute in Validity of Arbitration Agreement between YunYu Limited and Shenzhen ZhongYuanCheng Commercial Investment Holding Co. Limited.

[5] DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd [2022] EWCA Civ 1555 (24 November 2022)

[6] SPC's Interpretation of Several Issues concerning the Application of Arbitration Law, Fa Shi?2006?No. 7.

[7] Clean Fixture is a concept in the maritime area. It means the Parties' confirmation that the contract has been concluded and that there are no further Subjects and/or restrictions to the execution of the agreed Contract. The Fixture is not clean until both parties have waived their subjects/restrictions.

[8] Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701.

[9] Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40, [2007] 4 All ER 951.

[10] BCY v BCZ [2016] SGHC 249, [2016] 2 Lloyd's Rep 583.

[11] Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38, [2020] 1 WLR 4117

[12] See McNeill M. S. & Juratowitch B., *Agora: Thoughts on Fiona Trust: The Doctrine of Separability and Consent to Arbitrate*, 3 Arbitration International 475 (2008).

[13] See Gary B. Born, International Commercial Arbitration (3rd edition), Kluwer Law International 2021, p. 428.

Chronology of Practice: Chinese Practice in Private International Law in 2021

Professor HE Qisheng has published the annual report, *Chronology of Practice: Chinese Practice in Private International Law in 2021*, now in its 9th year. The article has been published by the Chinese Journal of International Law, a journal published by Oxford University Press..

This survey contains materials reflecting the Chinese practice of Chinese private international law in 2021. Firstly, regarding changes in the statutory framework of private international law in China, six legislative acts, one administrative regulation on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures, and six judicial interpretations of the Supreme People's Court ("SPC") were adopted or amended in 2021, covering a wide range of matters, including punitive damages, online litigation, online mediation, and international civil procedure. Secondly, five typical cases on Chinese courts' jurisdiction are selected to highlight the development of Chinese judicial practice in respect of consumer contracts, abuse of dominant market position, repeated actions and other matters. Thirdly, this survey considers 18 cases on choice-of-law issues relating, in particular, to capacities of legal persons, proprietary rights, employee contracts, mandatory rules, gambling and public policy. Fourthly, two significant decisions on punitive damages of intellectual property are reported. Fifthly, several key decisions in the recognition and enforcement of foreign judgments, international arbitration agreements and foreign settlement agreements, are reproduced. Lastly, this survey also covers the Summaries of the National Symposium on Foreign-related Commercial and Maritime Trials of Courts published by the SPC, an official document which represents the current judicial practices in the Chinese courts, and which is expected to provide guidance in the adjudication of foreign-related matters in the future.

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Here are the links to the article:

- Standard link: https://academic.oup.com/chinesejil/advance-article-abstract/doi/10.1093/chinesejil/jmac041/6988730?utm_source=advanceaccess&utm_campaign=chinesejil&utm_medium=email
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Bonn University / HCCH Conference — The HCCH 2019 Judgments Convention: Cornerstones – Prospects – Outlook, 9 and 10 June 2023

Registration now open

Dates:

Friday and Saturday, 9 and 10 June 2023

Venue:

Universitätsclub Bonn, Konviktstraße 9, D – 53113 Bonn

Registration:

sekretariat.weller@jura.uni-bonn.de

Registration Fee:	**€ 220.-**
Young Scholars Rate (limited capacity):	**€ 110.-**
Dinner (optional):	**€ 60.-**

Registration: Please register with sekretariat.weller@jura.uni-bonn.de. **Please communicate your full name and your postal address (for accounting purposes).** Clearly indicate whether you want to benefit from the young scholars' reduction of the conference fees and whether you want to participate in the conference dinner. You will receive an invoice **invoice per email** for the respective conference fee and, if applicable, for the conference dinner. **Please**

make sure that we receive your payment at least two weeks in advance to the conference (26 May 2023 at the latest). After receiving your payment we will send out a confirmation of your registration. This confirmation will allow you to access the conference hall and the conference dinner.

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

Accommodation: We have blocked a larger number of rooms in the newly built hotel **"MotelOne Bonn-Beethoven"**, https://www.motel-one.com/de/hotels/bonn/hotel-bonn-beethoven/, few minutes away from the conference venue. The hotel's address is: Berliner Freiheit 36, D – 53111 Bonn. The contact details are: bonn-beethoven@motel-one.com, +49 228 9727860. These rooms need to be booked on your own initiative and account by making reservation with the Hotel and by referring to „Universität Bonn". These rooms will be **blocked until 22 April 2023 at the latest.** As there will be several larger events in town at the date of our conference we recommend making arrangements for accommodation quickly.

Programme

Friday, 9 June 2023

8.30 a.m. Registration

9.00 a.m. Welcome notes

Prof Dr Matthias Weller, Director of the Institute for German and International Civil Procedural Law, Rheinische Friedrich-Wilhelms-Universität Bonn;
Dr Christophe Bernasconi, Secretary General, HCCH

Moderators: Prof Dr Moritz Brinkmann, Prof Dr Nina Dethloff, Prof Dr Matthias

Weller, University of Bonn; Prof Dr Matthias Lehmann, University of Vienna; Dr João Ribeiro-Bidaoui, Former First Secretary, HCCH; Melissa Ford, Secretary, HCCH

Part I: Cornerstones

1. **Scope of application**
   Prof Dr Xandra Kramer, Erasmus University Rotterdam, Utrecht University, The Netherlands
2. **Judgments, Recognition, Enforcement**
   Prof Dr Wolfgang Hau, Ludwig-Maximilians-Universität Munich, Germany
3. **The jurisdictional filters**
   Prof Dr Pietro Franzina, Catholic University of Milan, Italy
4. **Grounds for refusal**
   Adj Prof Dr Marcos Dotta Salgueiro, University of the Republic, Montevideo; Director of International Law Affairs, Ministry of Foreign Affairs, Uruguay
5. **Article 29: From a Mechanism on Treaty Relations to a Catalyst of a Global Judicial Union**
   Dr João Ribeiro-Bidaoui, Former First Secretary, HCCH
   Dr Cristina Mariottini, Senior Research Fellow at the Max Planck Institute for International, European and Regulatory Law, Luxembourg

1.00 p.m. Lunch Break

6. **The HCCH System for choice of court agreements: Relationship of the HCCH Judgments Convention 2019 to the HCCH 2005 Convention on Choice of Court Agreements**
   Prof Dr Paul Beaumont, University of Stirling, United Kingdom

Part II: Prospects for the World

1. **European Union**

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

2. **Perspectives from the US and Canada**
   Professor Linda J. Silberman, Clarence D. Ashley Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law, USA
   Professor Geneviève Saumier, Peter M. Laing Q.C. Professor of Law, McGill Faculty of Law, Canada

3. **Southeast European Neighbouring and EU Candidate Countries**
   Prof Dr Ilija Rumenov, Associate Professor at Ss. Cyril and Methodius University, Skopje, North Macedonia

8.00 p.m. Conference Dinner (€ 60.-)

Dinner Speech
Prof Dr Burkhard Hess, Director of the Max Planck Institute for International, European and Regulatory Law, Luxembourg

Saturday, 10 June 2023

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

4. **Perspectives from the Arab World**
   Prof Dr Béligh Elbalti, Associate Professor at the Graduate School of Law and Politics at Osaka University, Japan

5. **Prospects for Africa**
   Prof Dr Abubakri Yekini, University of Manchester, United Kingdom
   Prof Dr Chukwuma Okoli, University of Birmingham, The Netherlands

6. **Gains and Opportunities for the MERCOSUR Region**
   Prof Dr Verónica Ruiz Abou-Nigm, Director of External Relations, Professor of Private International Law, University of Edinburgh, United

Kingdom

7. **Perspectives for ASEAN**
   Prof Dr Adeline Chong, Associate Professor of Law, Yong Pung How School of Law, Singapore Management University, Singapore

8. **China**
   Prof Dr Zheng (Sophia) Tang, University of Newcastle, United Kingdom

1.00 p.m. Lunch Break

Part III: Outlook

1. **Lessons Learned from the Genesis of the HCCH 2019 Judgments Convention**
   Dr Ning Zhao, Principal Legal Officer, HCCH

2. **International Commercial Arbitration and Judicial Cooperation in civil matters: Towards an Integrated Approach**
   José Angelo Estrella-Faria, Principal Legal Officer and Head, Legislative Branch, International Trade Law Division, Office of Legal Affairs, United Nations; Former Secretary General, UNIDROIT

3. **General Synthesis and Future Perspectives**
   Hans van Loon, Former Secretary General, HCCH

UNIVERSITÄT BONN

Rechts- und Staatswissenschaftliche Fakultät
Rechtswissenschaft

Institut für deutsches und internationales Zivilverfahrensrecht

Zentrum für Europäisches Wirtschaftsrecht (ZEW)

HCCH

Bundesministerium der Justiz und für Verbraucherschutz

The HCCH 2019 Judgments Convention: Cornerstones – Prospects – Outlook

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Venue: Universitätsclub Bonn, Konviktstraße 9, D – 53113 Bonn

8.30 a.m. **Registration**

9.00 a.m. **Welcome notes**
Prof Dr Matthias Weller, Director of the Institute for German and International Civil Procedural Law, Rheinische Friedrich-Wilhelms-Universität Bonn;
Dr Christophe Bernasconi, Secretary General, HCCH

Part I: Cornerstones

1. Scope of application
Prof Dr Xandra Kramer, Erasmus University Rotterdam, Utrecht University, The Netherlands

2. Judgments, Recognition, Enforcement
Prof Dr Wolfgang Hau, Ludwig-Maximilians-Universität Munich, Germany

3. The jurisdictional filters
Prof Dr Pietro Franzina, Catholic University of Milan, Italy

4. Grounds for refusal
Adj Prof Dr Marcos Dotta Salgueiro, University of the Republic, Montevideo; Director of International Law Affairs, Ministry of Foreign Affairs, Uruguay

5. Article 29: From a Mechanism on Treaty Relations to a Catalyst of a Global Judicial Union
Dr João Ribeiro-Bidaoui, Former First Secretary, HCCH; Dr Cristina Mariottini, Senior Research Fellow at the Max Planck Institute for International, European and Regulatory Law, Luxembourg

1.00 p.m. **Lunch Break**

6. The HCCH System for choice of court agreements: Relationship of the HCCH Judgments Convention 2019 to the HCCH 2005 Convention on Choice of Court Agreements
Prof Dr Paul Beaumont, University of Stirling, United Kingdom

Part II: Prospects for the World

1. European Union
Dr Andreas Stein, Head of Unit, DG JUST - A1 "Civil Justice", European Commission

2. Perspectives from the US and Canada
Professor Linda J. Silberman, Clarence D. Ashley Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law, USA
Professor Geneviève Saumier, Peter M. Laing Q.C. Professor of Law, McGill Faculty of Law, Canada

3. Southeast European Neighbouring and EU Candidate Countries
Prof Dr Ilija Rumenov, Assistant Professor at Ss. Cyril and Methodius University, Skopje, North Macedonia

8.00 p.m. **Conference Dinner (€ 60.-)**

Dinner Speech
Prof Dr Burkhard Hess, Director of the Max Planck Institute for International, European and Regulatory Law, Luxembourg

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

4. Perspectives from the Arab World
Prof Dr Béligh Elbalti, Associate Professor at the Graduate School of Law and Politics at Osaka University, Japan

5. Prospects for Africa
Prof Dr Abubakri Yekini, University of Manchester, United Kingdom
Prof Dr Chukwuma Okoli, University of Birmingham

6. Gains and Opportunities for the MERCOSUR Region
Prof Dr Verónica Ruiz Abou-Nigm, Director of Internationalisation, Professor in International Private Law, School of Law, University of Edinburgh, United Kingdom

7. Perspectives for ASEAN
Prof Dr Adeline Chong, Associate Professor of Law, Yong Pung How School of Law, Singapore Management University, Singapore

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

1.00 p.m. **Lunch Break**

Part III: Outlook

1. Lessons Learned from the Genesis of the HCCH 2019 Judgments Convention
Dr Ning Zhao, Principal Legal Officer, HCCH

2. International Commercial Arbitration and Judicial Cooperation in civil matters: Towards an Integrated Approach
José Angelo Estrella-Faria, Principal Legal Officer and Head, Legislative Branch, International Trade Law Division, Office of Legal Affairs, United Nations; Former Secretary General, UNIDROIT

3. General Synthesis and Future Perspectives
Hans van Loon, Former Secretary General, HCCH

Registration Fee:	€ 220.-
Young Scholars Rate (limited capacity):	€ 110.-
Dinner (optional):	€ 60.-

Registration: Please register with sekretariat.weller@jura.uni-bonn.de. Please communicate your full name and your postal address (for accounting purposes). Clearly indicate whether you want to benefit from the young scholars' reduction of the conference fees and whether you want to participate in the conference dinner. You will receive an invoice per email for the respective conference fee and, if applicable, for the conference dinner. Please make sure that we receive your payment at least two weeks in advance to the conference (26 May 2023 at the latest). After receiving your payment, we will send out a confirmation of your registration. This confirmation will allow you to access the conference hall and the conference dinner.

Please note: Access will only be granted if you are vaccinated against Covid-19. Please confirm in your registration that you are, and attach an e-copy of your vaccination document. Please follow further instructions on site. Thank you for your cooperation.
Accommodation: We have blocked a larger number of rooms in the newly built hotel "MotelOne Bonn-Beethoven", https://www.motel-one.com/de/hotels/bonn/hotel-bonn-beethoven/, few minutes away from the conference venue. The hotel's address is: Berliner Freiheit 36, D – 53111 Bonn. The contact details are: bonn-beethoven@motel-one.com, +49 228 9727860. These rooms need to be booked on your own initiative and account by making reservation with the Hotel and by referring to „Universität Bonn". These rooms will be blocked until 22 April 2023 at the latest. As there will be several larger events in town at the date of our conference we recommend making arrangements.

https://www.jura.uni-bonn.de/professur-prof-dr-weller/the-hcch-2019-judgments-convention-cornerstones-prospects-outlook-conference-on-9-and-10-june-2023

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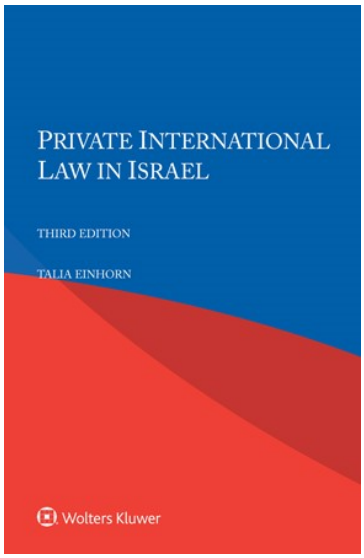
Out now: Talia Einhorn, Private International Law in Israel, 3rd edition



It is my pleasure to recommend to the global CoL community a real treat: Talia Einhorn's "Private International Law in Israel", an analysis of the country's private international law of no less than almost 900 pages, now in its third edition. This monograph, significantly enlarged and extended, grounds on the respective country report for the International Encyclopedia of Laws/Private International Law amongst a large series of country reports on which the "General Section" by Bea Verschraegen, the editor of the entire series, builds.

According to the Encyclopedia's structure for country reports, the text covers all conceivable aspects of a national private international law, from "General Principles (Choice of Law Techniques)" in Part I, including the sources of PIL, the technical and conceptual elements of choice of law rules ("determination of the applicable law") as well as "basic terms". Part II unfolds a fascinating tour d'horizon through the "Rules of Choice of Law" on persons, obligations, property law, intangible property rights, company law, corporate insolvency and personal bankruptcy, family law and succession law. Part III covers all matters of international civil procedure, including jurisdictional immunities, international jurisdiction, procedure in international litigation, recognition and enforcement and finally international arbitration.

The analyses offered seem to be extremely thorough and precise, including in-depth evaluations of key judgments, which enables readers to grasp quickly core concepts and issues beyond basic information and the mere black letter of the rules. For example, Chapter 4 of Part III on the recognition and enforcement of foreign judgments explains that Israel is a State Party to only one rather specific convention, the UN Convention on the Recovery Abroad of Maintenance 1956 (apparently operated without any implementing legislation, see para. 2434). Further, Israel entertains four bilateral treaties (with Austria, Germany, Spain and the UK) that provide generally for recognition and enforcement of judgments in civil and commercial matters. These four treaties, however, seem to differ substantially from each other and from the domestic statutory regime under the Israeli Foreign Judgments Enforcement Law ("FJEL"), see para. 2436. These differences are spelled out down to the level of decisions of first instance courts of the respective foreign State Party, see e.g. footnote 1927 with reference to recent jurisprudence (of the German Federal Court of Justice and) of the local court of Wiesbaden on Article 8(2) of the bilateral treaty with Germany stipulating, according to these courts' interpretation, a far-reaching binding effect to the findings of the first court. This is contrasted with case law of the Israeli Supreme Court rejecting recognition and enforcement of a German judgment, due to the lack of a proper implementation of the Treaty in Israeli domestic law, see paras. 2437 et seq. – a state of things criticized by the author who also offers an alternative interpretation of the legal constellation that would have well allowed recognition and enforcement under the Treaty, see para. 2440. Additionally, interpretation of the domestic statutory regime in light of treaty obligations of the State of Israel, irrespective of a necessity of any specific implementation measures, is suggested, para. 2447. On the level of the domestic regime, the FJEL, in § 3 (1), prescribes as one out of a number of cumulative conditions for enforcement that "the judgment was given in a state, the courts of which were, according to its laws, competent to give it", see para. 2520. Indeed, "the first condition is puzzling", para. 2526, but by no means unique and does even appear in at least one international convention (see e.g. Matthias Weller, RdC 423 [2022], at para. 251, on Art. 14(1) of the CEMAC 2004 Agreement and on comparable national rules). At the same time, and indeed, controlling the jurisdiction of the first court according to its own law appears hardly justifiable, all the more, as there is no control under § 3 FJEL of the international jurisdiction according to the law of the requested court / State, except perhaps in extreme cases under the general public policy control in § 3 (3) FJEL. Additionally, on the level of domestic

law, English common law seems to play a role, see paras. 2603, but the relation to the statutory regime seems to pose a question of normative hierarchy, see para. 2513, where Einhorn proposes that the avenue via common law should only be available as a residual means. In light of this admirably clear and precise assessment, one might wonder whether Israel should considering participating in the HCCH 2019 Judgments Convention and the reader would certainly be interested in hearing the author's learned view on this. The instrument is not listed in the table of international treaties dealt with in the text, see pp. 821 et seq., nor is the HCCH 2005 Choice of Court Agreements Convention. Of course, these instruments do not (yet?) form part of the Israeli legal system, but again, the author's position whether they should would be of interest.

As this very brief look into one small bit of Einhorn's monograph shows, this is the very best you can expect from the outsider's and a PIL comparative perspective, probably as well from the insider's perspective if there is an interest in connecting the own with the other. Admirable!

Return of the anti-suit injunction: parallel European proceedings and English forum selection clauses

Written by Kiara van Hout. Kiara graduated from the Law Tripos at the University of Cambridge in 2021 (St John's College). She is currently an Associate to a Judge at the Supreme Court of Victoria.

In two recent English cases, the High Court has granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. This article compares the position on anti-suit injunctive relief under the Brussels I Regulation Recast and the English common law rules, and the operation of the latter in a post-Brexit landscape. It considers whether anti-suit injunctions to

protect forum selection clauses will become the new norm, and suggests that there is Supreme Court authority militating against the grant of such injunctive relief as a matter of course. Finally, it speculates as to the European response to this new English practice. In particular, it questions whether the nascent European caselaw on anti anti-suit injunctions foreshadows novel forms of order designed to protect European proceedings.

Anti-suit injunctions under the Brussels I Regulation Recast

In proceedings commenced in the English courts before 1 January 2021, it is not possible to obtain an anti-suit injunction to restrain proceedings in other EU Member States.

In Case 159/02 Turner v Grovit [2004] ECR I-3565, the Full Court of the European Court of Justice found that it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country. That is so even where that party is acting in bad faith in order to frustrate existing proceedings. The Court stated that the Brussels I Regulation enacted a compulsory system of jurisdiction based on mutual trust of Contracting States in one another's legal systems and judicial institutions:

> It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them… Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

In the subsequent Case 185/07 Allianz v West Tankers [2009] ECR I-00663, the question arose as to whether it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country on the basis that such proceedings would be contrary to an English arbitration agreement. In its decision, the Grand Chamber of the European Court of Justice found that notwithstanding that Article 1(2)(d) excludes arbitration from the scope of the Brussels I Regulation, an anti-suit injunction may have consequences which undermine the effectiveness of that regime. An anti-suit

injunction operates to prevent the court of another Contracting State from exercising the jurisdiction conferred on it by the Brussels I Regulation, including its exclusive jurisdiction to determine the very applicability of that regime to the dispute. The decision in Allianz v West Tankers represents an extension of Turner v Grovit insofar as it prohibits the issue of anti-suit injunctions in support of English arbitration as well as jurisdiction agreements.

Anti-suit injunctions under the common law rules

The Brussels I Regulation Recast rules govern proceedings commenced in the English courts before 1 January 2021. The regime governing jurisdiction in proceedings commenced after 1 January 2021 comprises the Hague Choice of Court Convention and, more pertinently for present purposes, the common law rules.

At common law, a more flexible approach to parallel proceedings is taken. Anti-suit injunctions may be deployed to ensure the dispute is heard in only one venue. Section 37 of the Senior Courts Act 1981 empowers courts to grant an anti-suit injunction where it appears just and convenient to do so. The ordinary justification for injunctive relief is protection of the private rights of the applicant by preventing a breach of contract. Where parties have agreed to a forum selection clause, either in the form of a jurisdiction or arbitration agreement, anti-suit injunctions may be available to prevent a breach of contract.

In two recent cases, the English courts have granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. These cases demonstrate clearly the change of position as compared with Allianz v West Tankers and Turner v Grovit, respectively.

Proceedings in violation of English arbitration agreement

In QBE Europe SA/NV v Generali España de Seguros Y Reaseguros [2022] EWHC 2062 (Comm), a yacht allegedly caused damage to an underwater power cable which resulted in hydrocarbon pollution. The claimant had issued a liability insurance policy to the owners in respect of the yacht. That policy contained a multi-faceted dispute resolution and choice of law clause, which provided *inter alia* that any dispute arising between the insurer and the assured was to be

referred to arbitration in London.

The defendant had issued a property damage and civil liability insurance policy with the owners of the underwater power cable. The defendant brought a direct claim against the claimant in the Spanish courts under a Spanish statute. The claimant responded by issuing proceedings in England, and applied for an anti-suit injunction in respect of the Spanish proceedings brought by the defendant.

The court found that the claims advanced by the defendant in the Spanish proceedings were contractual in nature, as the Spanish statute provided the defendant with a right to directly enforce the contractual promise of indemnity created by the insurance contract. The matter therefore concerned a so-called 'quasi-contractual' anti-suit injunction application, as the defendant was not a party to the contractual choice of jurisdiction in issue. Nevertheless, the right which the defendant purported to assert before the Spanish court arose from an obligation under a contract (the claimant's liability insurance policy) to which the arbitration agreement is ancillary, such that the obligation sued upon is said to be 'conditioned' by the arbitration agreement.

That the defendant was seeking to advance contractual claims without respecting the arbitration agreement ancillary to that contract provided grounds for granting an anti-suit injunction. As such, the position under English conflict of laws rules is that the court will ordinarily exercise its discretion to restrain proceedings brought in breach of an arbitration agreement unless the defendant can show strong reasons to refuse the relief (see Donohue v Armco Inc [2001] UKHL 64). The defendant advanced several arguments, which were dismissed as failing to amount to strong reasons against the grant of relief. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining Spanish proceedings brought by the defendants.

Proceedings in violation of exclusive English jurisdiction agreement

In Ebury Partners Belgium SA/NV v Technical Touch BV [2022] EWHC 2927 (Comm), the defendants were interested in receiving foreign exchange currency services from the claimant company. The claimant submitted that the parties had entered into two agreements in early 2021.

The first agreement was a relationship agreement entered into by the second defendant Mr Berthels as director of the first defendant Technical Touch BV. Mr Berthels completed an online application form for currency services, agreeing to the claimant's terms and conditions. These terms and conditions were available for download and accessible via hyperlink to a PDF document, though in the event Mr Berthels did not access the terms and conditions by either method. The terms and conditions included an exclusive jurisdiction agreement in favour of the English courts.

The second agreement was a personal guarantee and indemnity given by Mr Berthels in respect of the defendant company's obligations to the claimant. This guarantee also included an exclusive English jurisdiction agreement.

When a dispute arose in April 2021 as to the first defendant's failure to pay a margin call made by the claimant under the terms of the relationship agreement, the defendants initiated proceedings in Belgium seeking negative declaratory relief and challenging the validity of the two agreements under Belgian law. The claimant responded by issuing proceedings in England, and applied for an interim anti-suit injunction in respect of Belgian proceedings brought by the defendants. The claimant submitted that the Belgian proceedings were in breach of exclusive jurisdiction agreements in favour of the English court.

An issue arose as to whether there was a high degree of probability that the English jurisdiction agreement was incorporated into the relationship agreement, and which law governed the issue of incorporation. It is not within the scope of this article to consider this choice of law issue in depth. For present purposes, it is sufficient to note that the court decided that it was not unreasonable to apply English law to the issue of incorporation, and that on this basis, there was a high degree of probability that the clause was incorporated into the relationship agreement.

As in QBE Europe, the court approached the discretion to award injunctive relief on the basis that the court will ordinarily restrain proceedings brought in breach of a jurisdiction agreement unless the defendant can show strong reasons to refuse the relief. No sufficiently strong reasons were shown. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining the Belgian proceedings.

Anti-suit injunctions to protect forum selection clauses: the new norm?

It is plainly important to the status of London as a litigation hub in Europe that English forum selection clauses maintain their security and enforceability. The Brussels I Regulation Recast provided one means of managing parallel proceedings contrived to circumvent such clauses. Absent the framework provided by the Brussels I Regulation Recast; the English courts appear to be employing anti-suit injunctions as an alternative means of protecting English forum selection clauses. This ensures that litigants are still equipped to resist parallel proceedings brought to 'torpedo' English proceedings.

Proceedings in which there is an exclusive English forum selection clause represent among the most compelling circumstances in which the court might grant an anti-suit injunction. In those circumstances, the court is likely to grant injunctive relief to protect the substantive contractual rights of the applicant. The presence of an exclusive forum selection clause is a powerful ground for relief which tends to overcome arguments as to comity and respect for foreign courts. As noted in the joint judgment of Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed) in Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38, citing Millett LJ in Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87, a foreign court is unlikely to be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.

Nevertheless, it is not to be assumed that injunctive relief will always be granted to enforce English forum selection clauses. As Lord Mance (with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Toulson agreed) stated in Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35, at paragraph [61]:

> In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum. But in the present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these

> circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC.

It is too early to say whether anti-suit injunctions will be granted as a matter of course in circumstances such as those in QBE Europe and Ebury Partners. The judgment of Lord Mance indicates that there is a residual role for comity and respect for foreign courts even in cases of breach of a forum selection clause. The English court should not necessarily assume that its own view as to the validity, scope and interpretation of a forum selection clause is the only one. In some instances, it will be appropriate to allow a foreign court to come to its own conclusion, and consequently to refuse injunctive relief. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 117-124] It is clear, at least, that anti-suit injunctions have returned to the toolbox.

The European response: anti anti-suit injunctions?

It seems likely that English anti-suit injunctions will be met with resistance by European courts who find their proceedings obstructed by such orders. As a matter of theory, it is now possible for European courts to issue anti-suit injunctions to restrain English proceedings: the inapplicability of Allianz v West Tankers and Turner v Grovit vis-à-vis England cuts both ways. However continental European legal systems have traditionally regarded anti-suit injunctions as being contrary to international law on the basis that they operate extraterritorially and impinge on the sovereignty of the State whose legal proceedings are restrained.

It is more plausible that European courts would deploy anti anti-suit injunctions to unwind offending English orders. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 50] Assuming that the grant of anti-suit injunctions becomes a regular practice of the English courts in these circumstances, this could provide the impetus for legal developments in this direction across the Channel. In recent years both French and German courts have issued orders of this kind in the context of patent violation. In a December 2019 judgment, the Higher Regional Court of Munich issued an anti anti-suit injunction to prevent a German company from making an application in US proceedings for an anti-suit injunction (see Continental v Nokia, No. 6 U

5042/19). In a March 2020 judgment, the Court of Appeal of Paris issued an anti anti-suit injunction ordering various companies of the Lenovo and Motorola groups to withdraw an application for an anti-suit injunction in US proceedings (see IPCom v Lenovo, No. RG 19/21426).

However, neither decision endorses the general availability of anti anti-suit injunctions outside of the specific circumstances in which relief was sought in those cases. It remains to be seen whether European courts will be willing to utilise anti anti-suit injunctions in circumstances wherein parties have agreed to English forum selection clauses. At this stage, it can only be said that there is a possibility of an undesirable tussle of anti-suit injunctions and anti anti-suit injunctions. This would expose litigants to increased litigation costs, wasted time and trouble, uncertainty as to which court will ultimately hear their case, and the spectre of coercive consequences in the event of non-compliance. Furthermore, a move towards relief of this kind would have a profound impact on the security of English jurisdiction and arbitration agreements. Developments in this area should be watched with interest.

Yegiazaryan v. Smagin, Civil RICO, and the Enforcement of Foreign Awards in the United States

Thanks to Alberto Pomari, JD Candidate at the University of Pittsburgh School of Law, for his assistance with this post.

Two cases slated for Supreme Court's 2024 term could boost the enforcement of foreign arbitral awards in the United States. On Friday January 13, 2023, the U.S. Supreme Court granted certiorari and consolidated the cases of Yegiazaryan v. Smagin and CMB Monaco v. Smagin. Both present the question of when an injury is foreign or domestic for purposes of RICO civil applicability. Beyond this statutory issue, however, the Supreme Court's decision will have consequences

for the enforcement of foreign arbitral awards too.

The Racketeer Influenced and Corrupt Organizations Act ("RICO") enables private individuals injured by a racketeering violation to bring a civil suit and recover treble damages if he was "injured in his business or property." In RJR Nabisco, Inc. v. European Cmty., the U.S. Supreme Court upheld the federal presumption against extraterritoriality to limit RICO's private right of action to only those injuries that are "domestic" in their nature. However, no definition or test was provided to draw a bright line between domestic and foreign injuries.

In Yegiazaryan v. Smagin, the defendant (Yegiazaryan) is a Russian businessman living in California. The plaintiff (Smagin) commenced arbitration proceedings against him in London and was awarded $84 million. In 2014, Smagin successfully filed to recognize and enforce the award against Yegiazaryan in the U.S. district court where Yegiazaryan now resides. In 2020, Smagin filed a RICO action against Yegiazaryan alleging that he and various associates attempted to conceal $198 million from Smagin, which inevitably "injured in his business or property." Specifically, Smagin alleged that his U.S. judgment confirming this prior foreign arbitral award against Yegiazaryan is intangible property located in the United States, thus making any injury thereto eligible for a RICO civil claim even though he lives abroad.

As to the location of intangible property for purposes of RICO injuries, circuits have split. The Seventh Circuit adopted the residency test, according to which an injury to intangible property must occur in the place where the plaintiff has its residence. Accordingly, a foreign-resident plaintiff like Smagin always suffers foreign injuries to intangible property and cannot recover under RICO. The Third Circuit rejected the residency test in favor of a holistic, six-factor test, with particular emphasis on where the plaintiff suffers the effect of the injurious activity. The Ninth Circuit in the Smagin cases adopted a totality-of-the-circumstances test similar to the Third Circuit's one, yet with a particular emphasis on the defendant's conduct. Indeed, the court concluded that Smagin had pleaded a domestic injury because much of the defendant's alleged misconduct took place in California and the U.S. judgment confirming the foreign award could be executed against the defendant only in California.

The case also has implications for the enforcement of foreign judgments and arbitral awards in the United States. If a U.S. judgment recognizing a foreign

judgment or confirming a foreign arbitral award are considered property in the United States, then RICO violations committed in the process of trying to avoid enforcement of the U.S. judgment may give rise to civil liability.