# Call for Paper: Private International Law and Business Compliance in Asia Pacific

**This national conference will be held on 21 February 2024 at The University of Sydney Law School in Australia.**

Business compliance in international transactions across the Asia-Pacific region holds immense importance for organizations seeking to expand their activities within this dynamic and evolving landscape. Multinational corporations operating in Asia Pacific often confront unique compliance challenges due to the swiftly changing regulatory and geopolitical environment in the region.

We welcome scholars, irrespective of their career stage, to submit paper or panel proposals for presentation at the conference. The event will take place at the Camperdown campus of the University of Sydney Law School in Sydney, Australia, on February 21, 2024 in a hybrid format (in-person or online presentation). The conference is specifically designed to provide researchers with the opportunity to present their work-in-progress papers to fellow scholars. The primary language of the conference will be English.

We are enthusiastic about receiving proposals that delve into various aspects of business compliance in international business transactions, especially:

- Key Compliance Risk Areas:
    - Criminal Law Compliance: corporate crime, anti-corruption law, fraud and cyber fraud, anti-money laundering and counter terrorism financing, etc.
    - Data Protection and Digital Trade Compliance: cross-border privacy protections, data security laws, crypto asset regulatory frameworks, governance of AI and digital trade, etc.
    - **Dispute Resolution related Compliance: complex private international law issues associated with jurisdiction, choice of law, and judgement recognition and enforcement,**

**arbitration and mediation, sanctions, foreign state sovereign immunity, etc.**
    - Environmental, Social and Governance (ESG) Disclosure and Traceability Compliance: climate change disclosure regulations, modern slavery laws, regulations for sustainability of international supply chains in circular economy, etc.
- Compliance Expectations in these Risk Areas
- Recommended Best Practices

Other legal issues related to Business Compliance in International Commercial Transactions in Asia Pacific are also welcome.

**Confirmed Keynote Speaker**: Professor Andrew Dickinson, Oxford University Faculty of Law

### Requirements for Abstract Submission:

For paper proposals, please submit a title and max 200-word abstract, along with a one-page CV. For panel proposals, please submit a title and max 800-word abstract, along with a three-page CV covering 3-4 panel members.

Proposal Due: **1 December 2023**.
Announcement of successful submission: 15 December 2023.
Conference Date: **21 February 2024**

More information can be found here.

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# The 2023 NGPIL Lecture Series

Originally posted today on the NGPIL website.

On the **23rd November 2023, 5pm** (WAT/Lagos/Abuja) the NGPIL will host our guest speaker Professor Wale Olawoyin SAN, FCIArb at this year's conference. The event will explore the coming into force of the Arbitration and Conciliation Act 2023 and how, from a private international law perspective, the arbitration

appeal process in Nigeria can be enhanced. Discussions will build on practice thus far, and will allow practitioners, judges and academics alike to develop knowledge and insight into its utility.

To register: https://us06web.zoom.us/webinar/register/WN_q5pY1JWARiaUxi1TIw8xBQ

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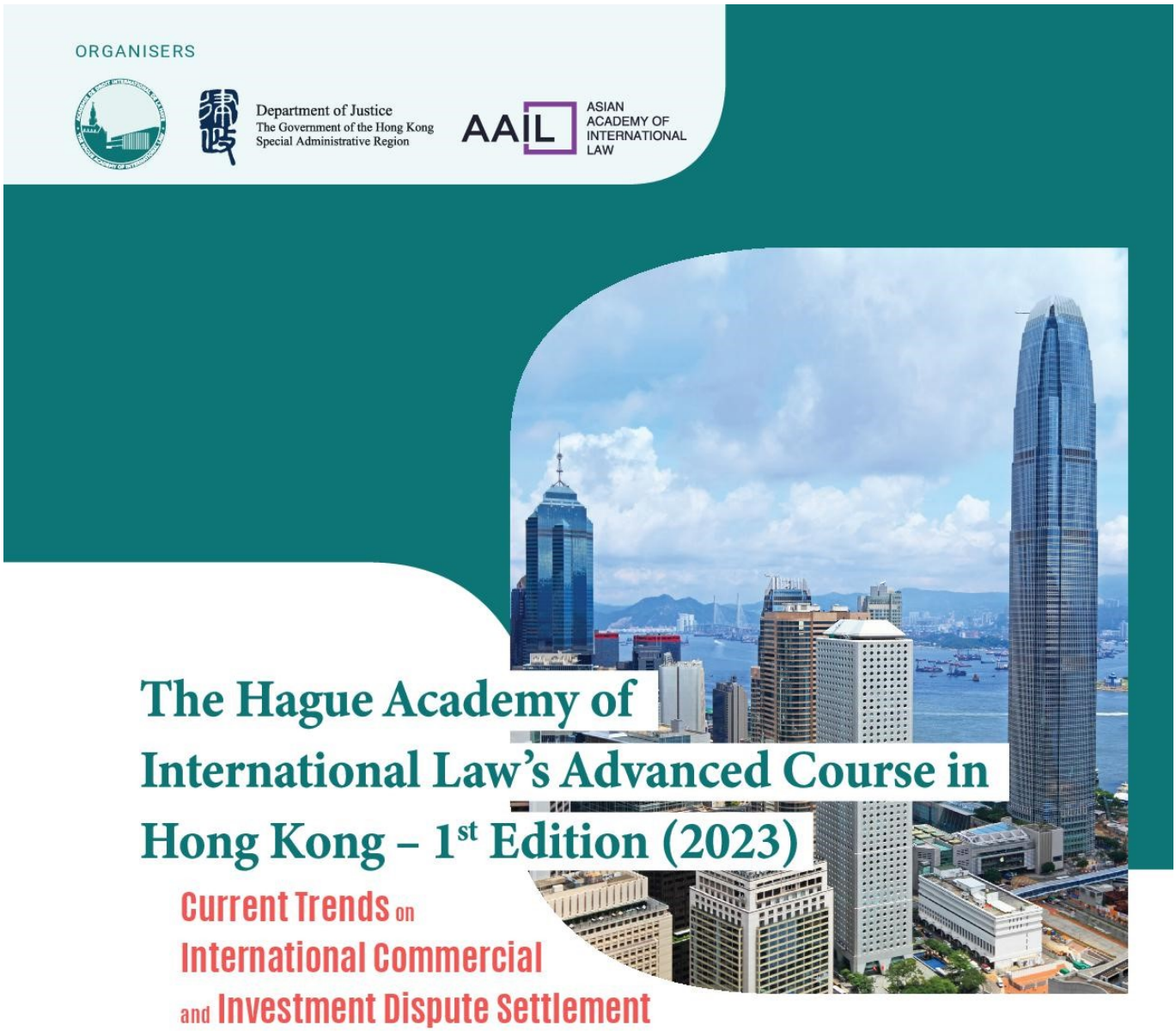
# Application Now Open: The Hague Academy of International Law's Advanced Course in Hong Kong – 1st Edition (2023)




The first edition of the **HAIL Advanced Courses in Hong Kong,** organised in cooperation with with the Asian Academy of International Law and (AAIL) and the Hong Kong Department of Justice, will take place on **11-15 December 2023** with a focus on "**Current Trends on International Commercial and Investment Dispute Settlement**".

For this special programme, the Secretary-General of The Hague Academy of International Law (Professor Jean-Marc Thouvenin) has invited **leading academics and practitioners** from around the world to Hong Kong, including **Diego P. Fernández Arroyo** (Science Po, Paris), **Franco Ferrari** (New York University), **Natalie Morris-Sharma** (Attorney-General's Chambers, Singapore), **Matthias Weller** (University of Bonn) and **Judge Gao Xiaoli** (Supreme People's Court, China), who will deliver **five expert lectures** on:

Lecture 1: ‘The United Nations Convention on International Settlement Agreements Resulting from Mediation’ (Natalie Morris-Sharma)
Lecture 2: ‘Investor-State Dispute Settlement’ (Diego P. Fernández Arroyo)
Lecture 3: ‘International Commercial Arbitration’ (Franco Ferrari)
Lecture 4: , ‘Settlement of International Disputes before Domestic Courts’ (Matthias Weller)
Lecture 5: ‘Latest Developments of Dispute Resolution in China’ (Judge Gao Xiaoli)

This course is **free of charge**. However, full attendance is mandatory. Interested candidates are invited to send the completed application form to events@aail.org **by 13 October 2023**. All applications are subject to review. Succesful applicants will receive email confirmation by October 31. Registered participants will have **pre-course access** to the **HAIL e-learning platform** that provides reading materials prepared by the lecturers. A **certificate of attendanc**e will be awarded to participant with a perfect attendance record.

For **further information** provided by the organisers, please refer to the attached HAIL eFlyer and application form.

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# Symposium for Trevor Hartley at LSE on 27 October 2023

*Written by Ugljesa Grusic, Associate Professor at University College London, Faculty of Laws*

Jacco Bomhoff (LSE), Ugljesa Grusic and Manuel Penades (KCL) are pleased to announce that the LSE Law School will host a symposium to celebrate the scholarly work of emeritus professor Trevor C Hartley.

Trevor has long been one of the world’s most distinguished scholars of Conflict of

Laws (Private International Law), continuing a tradition started at the LSE by Professor Otto Kahn-Freund. For many decades, he has been at the forefront of developments in the field. As a prominent critic, notably of the Court of Justice's efforts to unify European private international law. But also as an active participant in projects of legislation and modernization. And as author of authoritative treatises and clear and accessible student textbooks.

His publications include the Hartley & Dogauchi Explanatory Report on the 2005 Hague Convention on Choice of Court Agreements, Hague lectures on 'Mandatory Rules in International Contracts: the Common Law Approach' and 'The Modern Approach to Private International Law – International Litigation and Transactions from a Common-Law Perspective', student textbook on *International Commercial Litigation (CUP, now in its third edition from 2020)*, and monographs on *Civil Jurisdiction and Judgments in Europe (OUP, now in its second edition from 2023)* and *Choice-of-Court Agreements under the European and International Instruments (OUP, 2013)*.

This Symposium will bring together colleagues and friends, from the UK and abroad, to celebrate and discuss Trevor's many contributions. It is organised around some of the main themes of Trevor's private international law scholarship.

The first panel will focus on global and comparative private international law. Paul Beaumont, Alex Mills, Veronica Ruiz Abou-Nigm, and Koji Takahashi (chair Roxana Banu) will discuss the 2019 and 2005 Hague Conventions, common law and civil law traditions in private international law, and the role of private international law in protecting global commons.

The second panel will examine contemporary English conflict of laws, through the lens of Trevor's famous ICLQ article on the systematic dismantling of the common law of conflict of laws. Eva Lein, Andrew Dickinson, Jonathan Harris, and Adrian Briggs (chair Pippa Rogerson) will discuss the 'Italian torpedo', anti-suit injunctions, *forum non conveniens*, and the residual influence (if any) of the Brussels I Regulation in English law.

The third panel will focus on dispute resolution. Alexander Layton, Richard Fentiman, Jan Kleinheisterkamp, and Linda Silberman (chair Yvonne Baatz) will explore the reflexive effect of EU private international law and dispute resolution clauses, the interplay between EU (private international) law and arbitration, and

the comparison between the 2005 Hague Convention and the New York Convention.

In addition, Lawrence Collins, Hans van Loon, Damian Chalmers, and Carol Harlow will give keynote speeches, reflecting on Trevor's influence on private international law, the work of the Hague Conference, EU law, and LSE.

This is an in-person event. It is open to all, subject to capacity, but registration is required. Please follow this link for more information about the event, including programme and registration.

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# Overview of the 2023 Amendments to Chinese Civil Procedure Law

Written by NIE Yuxin, Wuhan University Institute of International Law

1. Background

China's Civil Procedure Law was enacted in April 1991 by the Fourth Session of the Seventh National People's Congress. Since then, it had undergone four revisions in 2007, 2012, 2017, and 2021. However, no substantial revisions were made to the provisions concerning foreign-related civil litigation. The latest amendments to the Civil Procedure Law in 2023, referred to as the new CPL, involve 26 amendments, including 14 modified articles and 15 new additions. Notably, 19 changes deal with the special provisions on cross-border procedures.

## 2. Jurisdiction

### 2.1 Jurisdiction grounds

Special jurisdiction: The new CPL expands the scope of jurisdiction by introducing additional connecting factors and fall-back provisions. The new law widens the category of disputes previously covered from "contractual disputes or other property rights disputes" to "litigation other than disputes involving personal relationships" (Art. 276, para. 1). Compared to the previous CPL, this expansion encompasses non-property rights disputes involving personal relationships, such as foreign-related marriage, adoption, maintenance, and guardianship disputes, thereby addressing the previous omission of non-property rights disputes. Further, the new CPL introduces "the place of torts committed within the territory of China" as a new connecting factor for jurisdiction. Additionally, a new fall-back provision of "other appropriate connections" is included, granting Chinese courts greater flexibility over foreign-related cases. Article 276 stipulates that the Chinese court may have jurisdiction if the dispute is of other appropriate connections with China (Art. 276, para. 2).

It is worth noting that the "other appropriate connections" provision has a certain degree of openness. What constitutes an appropriate connection is ambiguous. Previously, the Supreme People's Court established judicial guidance on this issue regarding standard-essential patents cases. For instance, in Godo Kaisha IP Bridge 1 v. Huawei, the Supreme People's Court found an appropriate connection between the city of Dongguan and the dispute, citing evidence that Huawei Terminal Co., Ltd. – being primarily responsible for manufacturing and selling Huawei's smart terminal products – was domiciled there. Dongguan would also be a key location for implementing the essential patents at issue following any agreement between the parties. On this basis, the Supreme People's Court deemed Dongguan to have an appropriate connection to the case. By

incorporating the principle of appropriate connection into the new CPL, its application scope expands beyond intellectual property cases to other foreign-related cases. However, determining the standards for appropriate connection in practice will undoubtedly pose a significant challenge going forward.

To some extent, this provision allows Chinese courts the flexibility to exercise jurisdiction in appropriate circumstances, providing a channel for Chinese enterprises and citizens to seek remedies from domestic courts when their interests are harmed abroad. In practice, courts should take caution when assessing jurisdiction based on the appropriate connection. From a systematic perspective, the appropriate connection should bear some resemblance to the jurisdictional connecting factors listed in this article, such as the place of contract, place of performance, location of the subject matter of the litigation, location of attachable assets, place of the tort, and the domicile of the defendant's representative. In addition, China could consider deriving insights from the indirect jurisdiction grounds established in the Hague Judgement Convention 2019. These grounds represent a consensus and are accepted by the majority of countries. If China were to refer to the Convention's standards when considering appropriate connection, it would gain greater predictability and reciprocity. This could facilitate the recognition and enforcement of Chinese judgments abroad, especially among Convention contracting states.

Choice of court agreement: Prior to this amendment, except for disputes related to foreign maritime matters, choice of court agreements designating Chinese court were subject to the prerequisite that the case has a practical connection with China. While China established two international commercial courts to specially hear international commercial cases, the cases they can accept are still limited by the requirement of actual connection under the legal framework of previous CPL. This overly conservative jurisdiction regime hampered the international commercial courts from taking jurisdiction over offshore cases without connection to China.

The newly introduced Article 277 of the CPL breaks this constraint. It allows the parties to choose Chinese courts by writing even if Chinese courts do not have any connection with the dispute. This legislative change provides a clear legal basis for Chinese courts to exercise jurisdiction over offshore cases, expands both the types of cases they can accept and their geographical reach. Moving forward, this change will benefit Chinese courts by enabling them to actively exercise jurisdiction and provide judicial support for the Belt and Road Initiative,

positioning China as a preferred location for international litigation. Ultimately, it will enhance the international competitiveness and influence of Chinese judiciary.
However, the amendment does not specify whether parties can choose foreign courts without any connections with the dispute. To align with international common practice and promote reciprocity, it is recommended to clearly state that parties have the freedom to choose any courts, Chinese or foreign, to hear cross-border disputes even if the courts lack practical connections with the dispute.
The amendment does not address some matters that remain unclear in Chinese law. For example, which law applies to determine the substantive validity of jurisdiction agreements? In practice, courts may apply either the law of the forum or the law governing the main contract to this matter, leading to uncertainty.

Responding jurisdiction: Article 278 of the new CPL introduces the rule of responding jurisdiction. It stipulates that if a party does not raise an objection to the jurisdiction and participates in the proceedings by submitting a defence or filing a counterclaim, the Chinese court shall be deemed to have jurisdiction (Art. 278). Further, in contrast to the previous draft amendment, the new CPL expands the scope of jurisdiction by appearance from the defendant to all parties involved.

Exclusive jurisdiction: Under the previous CPL, exclusive jurisdiction covered l disputes related to immovable property, port operations, succession, and contracts involving Sino-foreign joint ventures, Sino-foreign cooperative business enterprises, and Sino-foreign cooperative exploration and development of natural resources. The new CPL adds two additional categories of cases under exclusive jurisdiction: disputes arising from the establishment, dissolution, liquidation of legal persons or other organizations established within China's territory, and disputes related to the validity of intellectual property rights granted through examination within China's territory (Art. 279). These amendments are consistent with international common practice.

2.2 Conflict of jurisdiction, Lis pendens and Forum Non Conveniens
Parallel proceedings: The new CPL formally adopts the rule for parallel proceedings. First of all, the law accepts parallel proceedings. Article 280 explicitly provides that: "For the same dispute arises between the parties involved, if one party initiates a lawsuit in a foreign court and the other party initiates a lawsuit in a Chinese court, or if one party files lawsuits in both a foreign court and a Chinese court, the Chinese court may accept the case if it has jurisdiction according to this law." However, if the parties have entered into an

exclusive jurisdiction agreement selecting a foreign court, provided it does not violate the provisions of the CPL regarding exclusive jurisdiction and does not involve China's sovereignty, security, or public interests, the Chinese court may decide not to accept the case; if the case has already been accepted, the court shall dismiss the lawsuit (Art. 280). This amendment reflects the respect for the parties' autonomy in cases where it does not violate the principle of exclusive jurisdiction and demonstrates China's active implementation of international judicial cooperation through legislation.

First-in-time rule: Article 281 of the new CPL adopts the first-in-time rule to address jurisdictional conflicts arising from international parallel litigation. After a Chinese court accepts a case under Article 280, Article 281 then permits the Chinese court to suspend its proceedings if a party applies in writing on the grounds that proceedings involving the same parties and subject matter have already commenced earlier before a foreign court. However, if the first-seized court fails to exercise jurisdiction, the Chinese court may resume the proceedings to protect the parties' legitimate right to litigation. According to this provision, the parties have significant discretion in requesting the suspension or resumption of litigation.
The first-in-time rule includes two exceptions: (1) when the parties agree to the jurisdiction of the Chinese courts, or the dispute falls under the exclusive jurisdiction of the Chinese courts, and (2) when it is clearly more convenient for the case to be heard by the Chinese courts. The issue here is that it is not clear whether the choice of Chinese courts by the parties includes non-exclusive selection. In addition, the determination of whether the Chinese courts are clearly more convenient requires the court to exercise discretionary judgment, which introduces uncertainty.

Forum Non Conveniens: The 2023 amendments formally accept forum non conveniens and relaxed the conditions for its application in compared to previous judicial interpretation. In order to apply forum non conveniens the defendant must raise an objection to jurisdiction, and the court will not assess forum non conveniens by its own motion. Article 282 listed five factors for the court to exercise discretion: (1) The underlying facts of the dispute did not occur within China's territory, and it is significantly inconvenient for the Chinese court to hear the case and for the parties to participate in the proceedings; (2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court;

(3) The case does not fall under the exclusive jurisdiction of the Chinese court; (4) The case does not involve China's sovereignty, security, or public interests; (5) It is more convenient for a foreign court to hear the case. The standard to apply forum non conveniens is thus more relaxed than China's previous practice. The difference between the CPL 2023 and the Judicial Interpretation of CPL 2022 can be found in this table.

| Article 530 of the Judicial Interpretation of CPL 2022 | Article 282(1) of the CPL 2023 |
|---|---|
| When a foreign-related civil case meets the following conditions simultaneously, the Chinese court may render a ruling to dismiss the plaintiff's lawsuit and inform them to file a lawsuit with a more convenient foreign court: | For foreign-related civil case accepted by the Chinese court, **where the defendant raises an objection to jurisdiction**, and simultaneously meets the following conditions, the court may render a ruling to dismiss the lawsuit and inform the plaintiff to file a lawsuit with a more convenient foreign court: |
| | (1) The underlying facts of the dispute did not occur within China's territory, and it is significantly inconvenient for the Chinese court to hear the case and for the parties to participate in the proceedings; ("*added*") |
| (1) The defendant requests that a more convenient foreign court has jurisdiction over the case or raises an objection to jurisdiction; | *"deleted"* |

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| (2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court; | (2) There is no agreement between the parties to submit to the jurisdiction of the Chinese court; |
| (3) The case does not fall under the exclusive jurisdiction of the Chinese court; | (3) The case does not fall under the exclusive jurisdiction of the Chinese court; |
| (4) The case does not involve the interests of China, its citizens, legal persons or other organizations; | (4) The case does not involve **China's sovereignty, security, or public interests**; |
| (5) The main facts in dispute did not occur within China's territory and Chinese law does not apply to the case, creating significant difficulties for the Chinese court in ascertaining facts and applying the law; | *"deleted"* |
| (6) The foreign court has jurisdiction over the case and it is more convenient for it to hear the case. | (5) It is more convenient for a foreign court to hear the case. |

In practice, Chinese courts often refuse to apply the doctrine of forum non conveniens due to the criterion that the case does not involve the interests of China, its citizens, legal persons, or other organizations. Courts often assess whether a case involves Chinese interests or parties based on nationality or habitual residence. The removal of this criterion reduces the obstacles to the judicial application of the forum non conveniens doctrine.

Finally, to better safeguard parties' interests, Art. 282 (2) provides: if the foreign court refuses jurisdiction after the plaintiff's claim is dismissed, or fails to take necessary actions or render judgement within a reasonable period, and the plaintiff sues again in China, the Chinese court shall accept it. It aims to protect the claimant's effective access to justice.

3. Judicial assistance

Service of process abroad: Compared to domestic service of process, the process of serving documents in cross-border cases involves more complex procedures, longer duration and lower efficiency. This significantly affects the progress of cross-border judicial procedures. The new CPL enriches the means of cross-border service of process. While retaining the existing methods of service through treaties, diplomatic channels, and embassy channels, the CPL 2023 improves other methods of services and add additional modes of services. See the table below.

| Article 274 of the CPL 2022 | Article 283 of the CPL 2023 |
|---|---|
| A court may serve process on a party which has no domicile within China's territory in the following manners: | A court may serve process on a party which has no domicile within China's territory in the following manners: |
| (1) in accordance with the provisions of an international treaty concluded or acceded to by the home country of the party to be served and China; | (1) in accordance with the provisions of an international treaty concluded or acceded to by the home country of the party to be served and China; |
| (2) through diplomatic channels; | (2) through diplomatic channels; |
| (3) by entrusting the service to Chinese embassy or consulate in the country where the party is domiciled, if the party is a Chinese national; | (3) by entrusting the service to Chinese embassy or consulate in the country where the party is domiciled, if the party is a Chinese national; |
| (4) by entrusting the service to the litigation agent authorized by the party to be served to receive service of process; | (4) by entrusting the service to the litigation agent **appointed by the party in this case**; |

| | |
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| (5) by delivering the document to the representative office or a branch office or business agent authorized to receive service of process established by the party to be served within China’s territory; | (5) by delivering the documents to the **solely funded enterprise**, representative office, branch office or authorized business agent established by the party to be served within China’s territory; |
| | (6) where the party is a foreigner or stateless person who acts as the legal representative or main person in charge of a legal person or any other organization established within China’s territory, and is a co-defendant with such legal person or other organization, by delivering the documents to such legal person or other organization; (“*added*”) |
| | (7) where the legal representative or main person in charge of a foreign legal person or any other organization is within China’s territory, by delivering the documents to such legal representative or main person in charge; (“*added*”) |

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| (6) by mail, if the law of the country where the party is domiciled permits service of process by mail and a receipt showing the date of delivery has not been returned within three months after the date of mailing, provided that other circumstances sufficiently show the document has been served; | (8) by mail, if the law of the country where the party is domiciled permits service of process by mail and a receipt showing the date of delivery has not been returned within three months after the date of mailing, provided that other circumstances sufficiently show the document has been served; |
| (7) by fax, email or any other means capable of confirming receipt by the party to be served; | (9) by **electronic means** capable of confirming the receipt of the documents by the recipient, **unless prohibited by the law of the country where the party is domiciled;** |
| | (10) by any other means agreed by the party, unless prohibited by the law of the country where the party is domiciled. (“*added*”) |
| (8) by public announcement if none of the above means is feasible, in which case the document shall be deemed to have been served after six months from the date of the public announcement. | If none of the above means is feasible, public announcement shall be made, and the documents shall be deemed to have been served after **60 days** from the date of announcement. |

Obtaining evidence abroad: Article 284 of the new CPL introduces provisions for obtaining evidence from abroad. In addition to the traditional methods of obtaining evidence through treaties or bilateral agreements with the country where the evidence is located, as well as through diplomatic channels, the new provision authorises other means to take evidence abroad, including entrusting Chinese embassy or consulate in the country where the party or witness is located to obtain evidence, obtaining evidence through real-time communication tools with the consent of both parties, and by other means agreed upon by both parties.

4. Recognition and enforcement of foreign judgments and arbitral awards

Requirement for the recognition and enforcement of foreign judgments: Articles 297 and 298 of the new CPL retain the principle of reciprocity as a prerequisite of recognition and enforcement of foreign judgement. They state that foreign judgments should be recognized and enforced in accordance with international treaties that China has concluded or based on the principle of reciprocity. However, the reciprocity principle raises the following issues.

Firstly, the term "reciprocity" is ambiguous, and China's judicial practice of using the de facto reciprocity has made it difficult for many foreign court judgments to be recognized and enforced in Chinese courts. Secondly, although the "presumed reciprocity" standard has been suggested in the "Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Belt and Road Initiative" and the "Nanning Declaration" adopted at the Second China-ASEAN Chief Justices' Roundtable, these documents are not binding and this new standard has limited impact on judicial practice. Further, even if presumed reciprocity is adopted, there may still be arbitrary situations. For example, a foreign court may refuse to recognize a Chinese judgment because that the domestic judgment has already become res judicata, but this does not mean that the foreign court will not recognize the Chinese judgment. Nevertheless, the existence of negative precedence may be enough to deny presumed reciprocity.

Notably, Article 49 of the Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trials 2021 establishes a reporting and notification mechanism for recognizing and enforcing foreign court judgments. It requires that in cases where the court needs to examine the application of the reciprocity principle, it should submit the proposed decision to the higher court in its jurisdiction for review. If the higher court agrees with the proposed handling, it should submit its review opinion to the Supreme People's Court for verification. Only after receiving a response from the Supreme People's Court can a ruling be made. In March 2022, the Shanghai Maritime Court, after seeking instructions from the Supreme People's Court, applied the standard of de jure reciprocity to determine the existence of reciprocity between China and the United Kingdom in the recognition and enforcement of civil and commercial judgments in the case of SPAR Shipping Co., Ltd. v. Dalian Xin Hua Logistics Holdings (Group) Co., Ltd. (2018) Hu 72 Xie Wai Ren 1. This was the first precedent case of reciprocity

recognition by Chinese courts. Subsequently, on December 19, 2022, the High Court of England and Wales issued a summary judgment in the case of Hangzhou J Asset Management Co Ltd & Anor v Kei [2022] EWHC 3265 (Comm), recognizing and enforcing two Chinese judgments. This was the first time that Chinese court judgments were recognized and enforced in the UK. It opens up new possibilities for mutual recognition and enforcement of civil and commercial judgments between China and the UK.

Grounds for refusing to recognize and enforce foreign court judgments: Article 300 of the new CPL stipulates five grounds for refusing to recognize and enforce foreign court judgments. These include: (1) When the foreign court lacks jurisdiction over the case pursuant to Article 301 of the CPL; (2) When the defendant has not been properly served or, even if properly served, has not had a reasonable opportunity to present its case, or when a party lacking litigation capacity has not been adequately represented; (3) When the judgment or ruling was obtained through fraudulent means; (4) When a Chinese court has already rendered a judgment or ruling on the same dispute, or has recognized a judgment or ruling on the same dispute rendered by a court of a third country; (5) When it violates the basic principles of Chinese laws or undermines China's national sovereignty, security, or public interests. The prerequisite for recognizing and enforcing foreign court judgments is that the court rendering the judgment must have jurisdiction over the case.

Article 301 clarifies the three circumstances for determining foreign courts' lack of jurisdiction over a case, namely: (1) the foreign court has no jurisdiction over the case according to its laws, or has jurisdiction according to its laws but lacks an appropriate connection to the dispute; (2) violation of the provisions of the CPL on exclusive jurisdiction; (3) violation of the parties' exclusive choice of court agreement. Among them, the "appropriate connection" requirement in the first provision also echoes the rules for determining special jurisdiction over foreign-related cases under Article 276. Determining appropriate connection will likely be a focus in future foreign civil and commercial litigation disputes.

Article 302 further elucidates the fourth ground for refusing to recognize and enforce judgments. This ground mainly applies to parallel proceedings. According to this provision, the court should review the previously rendered effective foreign court judgment and suspend domestic proceedings. If the foreign judgment meets the requirements for recognition and enforcement, it should be recognized and enforced, and the domestic proceedings should be dismissed. If it does not meet

the requirements for recognition and enforcement, the domestic proceedings should resume. This provision aligns with Article 7(1)(5) and (6) of the HCCH Judgment Convention 2019, which China signed and joined on 2019, but has not yet ratified.

Recognition and enforcement of foreign arbitral awards: A significant change pertaining to arbitration decisions in the new law is that it clearly establishes the "place of arbitration" as the standard for determining the nationality of an arbitration decision. See the table below.

| Article 287(2) of the CPL 2022 | Article 297(2) of the CPL 2023 |
|---|---|
| Where a party applies for enforcement of an effective arbitration award of an international arbitral institution of China, if the party against whom enforcement is sought or the property thereof is not within China's territory, the applicant shall apply directly to the foreign court having jurisdiction for recognition and enforcement. | Where a party applies for enforcement of an effective arbitration award **which is made within China's territory**, if the party against whom enforcement is requested or its property is not within China's territory, the applicant may apply directly to the foreign court having jurisdiction for recognition and enforcement. |
| Article 290 of the CPL 2022 | Article 304 of the CPL 2023 |

| | |
|---|---|
| Where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a Chinese court, a party shall apply directly to China's intermediate court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the Chinese court shall process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity. | Where **a legally effective arbitral award which is made outside China's territory** requires recognition and enforcement by a Chinese court, a party may apply directly to China's intermediate court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located. |
| | If the domicile of the party against whom the application is made or its property is not within China's territory, the party may apply to the intermediate court of the place where the applicant is domiciled or that has appropriate connection with the dispute adjudicated in the award. (*"added"*) |
| | The Chinese court shall process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity. |

Chinese judicial practice on the nationality of arbitral awards has shifted from the "the location of the arbitral institution" standard to the "place of arbitration" standard. Several landmark cases reflect this change. The new CPL further cements the seat of arbitration standard, aligning with international practices. When parties apply to Chinese courts for recognition and enforcement of arbitration rulings made by foreign arbitration institutions within China, it facilitates their recognition and enforcement. This change not only encourages foreign arbitration institutions to conduct arbitration within China, but is also better enables Chinese courts to exercise judicial supervision.

## 5. Foreign immunity

In this revision of the CPL, a specific provision is added to clarify that in civil litigation involving foreign states, the relevant laws on immunity of foreign states in China shall apply; if no provisions are specified, the CPL shall apply (Art. 305). It is worth noting that the Law on Immunity of Foreign States was promulgated on September 1, 2023, and will be implemented from January 1, 2024. The Law on Immunity of Foreign States primarily stipulates the conditions under which a foreign state can become a defendant in a legal proceeding in China, hence providing a legal basis for when a foreign state cannot claim immunity from the jurisdiction of Chinese courts. On the other hand, the CPL provides the general procedural framework for all civil cases, and determines jurisdictional rules. This includes when and which court in China has the power to hear a case. So, essentially, the CPL determines which specific court has jurisdiction over the case, while the Law on Immunity of Foreign States regulates the separate substantive issue of whether the foreign state defendant is immune from such jurisdiction.

## 6. Conclusion

The 2023 amendments to the CPL have brought about significant improvements to the special provisions governing procedures for foreign-related civil litigation. The new amendment not only takes into account China's domestic situations but also keeps up with the latest international legislative developments in the field, drawing on the latest achievements in international legislation. Some provisions

have learnt from the latest international framework, such as the HCCH Choice of Court Convention 2005 and HCCH Judgment Convention 2019.
Of course, some new challenges emerge. First, how to define the concept of appropriate connection as a new jurisdiction ground. Second, the asymmetric approach that allows the parties to choose unrelated Chinese courts but requires the chosen foreign court to have practical connection is controversial. Thirdly, the principle of reciprocity as a prerequisite remains a barrier to enforce foreign judgments in China. When the refusal grounds are adopted, which are enough to protect Chinese interests, the requirement of reciprocity becomes unnecessary and redundant. Nonetheless, more clarification will be introduced in practice which hopefully will address some of the above problems.

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# HCCH Asia Pacific Week 2023

*HCCH Asia Pacific Week 2023 – Access to Justice and Sustainable Development: The Impact of the HCCH in an Inter-Connected World*, was successfully held from 11 to 14 September 2023 in the Hong Kong Special Administrative Region (SAR), China.

The HCCH celebrated its 130th Anniversary during the HCCH Asia Pacific Week. During the week, many important conventions and instruments of the HCCH were promoted and examined by the experts from around the Asia Pacific Region.

The program of the Conference was:

Day One | Mon 11 September 2023

13:00 Registration

Opening

14:00 Welcome Remarks

Mr John Lee Ka-Chiu, Chief Executive of the Hong Kong SAR of the People’s

Republic

of China

Chunyin Hua, Assistant Minster, Ministry of Foreign Affairs of the People's Republic of China

Commissioner, Commission of the Ministry of Foreign Affairs of the People's

Republic of China in the Hong Kong SAR

Mr Paul Lam Ting-Kwok, Secretary for Justice, Hong Kong SAR of the People's

Republic of China

Professor Xiang Zhang, President and Vice Chancellor, The University of Hong Kong,

Hong Kong SAR of the People's Republic of China

Dr Christophe Bernasconi, Secretary General of the HCCH

14:50 Group Photo

Session 1 | The HCCH: Benefits of Membership & Key Conventions

15:00 Introductory Presentation: An Overview of the HCCH

Dr Christophe Bernasconi, Secretary General of the HCCH

15:15 Keynote Speech: Private International Law and the Rule of Law

Chief Justice Andrew Cheung, Chief Justice of the Court of Final Appeal, Hong Kong

SAR of the People's Republic of China

15:30 Regional Perspectives

HCCH Regional Office for the Asia and the Pacific, ROAP:

Prof Yun Zhao, Representative of the HCCH ROAP / Associate Dean, Faculty of

Law, the University of Hong Kong, Hong Kong SAR of the People's Republic of China

Asia-Pacific Economic Cooperation, APEC:

Dr James Ding, Chair, APEC Economic Committee / Law Officer (International Law),

Department of Justice of the Hong Kong SAR of the People's Republic of China

Asian African Legal Consultative Organization, AALCO:

Mr Nick Chan, Director General, AALCO Hong Kong Regional Arbitration Centre

The Law Association for Asia and the Pacific, LawAsia:

Ms Melissa Pang, President, LawAsia

International Organization for Mediation (Preparatory Office), IMOed:

Dr Jin Sun, Director General of the IMOed Preparatory Office

16:10 Q&A

16:30 Coffee Break

Session 2 | Joint Statement

18:15 Welcome Reception (By Invitation Only)Asia Pacific Week 2023 | Draft Programme

Day Two | Tuesday 12 September – a Day of Celebration: The 130th Anniversary of

the HCCH and the Entry into Force of the 2019 Judgments Convention

08:30 Registration

Session 3 | 130th Anniversary of the HCCH (Part One)

09:30 Opening: The 130th Anniversary of the HCCH

Dr Christophe Bernasconi, Secretary General of the HCCH

09:45 Keynote Speech: The Role of Private International Law in the 21st Century

Prof Jin Huang, President, Chinese Society of Private International Law

10:10 Panel: Challenges and Opportunities for Private International Law in the 21st Century

Prof Junhyok Jang, Sungkyunkwan University, the Republic of Korea

Prof Alan Gibb, Professional Consultant, Associate Professor of Practice in Law,

The Chinese University of Hong Kong, Hong Kong SAR of the People's Republic of

China

10:40 Q&A

11:00 Coffee Break

Session 4 | 130th Anniversary of the HCCH (Part Two)

11:30 Panel: Regional Perspectives of the Impact of the HCCH

Prof Tao Du, Dean, School of International Law, East China University of Political

Science and Law, China

Mr Patthara Limsira, Lecturer, Faculty of Law, Ramkhamhaeng University, Thailand

12:00 Panel: Looking Forward to the Next 130 Years: Challenges and Opportunities for the HCCH

Hon Justice Xiaoli Gao, Chief Judge of the Fourth Civil Division, Supreme People's

Court, China

Ms Delphia Lim, Director, International Division, Ministry of Law, Singapore

12:40 Q&A

13:00 Lunch Break

Session 5 | Entry into Force of the 2019 Judgments Convention (Part One)

14:30 Keynote Speech: The 2019 Judgments Convention – A Gamechanger in Transnational

Litigation

Hon Justice David Goddard (Online), Judge, High Court and Court of Appeal,

New Zealand

14:50 Introduction to the 2019 Judgments Convention: History, Text, and Impact

Prof Yuko Nishitani, Kyoto University, Japan

15:10 Panel: Joining the 2019 Judgments Convention: Experiences of Contracting Parties

Prof Fernando Dias Simoes, Associate Professor of Law at Lusíada University of

Porto and Portucalense University, Porto (Portugal)

Dr Jacek Kozikowski, Partner, Kochanski & Partners, Poland

15:40 Q&A

16:00 Coffee Break

Session 6 | Entry into Force of the 2019 Judgments Convention (Part Two)

16:30 Benefits and Challenges of the Judgments Convention

Prof Zhengxin Huo, Professor of Law and Vice Dean of the Faculty of International

Law at the China University of Political Science and Law (CUPL), China

16:50 Panel: Regional Perspectives

Ms Peggy Au Yeung, Principal Government Counsel, Department of Justice of the

Government, Hong Kong SAR of the People's Republic of China

Judge Soojin Cho, Judge, Seoul Western District Court, Korea

17:30 Looking Forward: The Jurisdiction Project

Prof Keisuke Takeshita, Professor, Graduate School of Law, Hitotsubashi University,

Japan

17:50 Q&A

18:15 Dinner (By Invitation Only)

Day Three| Wednesday 13 September

08:30 Registration

Transnational Litigation and Legal Cooperation

Session 7 | 2005 Choice of Court Convention

09:30 Introductory Presentation

Prof Jianwen Luo, Professor, School of Law, Sun Yat-sen University, China

09:50 Regional Perspectives

Prof Gyooho Lee (Online), Professor, School of Law, Chung-Ang University, the

Republic of Korea

Prof Afifah Kusumadara, Associate Professor, the Faculty of Law, Brawijaya University,

Indonesia

10:10 Q&A

Session 8 | 1961 Apostille Convention

10:30 Introductory Presentation

Mr Simon Kwang, Registrar, High Court of the Hong Kong SAR of the People's

Republic of China

10:50 Regional Perspectives

Ms Dyan Kristine Miranda-Pastrana, Director, Office of Consular Affairs, Department

of Foreign Affairs, Philippines

Mr Paul Neo, Chief Operating Officer & Chief Financial Officer, Singapore Academy of

Law, Singapore

11:10 Q&A

11:30 Coffee Break

Session 9 | 1965 Service Convention & 1970 Evidence Convention

12:00 Introductory Presentation

Mr Brody Warren (Online), Assistant Director, Private International & Commercial Law

Section, Attorney-General's Department, Australia

12:20 Regional Perspectives

Hon Raul B. Villanueva, Court Administrator, Supreme Court of the Philippines

Ms Pham Ho Huong, Department of International Law, Ministry of Justice, Vietnam

12:40 Q&A

13:00 Lunch Break

International Commercial, Digital and Financial Law

Session 10 | Normative Work in International Commercial, Digital and Financial Law

14:30 Normative Projects: The Central Bank Digital Currencies (CBDCs), HCCH-UNIDROIT Digital

Assets and Tokens (DAT) Joint Project, Digital Economy, and Insolvency Projects

Dr Gerardine Goh Escolar, Deputy Secretary General of the HCCH

15:00 Regional Perspectives

Prof Jingxia Shi, Professor, School of Law, Renmin University of China (RUC), China

Dr Emily Lee, Associate Professor, Faculty of Law, the University of Hong Kong, Hong

Kong SAR of the People's Republic of China

15:20 Q&A

Session 11 | 2015 Choice of Law Principles

15:40 Introductory Presentation

Prof Guangjian Tu, Professor, School of Law, the University of Macau, Macau SAR of

the People's Republic of China

16:00 Regional Perspectives

Prof Nobumichi Teramura, Assistant Professor, the Institute of Asian Studies,

University of Brunei Darussalam, Brunei Darussalam

Prof Priskila Pratita Penasthika, Assistant Professor, Faculty of Law, Universitas

Indonesia, Indonesia

16:20 Q&A

16:40 Tea & Coffee Break

Session 12 | 2006 Securities & 1985 Trusts Conventions

17:10 Introductory Presentation

Prof Yongping Xiao, Director of International Law Institute of Wuhan University, China

17:30 Regional Perspectives

Dr Dicky Tsang, Associate Professor, Faculty of Law, Chinese University of

Hong Kong, Hong Kong SAR of the People's Republic of China

Dr Adeline Chong, Associate Professor, School of Law, Singapore Management

University, Singapore

17:50 Q&A

18:10 Conclusion of Day Three

18:15 Dinner (By Invitation Only)

Day Four| Thursday 14 September

08:30 Registration

International Family and Child Protection Law

Session 13 | 1993 Adoption Convention

09:30 Introductory Presentation

Hon Justice Bebe Chu, Judge, Court of First Instance of the High Court of Hong Kong

SAR of the People's Republic of China

09:50 Regional Perspectives

Prof Elizabeth H. Aguiling-Pangalangan, College of Law Director, Institute of Human

Rights, Law Center University of the Philippines

Ms Iris Liu, Programme Director of Cross-boundary and International Casework,

International Social Service Hong Kong Branch

10:10 Q&A

Session 14 | 1980 Child Abduction Convention & 1996 Child Protection Convention

10:30 Introductory Presentation

Hon Justice Victoria Bennett, Judge, Federal Circuit and Family Court of Australia

10:50 Regional Perspectives

Hon Justice Amy C. Lazaro-Javier, Associate Justice, Supreme Court of the Philippines

Mr Stephen Yau GBS, Chief Executive, International Social Service Hong Kong Branch

Ms Yet Ngo Foo, Y.N. Foo & Partners, Malaysia

11:20 Q&A

11:40 Tea & Coffee Break

Session 15 | 2000 Adults Convention & 2007 Child Support Convention

12:10 Introductory Presentation

Hon Chief Justice John Pascoe AC CVO, former Chief Justice of the Federal Circuit

and Family Court of Australia of Australia, Deputy Chancellor of the University of New

South Wales, Australia

12:30 Regional Perspectives

Hon Angelene Mary W. Quimpo-Sale, Associate Justice of Court of Appeals of

the Philippines, Philippines

Mr Enzo Chow, Barrister of the Hong Kong SAR of the People's Republic of China

12:50 Q&A

Closing

13:10 Closing Remarks

Mr Horace Cheung Kwok-kwan, Deputy Secretary for Justice, Hong Kong SAR of the People's Republic of China

Dr Gerardine Goh Escolar, Deputy Secretary General of the HCCH

13:30 Farewell Lunch (By Invitation Only)

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# Giustizia consensuale No 1/2023: Abstracts

The first issue of 2023 of *Giustizia Consensuale* (published by Editoriale Scientifica) has just been released, and it features:

**Annalisa Ciampi** (Professor at the University of Verona), ***La giustizia consensuale internazionale*** (*International Consensual Justice*; in Italian)

> All means of dispute settlement between States, including adjudication, are based on the consent of the parties concerned. The post-Cold War era saw an unprecedented growth of third-party (judge or arbitrator) dispute resolution systems. In more recent years, however, we are witnessing a weakening of

the international judicial function. This paper analyses and explains similarities and differences between dispute settlement between States and dispute resolution between private parties at the national level. Whilst doing so, it makes a contribution to the question of whether the de-judicialisation taking place in Italy and elsewhere, as well as in the international legal system, can be considered a step in the right direction.

**Sabrina Tranquilli** (Researcher at the "Università degli Studi di Napoli Parthenope"), ***I contratti istituzionali di sviluppo (CIS) e i modelli di risoluzione e prevenzione dei conflitti tra pubbliche amministrazioni*** (*Institutional Development Contracts (IDC) and Models for Conflict Resolution and Prevention between Public Administrations*; in Italian)

The paper examines the two models of conflict resolution between public administrations set out in the Institutional Development Contracts (IDC). These contracts – recurrently used by the Italian lawmaker, also for the implementation of the Recovery and Resilience Plan (NRRP) for strategic interventions, especially in the area of territorial cohesion – allow the Administrations involved to define their respective spheres of intervention while also preventing possible conflicts between them. IDCs provide for both a centralised-substitutive model of conflict resolution and a negotiated one. This article shows that, although there is no overriding criterion between the two models, in both cases the dialectic between the parties based on the principle of loyal cooperation is essential.

**Guillermo Schumann Barragán** (Associate Professor at the "Universidad Complutense" in Madrid), ***Verso una teoria generale degli accordi processuali. Premesse ricostruttive*** (*Toward a General Theory of Procedural Agreements. Reconstructive Premises*; in Italian)

Procedural agreements are legal transactions with which the parties pursue certain procedural effects. Although such agreements are not unknown in the Spanish and Italian legal systems, there seems to be a lack of drive in these to define them as a legal category per se, i.e. as a set of legal transactions that share a series of structural elements and common criteria of validity and effectiveness. The aim of this paper is to outline a general theory of procedural agreements and to apply the theoretical results

achieved to a few, selected procedural agreements. In doing so, this paper aims to assess the usefulness and appropriateness of such agreements, also in the light of the economic analysis of the law and of the growing regulatory competition of States vis-à-vis cross-border legal relations as well as jurisdiction, in case a dispute arises.

**Alessandro Giuliani** (Resercher at the "Università Politecnica delle Marche"), ***Percorsi di valorizzazione dell'arbitrato irrituale nel diritto del lavoro in una prospettiva diacronica*** (*Pathways to the Enhancement of Informal Arbitration in Labour Law in a Diachronic Perspective*; in Italian)

Through a diachronic examination of applicable law, the article addresses critical issues in informal arbitration in the context of labour disputes. The legal framework of informal arbitration reveals a piecemeal scenario marked by discrepancies between legal provisions and implementation thereof. Against this backdrop, informal arbitration contributes to fostering a culture of alternative dispute resolution within the Italian legal system. The article focuses in greater detail on the procedure set out in Article 7 of Italian Law No 300 of 1970 and its potential to boost the effectiveness of informal arbitration in labour disputes, thus enhancing the protection of workers' rights beyond the judicial process.

**Observatory on Legislation and Regulations**

**Claudio Scognamiglio** (Professor at the University of Rome "Tor Vergata"), ***La negoziazione assistita e le controversie di lavoro. Verso un nuovo ruolo dell'avvocato nel riequilibrio delle situazioni di asimmetria negoziale?*** (*Assisted Negotiation and Labor Disputes. Toward a New Role for the Lawyer in Rebalancing Situations of Negotiation Asymmetry?*; in Italian)

The article offers food for thought on assisted negotiation in labour disputes introduced in the context of the recent reform of civil justice in Italy, which was enacted with Legislative Decree No 149/2022. Starting from the traditional function of labour law, and recalling the legislator's distrust for this alternative resolution instrument for labour disputes – a distrust which lasted until the enactment of Legislative Decree No 149/2022 – the author analyzes the normative data to delve on the prospects of dialogue between

civil law and labour law, and on the (new?) role of lawyers and their suitability to perform the function of rebalancing the asymmetries in the parties' power.

**Observatory on Practices**

**Mauro Bove** (Professor at the University of Perugia), ***Insegnare la mediazione nell'Università*** (*Teaching Mediation at the University*; in Italian)

> The paper explores ways to integrate the teaching of mediation into university curricula. The discourse ties into the overall issue of legal education and addresses relevant topics such as negotiation strategies for the settlement of civil disputes and university education as a means of cultural and personal growth for all those involved.

**Viviana Di Capua** (Researcher at the "Università degli Studi di Napoli Federico II"), ***La funzione 'mediatrice' dell'Arbitro per le Controversie Finanziarie. La segreteria tecnica quale strumento di riequilibrio delle parti in lite*** (*The 'Mediating' Function of the Financial Disputes Arbitrator. The Technical Secretariat as a Tool for Rebalancing the Disputing Parties*; in Italian)

> Almost two decades after its establishment, Arbitration for Financial Disputes (AFD) has proven to be an effective alternative means to resolve financial disputes between intermediaries and retail investors. Although the instrument was not created with the aim of reaching a consensual solution to disputes, the structure of the procedure, the investigative powers and the strategic role of the technical secretariat, along with the features introduced by the most recent reform, have created room for dialogue between the parties, thus providing incentives for reaching an agreement regardless of the final decision. The contribution aims to examine the nature of the proceedings, the powers available to the arbitrator, and the final decision, focusing on cases in which the AFD can take on a 'mediating' function between the parties, instrumental to a consensual resolution of the dispute.

**Rachele Beretta** (Ph.D. Candidate at the University of Antwerp), ***The Evolving Landscape of Online Dispute Resolution. A Study on the Use of ICT in International Civil and Commercial ODR***

Over the last two decades, Online Dispute Resolution (ODR) has expanded to new geographical and practice areas. However, data regarding the extension and characteristics of the ODR market are scarce. The empirical study presented in this article provides a snapshot of the current ODR landscape in international civil and commercial dispute resolution. After introducing the orienting framework for the study, this contribution will present data concerning ODR providers and the use of technology in civil and commercial dispute resolution services. The analysis will uncover critical issues and areas of interest for research and practice in light of the future development of ODR.

**Conference Proceedings**

**Silvana Dalla Bontà** (Associate Professor at the University of Trento), **Mediation: A Sleeping Beauty. *La promessa della giustizia consensuale alla luce della riforma della giustizia civile*** (*Mediation: A Sleeping Beauty. The Promise of Consensual Justice in Light of the Italian Reform of Civil Justice*; in Italian)

The paper draws on the introductory remarks to the Trento chapter of the 'Sleeping Beauty Conferences Series' organized by Giuseppe De Palo and Lela Love. Nearly ten years after the Jed D. Melnick Annual Symposium sponsored by the Cardozo Journal of Conflict Resolution (2014), the Conference at the University of Trento (11 November 2022) once again evokes the image of mediation as a 'sleeping beauty' awaiting her Prince Charming. What is the current state of play of mediation? Is mediation still a 'sleeping beauty'? Has the situation evolved? What could help improve the use of this promising dispute resolution tool? The author addresses these questions from the perspective of the recent Italian reform of civil justice, which significantly improved the legal framework for mediation. Will the promise of mediation be finally fulfilled?

**Giuseppe De Palo** (Senior Fellow and International Professor of ADR Law and Practice at Mitchell Hamline School of Law), ***Mediating Mediation Itself. The Easy Opt-Out Model Settles the Perennial Dispute between Voluntary and Mandatory Mediation***

The contribution reflects on the desirability of soft regulation of mediation to strike a balance between the principle of voluntariness and providing a viable alternative to litigation, thus boosting the efficiency of the civil justice system. While focusing on the debate around the mandatory attempt to mediate, the author argues that mediation not only benefits the disputing parties but also the judicial system at large in that it helps reduce the workload of courts and ensure access to justice for all. Despite the clear advantages of mediation, it is debated whether participation must be voluntary or should be mandatory in some instances. The author proposes an 'easy opt-out' mediation model where parties may leave the process if they so wish. Arguably, participation in the process may provide the parties with an understanding of mediation and its advantages. The proposed model has the potential to expose skeptical parties to the benefits of mediation.

**Zachary R. Calo** (Professor at the Hamad bin Khalifa University, Qatar), ***Commercial Mediation in the Gulf Cooperation Council. The Development of ADR in the Middle East***

The paper analyzes recent developments in the law and practice of commercial mediation among the Arab Gulf countries. Substantial changes have occurred since 2019, the year that Qatar and Saudi Arabia signed the Singapore Convention on Mediation, including issuance of new domestic laws, establishment of mediation rules and centers, and the general promotion of mediation. These changes have established in short order the foundational infrastructure needed to facilitate greater use of mediation in the region. Yet, in spite of the many impressive legal developments, there are barriers preventing the Gulf countries from more fully embedding mediation into their dispute resolution ecosystems.

**Paola Lucarelli** (Professor at the University of Florence), ***La nuova mediazione civile e commerciale*** (*The New Civil and Commercial Mediation*; in Italian)

By shedding light on the profound meaning of mediation, the legal culture begins to awaken consciences: the reform of mediation shifts the point of view from solely adversarial to one that contemplates beforehand the concerted, consensual sphere. In doing so, it enhances the role of mediation, which is of coexistence with litigation. In this framework, law as a mere remedy is escorted by cooperative dialogue: with mediation, people acquire a

leading role in the pursuit of answers to their needs and to the need for justice. Against this background, the issue of choice arises: for instance, the choice whether to participate in a process of evolution of the society or, rather, to assist inert, possibly complaining of injustices, puerile behaviours, and inefficiencies; and also the choice whether to contribute to the innovation of the legal profession to adequately respond to the needs of a client. In this context, the role of higher education is crucial. In fact, higher education can foster a legal culture that grants space and time to autonomy: a culture of adults, equipped to responsibly address their problems in a direct exchange with their counterparties.

**Filippo Danovi** (Professor at the University of Milano-Bicocca), ***La giustizia consensuale nella crisi familiare*** (*Consensual Justice in Family Crisis*; in Italian)

Within the recent civil justice reform, a dedicated attention has been given to alternative (or, better, complementary) means of dispute resolution. In particular, in the area of family and juvenile justice, a prominent place has been given to forms of consensual justice, both judicial in nature, which thus presuppose that the meeting of the parties' will is formalized within a jurisdictional framework, and extrajudicial in nature, in the models of assisted negotiation and family mediation. This essay reconstructs the main lines of regulatory intervention in this area.

In addition to the foregoing, this issue features the following chronicles:

**Angela M. Felicetti** (Research Fellow at the University of Bologna), ***Un'occasione di confronto tra Università e Organismi di mediazione. Note da un recente Convegno*** (*An Opportunity for Discussion between Universities and Mediation Bodies. Notes from a Recent Conference*; in Italian)

**Luciana Breggia** (formerly Judge at the Florence Tribunal), ***Una proposta degli Osservatori sulla Giustizia civile in merito alla riforma del processo civile. Tra buone prassi e auspicati correttivi al d.lgs. n. 149 del 2022*** (*A Proposal from the Civil Justice Observers on the Italian Reform of Civil Justice. Between Best Practices and Desired Corrective Measures to Legislative Decree No 149 of 2022*; in Italian)

Finally, it features the following book review by ***Cristina M. Mariottini:*** **Guillermo PALAO (ed),** ***The Singapore Convention on Mediation. A Commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation***, Edward Elgar Publishing, 2023, ix-xxvi, 1-350.

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# China Adopts Restrictive Theory of Foreign State Immunity

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

On September 1, 2023, the Standing Committee of the National People's Congress promulgated the Foreign State Immunity Law of the People's Republic of China (FSIL) (English translation here). When the law enters into force on January 1, 2024, China will join those countries—a clear majority—that have adopted the restrictive theory of foreign state immunity. For the law of state immunity, this move is particularly significant because China had been the most important adherent to the rival, absolute theory of foreign state immunity.

In two prior posts (here and here), I discussed a draft of the FSIL (English translation here). In this post I analyze the final version of the law, noting some of its key provision and identifying changes from the draft, some of which address issues that I had identified. I also explain why analysts who see China's new law as a form of "Wolf Warrior Diplomacy" are mistaken. Contrary to some suggestions, the FSIL will not allow China to sue the United States over U.S. export controls on computer chips or potential restrictions on Tiktok. Rather, the FSIL is properly viewed as a step towards joining the international community on an important question of international law.

# The Restrictive Theory of Foreign State Immunity

Under the restrictive theory of foreign state immunity, foreign states are immune from suits based on their governmental acts (acta jure imperii) but not from suits based on their non-governmental acts (acta jure gestionis). During the twentieth century many countries moved from an absolute theory of foreign state immunity, under which countries could never be sued in another country's courts, to the restrictive theory. Russia and China long adhered to the absolute theory. But Russia joined the restrictive immunity camp in 2016, when its law on the jurisdictional immunity of foreign states went into effect.

In 2005, China signed the U.N. Convention on Jurisdictional Immunities of States and Their Property, which follows the restrictive theory. But China has not ratified the U.N. Convention, and the Convention has not gained enough signatories to enter into force. As I noted in a prior post, China stated in 2009 that, despite signing the U.N. Convention, its position on foreign state immunity had not changed and that it still followed the absolute theory.

China's new FSIL therefore marks a significant shift in China's position on an important question of international law. As I explained in my earlier posts and discuss further below, the FSIL follows the U.N. Convention in many respects. By adopting this law, however, China has extended these rules not only to other countries that may join the Convention but to all countries, even those like the United States that are unlikely ever to sign this treaty.

# Significant Provisions of the State Immunity Law

China's FSIL begins, as most such laws do, with a general presumption that foreign states and their property are immune from jurisdiction. Article 3 says: "Foreign states and their property enjoy immunity from the jurisdiction of PRC courts, except as otherwise provided by this Law." Article 2 defines "foreign states" to include "foreign sovereign states," "state organs or constituent parts of foreign sovereign states," and "organizations or individuals who are authorized by foreign sovereign states to exercise sovereign authority and who engage in

activities on the basis of such authorization." These provisions generally track Articles 1 and 2(1)(b) of the U.N. Convention.

## Waiver Exception

Articles 4-6 of the FSIL law provide that a foreign state is not immune from jurisdiction when it has consented to the jurisdiction of Chinese courts. Article 4 sets forth means by which a foreign state may expressly consent to jurisdiction. Article 5 provides that a foreign state is deemed to consent if it files suit as a plaintiff, participates as a defendant and files "an answer or a counterclaim on the merits of the case," or participates as a third party in Chinese courts. Article 5 further provides that a foreign state participating as a plaintiff or third party waives immunity from counterclaims arising from the same legal relationship or facts. Article 6, on the other hand, says that a foreign state shall not be deemed to have consented to jurisdiction by appearing in Chinese court to assert immunity, by having its representatives testify, or by choosing Chinese law to govern a particular matter. These provisions track Articles 7-9 of the U.N. Convention.

## Commercial Activities Exception

The FSIL also contains a commercial activities exception. Article 7 provides that a foreign state shall not be immune from proceedings arising from commercial activities when those activities "took place in PRC territory, or have had a direct effect in PRC territory even though they took place outside PRC territory." Article 7 defines "commercial activity" as "transactions of goods or services, investments, borrowing and lending, and other acts of a commercial nature that do not constitute an exercise of sovereign authority." To determine whether an act is commercial, "a PRC court shall undertake an overall consideration of the act's nature and purpose." Like the U.N. Convention, the FSIL deals separately with employment contracts (Article 8) and intellectual property cases (Article 11).

Article 7's reference to both "nature and purpose" is significant. U.N. Convention Article 2(2) allows consideration of both. But considering "purpose" is likely to result in a narrower exception—and thus in broader immunity for foreign states—than considering "nature" alone. Under the U.S. Foreign Sovereign Immunities Act (FSIA), the commercial character of an act is determined only by reference to its nature and not by reference to its purpose. Applying this definition, the U.S. Supreme Court has held that issuing foreign government

bonds is a commercial activity, even if done for a sovereign purpose. It is unclear if Chinese courts applying the FSIL will reach the same conclusion.

## Territorial Tort Exception

Article 9 of the FSIL creates an exception to immunity for claims "arising from personal injury or death or damage to movable or immovable property caused by the relevant act of the foreign state in PRC territory." This generally tracks Article 12 of the U.N. Convention.

## Property Exception

Article 10 of the FSIL creates an exception to immunity for claims involving immoveable property in China, interests in moveable or immoveable property arising from gifts, bequests, or inheritance, and interests in trust property and bankruptcy estates. This provision closely follows Article 13 of the U.N. Convention.

## Arbitration Exception

Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from jurisdiction with respect to certain matters requiring review by a court. These include "the validity of the arbitration agreement," "the confirmation or enforcement of the arbitral award," and "the setting aside of the arbitral award." This provision corresponds to Article 17 of the U.N. Convention.

## Reciprocity Clause

China's FSIL also contains a reciprocity clause. Article 21 provides: "Where foreign states accord the PRC and its property narrower immunity that is provided by this Law, the PRC will apply the principle of reciprocity." This means, for example, that Chinese courts could hear claims against the United States for expropriations in violation of international law or for international terrorism, because the U.S. FSIA has exceptions for suchclaims, even though China's FSIL does not.

The U.N. Convention does not have a reciprocity provision. Nor do most other states that have codified the law of state immunity. But Russia's 2016 law on the

jurisdictional immunities of foreign states does contain such a clause in Article 4(1), and Argentina's state immunity law contains a reciprocity clause specifically for the immunity of central bank assets, reportedly adopted at China's request.

The FSIL's reciprocity clause is consistent with the emphasis on reciprocity that one finds in other provisions of Chinese law. For example, Article 289 of China's Civil Procedure Law (numbered Article 282 in this translation, prior to the law's 2022 amendment of other provisions), provides for the recognition and enforcement of foreign judgments "pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity."

The example of foreign judgments also shows that reciprocity may be interpreted narrowly or broadly. China used to insist on "de facto" reciprocity for foreign judgments—proof that the foreign country had previously recognized Chinese judgments. Last year, however, China shifted to a more liberal "de jure" approach, under which reciprocity is satisfied if the foreign country *would* recognize Chinese judgments even if it has not already done so. Time will tell how Chinese courts interpret reciprocity under the FSIL.

## Service

Article 17 of the FSIL provides that Chinese courts may serve process on a foreign state as provided in treaties between China and the foreign state or by "other means accepted by the foreign state and not prohibited by PRC law." (The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state's Central Authority.) If neither of these means is possible, then service may be made by sending a diplomatic note. A foreign state may not object to improper service after it has made a pleading on the merits. This provision also follows the U.N. Convention closely, specifically Article 22.

## Default Judgments

If the foreign state does not appear, Article 18 of China's draft law requires a Chinese court to "sua sponte ascertain whether the foreign state enjoys immunity from its jurisdiction." The court may not enter a default judgment until at least six months after the foreign state has been served. The judgment must then be

served on the foreign state, which will have six months to appeal. Article 23 of the U.N. Convention is similar but with four-month time periods.

## Immunity of Property from Execution

Under customary international law, the immunity of a foreign state's property from compulsory measures like execution of a judgment is separate from—and generally broader than—a foreign state's immunity from suit. Articles 13-15 of the FSIL address the immunity of a foreign state's property from compulsory measures.

Article 13 states the general rule that "[t]he property of a foreign state enjoys immunity from the judicial compulsory measures of PRC courts" and further provides that a foreign state's waiver of immunity from suit is not a waiver of immunity from compulsory measures. Article 14 creates three exceptions to immunity: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically earmarked property for the enforcement of such measures; and (3) "to implement the effective judgments and rulings of PRC courts" when the property is used for commercial activities, relates to the proceedings, and is located in China. Article 15 goes on to identify types of property that shall *not* be regarded as used for commercial activities for the purpose of Article 14(3), including the bank accounts of diplomatic missions, property of a military character, central bank assets, and property of scientific, cultural, or historical value.

As discussed further below, the addition of "rulings" (??) to Article 14(3) is significant because Chinese court decisions that recognize foreign judgments are considered "rulings." This change means that the exception may be used to enforce *foreign* court judgments against the property of a foreign state located in China by obtaining a Chinese court ruling recognizing the foreign judgment. This change brings the FSIL into greater alignment with Articles 19-21 of the U.N. Convention, which similarly permit execution of domestic and foreign judgments against the property of foreign states.

## Foreign Officials

As noted above, Article 2 of the FSIL defines "foreign state" to include "individuals who are authorized by foreign sovereign states to exercise sovereign

authority and who engage in activities on the basis of such authorization." The impact of the FSIL on foreign official immunity is limited by Article 20, which says that the FSIL shall not affect diplomatic immunity, consular immunity, special-missions immunity, or head of state immunity. But Article 20 makes no mention of conduct-based immunity—that is, the immunity that foreign officials enjoy under customary international law for acts taken in their official capacities.

Thus, foreign officials not mentioned in Article 20 will be subject to suit in Chinese courts, even for acts taken in their official capacities, if one of the exceptions discussed above applies. If, for example, a foreign official makes misrepresentations in connection with a foreign state's issuance of bonds, the FSIL's commercial activities exception would seem to allow claims for fraud not just against the foreign state but also against the foreign official.

The FSIL's treatment of foreign officials generally tracks the U.N. Convention, both in defining "foreign state" to include foreign officials (Art. 2(1)(b)(iv)) and in exempting diplomats, consuls, and heads of state (Art. 3). But, as I noted in an earlier post, there is no reason China had to follow the U.N. Convention's odd treatment of conduct-based immunity. Doing so in the absence of a treaty, moreover, appears to violate international law by affording some foreign officials less immunity than customary international law requires.

## Some Changes from the Draft Law

The NPC Standing Committee made small but potentially significant changes to the draft law in promulgating the FSIL. The NPC Observer has a helpful chart comparing the Chinese text of the final version to the draft law.

One change that others have noted is the explicit mention of "borrowing and lending" (??) in the commercial activities exception in Article 7. The enormous amounts that China has loaned to foreign states under the Belt and Road Initiative may explain this addition. But the practical effect of the change seems limited for two reasons. First, "borrowing and lending" would have naturally fallen into the catch-all phrase "other acts of a commercial nature" in any event. Second, as noted above, Article 7 instructs Chinese courts to "undertake an overall consideration of the act's nature and purpose." Considering an act's purpose may lead Chinese courts to conclude that some "borrowing and lending" involving foreign states is not commercial if it is done for governmental purposes.

The NPC Standing Committee also helpfully changed Article 9's territorial tort exception to clarify when that exception applies. In an earlier post, I wrote that the draft law did "not make clear whether it is the tortious act, the injury, or both that must occur within the territory of China." The final text of the FSIL now clearly states that the relevant conduct of the foreign state, though not the injury, must occur within China (????????????? ??????????????). This position is generally consistent with Article 12 of the U.N. Convention but, most importantly, it is simply clearer than the text of the draft law.

Another small but important change is the addition of "rulings" (??) to Article 14(3)'s exception for compulsory measures to enforce judgments. The corresponding provision in the draft law referred to Chinese "judgments" (??) but not to "rulings." As I pointed out before, this omission was significant because Chinese decisions recognizing foreign court decisions are designated "rulings" rather than "judgments." Under the draft law, the exception would have allowed execution against the property of a foreign state for Chinese court judgments but not for Chinese rulings recognizing foreign judgments. By adding "rulings" to the final text of the FSIL, the NPC Standing Committee has brought this exception more in line with Article 19(c) of the U.N. Convention and made it available to help enforce foreign judgments against foreign-state-owned property in China if the other requirements of the exception are met.

In another change from the draft law, the NPC Standing Committee has added "PRC Courts" (??????????) to the beginning of Article 17 on service of process. The general practice in China is that courts, rather than litigants, serve process. This is one reason why the practice of some U.S. courts to authorize alternative service on Chinese defendants by email is problematic. For present purposes, the change simply clarifies something that Chinese practitioners would take for granted but non-Chinese practitioners might not.

Article 20 provides that the FSIL does not affect the immunities of certain foreign officials. In its second paragraph, dealing with head-of-state immunity, the NPC Standing Committee has added "international custom" (????? ?) as well as "PRC laws" and "international agreements." This makes sense. Although diplomatic immunity, consular immunity, and other immunities mentioned in the first paragraph of Article 20 are governed by treaties, head-of-state immunity is governed not by treaty but by customary international law.

Finally, in Article 21's reciprocity provision, the NPC standing committee has eliminated the word "may" (??). The effect of this change is to make the application of reciprocity mandatory when foreign states accord China and its property narrower immunity than is provided by the FSIL.

## The Impact on China-U.S. Relations

Recent media coverage has suggested that China views the FSIL as a legal tool in its struggle with the United States. A senior official in China's Ministry of Foreign Affairs was quoted as saying that the law "provides a solid legal basis for China to take countermeasures" against discriminatory action by foreign courts and may have a "preventive, warning and deterrent" effect. One analyst has even suggested that the FSIL is "an important part of China's Wolf Warrior diplomacy, and another step forward in its diplomatic bullying of other countries." Such comments miss the mark. As Professor Donald Clarke aptly observes: "All China is doing is adopting a policy toward sovereign immunity that is the one already adopted by most other states."

Professor Sophia Tang points out that, although suits against China in U.S. courts over Covid-19 pushed the issue of state immunity up on Chinese lawmakers' agenda, the question had been under discussion for years. The Covid-19 lawsuits may explain why China included Article 21's provision on reciprocity, but it bears emphasis that these suits against China were *dismissed* by U.S. courts on grounds of state immunity. If Congress were foolish enough to amend the FSIA to permit such suits, the FSIL's reciprocity provision would allow China to respond in kind, but this scenario seems unlikely.

China's FSIL will not permit suits against the United States for other actions that China has protested, such as U.S. export controls on selling semiconductors to China or potential restrictions on TikTok. These are governmental actions, and the restrictive theory adopted by the FSIL maintains state immunity for governmental actions.

On the other hand, the FSIL clearly will permit suits in Chinese courts against foreign governments that breach commercial contracts. As Professor Congyan Cai points out, the FSIL may play a role in enforcing contracts with foreign governments under China's Belt and Road Initiative. More generally, Clarke notes, China's past adherence to the absolute theory meant that Chinese parties

could not sue foreign states in Chinese courts even though foreign parties could sue China in foreign courts. “China finally decided,” he continues, “that there was no point in maintaining the doctrine of absolute sovereignty, since other states weren’t respecting it in their courts and the only people it was hurting were Chinese plaintiffs.”

Ultimately, the FSIL is a step in what Professor Cai has called China’s “progressive compliance” with international law, which helps legitimate China as a rising power. The FSIL brings Chinese law into alignment with the law on state immunity in most other countries, ending its status as an outlier in this area.

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

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# “Quasi” Anti-Suit Injunctions and Public Policy under Brussels Regime

### THE CJEU: “QUASI” ANTI-SUIT INJUNCTION JUDGMENTS ARE AGAINST PUBLIC POLICY UNDER BRUSSELS REGIME

*This post is written by Mykolas Kirkutis, a lecturer and PhD student of law at Mykolas Romeris University and visiting researcher at Rotterdam Erasmus School of Law, Erasmus University Rotterdam (EU Civil Justice group).*

The Court of Justice of European Union (CJEU) on 7 of September 2023 in its newest case *Charles Taylor Adjusting Limited, FD v Starlight Shipping Company, Overseas Marine Enterprises Inc.* (case No. C?590/21) 2023 rendered a new preliminary ruling related to a non-recognition of “Quasi” anti-suit injunctions’ judgment under public policy ground of Brussels regime. This case is important because of two aspects. Firstly, CJEU clarified the main elements of “Quasi” anti-suit injunctions’ judgments. Secondly, Court stated what impact such judgments have for mutual trust in EU and if it can be safeguarded by public policy ground.

**Facts of the case and preliminary question**

The case concerns the maritime accident and dispute deriving from it. In connection with the sinking of a ship owners of the ship (Starlight and OME) demanded the insurers of that ship to pay an insurance claim based on their insurance contracts. After the insurers refused to pay a compensation, Starlight filed a claim against of the insurers to the UK courts and commenced another proceedings against another insurer in arbitration. While the legal action and arbitration were pending, Starlight, OME and the insurers concluded the settlement agreements in the UK court. According to the settlement agreement, it shall end parties' dispute and insurers had to pay the insurance benefit. The settlement agreements have been approved by the UK court.

Following the conclusion of the settlement agreements, the owners of the vessel (Starlight and OME with the other owners) brought several legal actions before the court in Greece for compensation of material and non-material damage. Legal actions were based insurers and their representatives liability on the publication of false and defamatory statements about the owners at a time when the initial proceedings for the payment of the insurance claim. These actions were based on the fact that the insurers' agents and representatives had informed the National Bank of Greece (the mortgage creditor of one of the shipowners) and had spread false rumours in the insurance market that the ship had sunk due to serious defects of which the shipowners were aware.

While those new legal actions before the Greece court were pending, the insurers of the vessel and their representatives brought another legal actions against Starlight and OME before the UK courts seeking a declaration that those new actions, instituted in Greece, had been brought in breach of the settlement agreements, and requesting that their applications for 'declarative relief and compensation' be granted. The High Court of Justice (England & Wales) on 26 September 2014 (while legal actions before the Greece court were pending) rendered judgment and orders by which the insurers and their representative's obtained compensation in respect of the proceedings instituted in Greece and payment of their costs incurred in England.

After that the issue of non-recognition of these UK court judgment and orders has come before the Greece courts. The Supreme Court of Greece deciding on the question of non-recognition of UK courts judgment and order refered to the CJEU

for a preliminary ruling. The main question, which was referred to the CJEU was whether recognition and enforcement of a judgment of a court of another Member State may be refused on grounds of public policy on the ground that it obstructs the continuation of proceedings pending before a court of another Member State by awarding one of the parties interim damages in respect of the costs incurred by that party in bringing those proceedings.

**Elements of "Quasi" anti-suit injunctions' judgment**

First, in its preliminary judgment the CJEU clarified the elements of the "Quasi" anti-suit injunctions' judgment. Court noted, that in the context of an 'anti-suit injunction', a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. When a court order prohibits a plaintiff from bringing an action before a court in another country, the order constitutes a restriction on the jurisdiction of the court in the other country, which is not compatible with the Brussels regime.

However, it is clear from this CJEU judgment that it is not essential that a prohibition to bring an action before a court of another State would be expressed directly in the such judgment to qualify it "Quasi" anti-suit injunctions' judgment. In this case, the judgment and orders of the UK court did not prohibited to bring an action before the courts of another State (Greece) *expressis verbis*. Although, that judgment and those orders contained grounds relating to the breach settlement agreements, the penalties for which they will be liable if they fail to comply with that judgment and those orders and the jurisdiction of the Greece courts in the light of those settlement agreements. Moreover, that judgment and those orders also contained grounds relating to the financial penalties for which Starlight and OME, together with the natural persons representing them, will be liable, in particular a decision on the provisional award of damages, the amount of which is not final and is predicated on the continuation of the proceedings before the Greece courts.

It is clear from paragraph 27 of the preliminary judgment of CJEU that, in order for a particular judgments of a another Member State to qualify them as a "quasi" anti-suit injunctions' judgments it is enough that they may be regarded as having, at the very least, the effect of deterring party from bringing proceedings before the another Member State courts or continuing before those courts an action the

purpose of which is the same as those actions brought before the courts of the United Kingdom. A court judgment with such consequences is contrary to the objectives of the Brussels regime. This leads to the conclusion that such judgment cannot be enforced in another Member states, because it contradicts to mutual trust on which Brussels regime is based.

**"Quasi" anti-suit injunctions', Mutual Trust and Public Policy**

Secondly, the CJEU considered whether such judgment can be not recognised on the ground of public policy. This means that court had to answer whether mutual trust and the right to access a court fall within the scope of the public policy clause. Court noted that such "quasi" anti-suit injunctions' run counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Brussels I Regulation (as well as under Brussels Ibis Regulation) is based.

As well as, the CJEU ruled that the recognition and enforcement of the judgment and orders of the High Court of Justice (England & Wales) may breach public policy in the legal order of the Member State in which recognition and enforcement are sought, inasmuch as that judgment and those orders are such as to infringe the fundamental principle, in the European judicial area based on mutual trust, that every court is to rule on its own jurisdiction. Furthermore, that type of '"quasi" anti-suit injunction' is also such as to undermine access to justice for persons on whom such injunctions are imposed.

The CJEU decided that Article 34(1) of Regulation No 44/2001, read in conjunction with Article 45(1) thereof, must be interpreted as meaning that a court or tribunal of a Member State may refuse to recognise and enforce a judgment of a court or tribunal of another Member State on the ground that it is contrary to public policy, where that judgment impedes the continuation of proceedings pending before another court or tribunal of the former Member State, in that it grants one of the parties provisional damages in respect of the costs borne by that party on account of its bringing those proceedings on the grounds that, first, the subject matter of those proceedings is covered by a settlement agreement, lawfully concluded and ratified by the court or tribunal of the Member State which gave that judgment and, second, the court of the former Member State, before which the proceedings at issue were brought, does not have jurisdiction on account of a clause conferring exclusive jurisdiction.

**Conclusion**

The above mentioned CJEU preliminary ruling leads to two findings. First, public policy ground includes both the principle of a EU judicial area which is based on mutual trust and the right to access a court, which is an important and fundamental principle of EU law. And second, that "Quasi" anti-suit injunctions' are against the purpose of Brussels regime, therefore such judgments can be non-recognized in another Member States on the basis of public policy clause.

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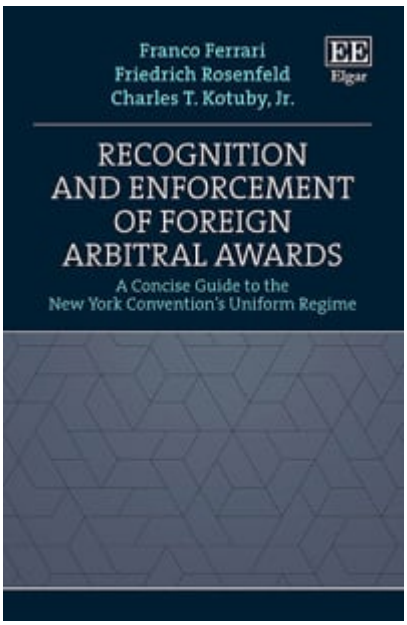
# Review of: Recognition and Enforcement of Foreign Arbitral Awards (Ferrari, Rosenfeld, & Kotuby Jr.)

## Franco Ferrari, Friedrich Rosenfeld, & Charles T. Kotuby Jr., Recognition and Enforcement of Foreign Arbitral Awards: A Concise Guide to the New York Convention's Uniform Regime

## Cheltenham, Edward Elgar, 2023

## 178 pp. Hardback : £72 eBook: £20




I was interested in reviewing this book as the first step towards familiarising myself with the recognition and enforcement of foreign arbitral awards. My previous knowledge of international commercial arbitration was derived from Nigerian case law, together with the much-cited ***West Tankers*** decision and its relationship with Brussels Ia. The book contains 10 chapters across 170 pages, wherein Ferrari et al. do an excellent job of introducing the uninitiated to 'internationalist' perspectives of the recognition and enforcement of foreign arbitral awards, greatly simplifying the topic to ensure the reader's comprehension. However, experts in this area of law will equally enjoy the extensive comparative jurisprudence that is drawn upon in the book. Besides, it makes for a very interesting read: I finished it in just two days!

The New York Convention is one of the world's most successful treaties. As of January 2023, there were 172 Contracting States. Thus, Ferrari et al. mainly rely on this Convention in the text, supported by extensive comparative case law and academic sources. From my reading of the book, its central themes are the promotion of a narrow approach to refusing the recognition and enforcement of foreign arbitral awards, and the promotion of uniformity in interpreting the New York Convention. Essentially, Ferrari et al. support a pro-arbitration stance throughout all the chapters of their book.

In particular, the above authors state that: “Recognition operates as a shield – at the outset of a dispute and after the arbitral process concludes” (p.1). Consequently, recognition could be used as a defence. Alternatively, they emphasise that an award in breach of an arbitration agreement should not be recognised. Recognition can similarly be used to avoid the re-litigation of a dispute. Furthermore, it is highlighted that: “Enforcement operates as a sword. It aims at giving effect to an arbitration agreement or arbitral award” (p.2). For example, this would involve compelling the parties to arbitrate, or applying coercive measures to execute an arbitral award under the law. Ferrari et al. claim that the enforceability of arbitral awards ranks highest amongst the perceived advantages of international arbitration

In Chapter One, the book advocates for a uniform and autonomous interpretation of the New York  Convention – it is not simply a case of harmonisation. However, the authors admit that the lack of a court that can provide uniform interpretation (like the European Court of Justice for the EU Member State Courts, or the International Court of Justice for the global community) represents an obstacle to a uniform interpretation of the New York Convention. It is also noted in this Chapter that most Courts of Member States adopt a pro-enforcement approach under the New York Convention, with a narrow interpretation of the grounds for refusing recognition and enforcement.

In Chapter Two, the focus is on the New York Convention’s scope of application, wherein three main issues are identified. The first of these is the need for an autonomous definition of what constitutes an arbitral award, citing the following criteria:  (a) The decision must be made by arbitrators or permanent arbitral tribunals in a private capacity, (b) The adjudicatory authority must be conferred with the consent of the parties, and (c) The decision must be a binding one, as in the case of a judicial decision.

The second issue explored in Chapter Two is internationality, likewise composed of three main pillars. The internationality requirement is fulfilled (a) Once the arbitral award is made in a State other than the contracting State in which

recognition and enforcement are sought, irrespective of whether the award would be considered international under domestic law, (b) The awards are issued within the territory of an enforcing State but possess foreign elements that prevent them from being domestic, and (c) The arbitration agreements are not purely domestic – they contain foreign elements. Finally, the third issue, according to the authors, is that reservations have lost their importance, due to the success of the New York Convention.

In Chapter Three, however, the authors turn their attention towards the recognition and enforcement of arbitration agreements. They submit that the success of international arbitration is based on respect for arbitration agreements, which is subject to five main criteria, the first being the presumptive validity of an arbitration agreement (pro-arbitration bias).

The second criterion mentioned is arbitrability, or the subject matter being capable of arbitration. The extent to which a state limits the matters that may be arbitrated will determine whether that state is arbitration friendly. Moreover, the determination of issues as non-arbitrable should be based on narrow and justifiable public policy grounds. The protection of weaker parties, like employees, is an example that the book provides of issues that are not arbitrable in certain legal systems.

The third criterion is that the arbitration agreement should not be null and void, and should likewise not be inoperative or incapable of being performed. Chapter Three discusses this point in depth, with the inclusion of separability (which safeguards arbitral authority), and the law that applies to an arbitration agreement. Here, the issue of the applicable law is widely debated in the UK and globally. In the absence of an express choice of law, it is contested whether the law of the seat, law governing the main contract, or *lex fori* should apply to an arbitration agreement. Therefore, it is wise for the parties to include an express choice of law to govern their arbitration agreement, so that these complexities and uncertainties may be avoided. Finally, the scope and drafting of arbitration agreements are outlined in this Chapter.

Chapter Four then proceeds to discuss the duty to recognise and enforce arbitral awards, together with the limitations of this duty. Interestingly, the authors argue that 'Enforcement shopping' for the most favourable forum is permitted under the New York Convention, even in multiple jurisdictions simultaneously. Meanwhile, the refusal to recognise or enforce foreign arbitral awards must be based on an exhaustive list of grounds, burden of proof, waivers, the preclusive effects of prior determinations (deference to arbitral tribunals), and the discretion to deny recognition and enforcement. Finally, Chapter Four clarifies that the refusal to recognise or enforce a foreign arbitral award is not binding on another State.

Chapter Five continues by discussing the grounds for refusing to recognise or enforce a foreign arbitral award in relation to jurisdiction. Here, three main elements are identified. First, it should be impossible to resolve the subject matter through arbitration (due to, for example, matters of state interest). Second, the parties should lack capacity under the applicable law, or else the arbitration agreement must be invalid. Third, the arbitral decision must fall outside the scope of the arbitration agreement or submission of the parties.

Chapter Six subsequently discusses grounds for refusal in relation to proper notice and the ability to present one's case, such as due process or natural justice. The authors hereby note that the courts in most of the signatory States of the New York Convention are reluctant to apply this ground for refusal, in order to protect international commercial arbitration.

Meanwhile, Chapter Seven focuses on further grounds for refusal, specifically with regard to procedure, such as the composition of the arbitral tribunal, the failure of the parties' agreement (or deviation of the arbitration procedure from that agreement), or the procedure not being in accordance with the law of the country in which the arbitration took place.

Conversely, Chapter Eight looks at grounds for refusal in relation to the status of an award under the applicable law. This involves situations where a foreign arbitral award has not become binding on the parties, or else has been set aside by a competent authority in the country where the award was made, or under the law of that country.

Chapter Nine then discusses public policy requirements, which .the authors rightly note as being applied narrowly or on justifiable grounds to promote international commercial arbitration.

Finally, Chapter Ten focuses on the procedure and formal requirements for recognition and enforcement.

My verdict is that this book is certainly worth reading for anyone with an interest in international commercial arbitration. I highly commend its simplicity and the comparative approach embodied in the writing, specifically with reference to the recognition and enforcement of foreign arbitral awards.

More please.