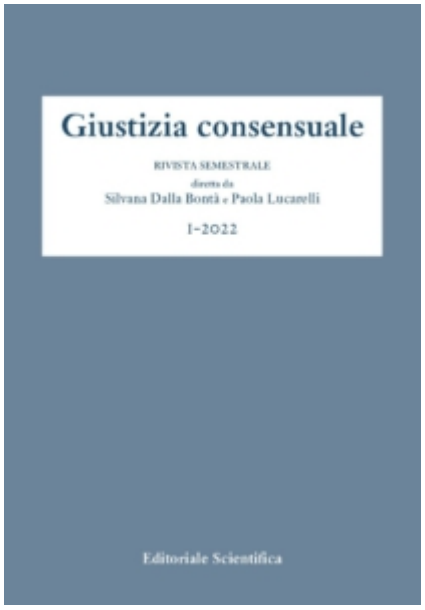
# Giustizia consensuale No 1/2022: Abstracts




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

**Andrea Simoncini** (Professor at the University of Florence) and **Elia Cremona** (PhD, University of Siena), ***Mediazione e Costituzione*** (*Mediation and Constitution*; in Italian)

> This paper deals with the issue of the constitutional basis of mediation. After describing the currently dominant view which sees mediation as merely a 'means' to an end, such as reducing the judicial backlog, and as a complementary tool to in-court proceedings, the authors argue that mediation could be considered as a constitutional 'end' in itself. Thus, by promoting the attainment of a more cohesive society, mediation is seen as a way to fulfil the social solidarity obligations as enshrined in the Italian Constitution.

**Claudio Cecchella** (Professor at the University of Pisa), ***La negoziazione assistita nelle controversie sulla crisi delle relazioni familiari dopo la riforma con legge n. 206 del 2021*** (*Lawyer-Assisted Negotiation Procedure in Family Disputes Subsequent to Law No 206 of 2021*; in Italian)

> This paper analyses the provisions of Law No 206 of 2021 concerning the negotiation process assisted by attorneys in family disputes. The author firstly examines the provisions which entered into force on 22 June 2022,

such as the extension of the scope of application of this negotiation process. Secondly, he explores the provisions that will enter into force at a later date, such as the possibility of agreeing to a lump-sum maintenance payment, the provision of legal aid and the right to take evidence during negotiations. While praising this reform, the author strongly criticizes it for not having provided for the minor's right to be represented and heard during the negotiation process.

**Juan F. Herrero** (Professor at the University of Zaragoza), *Accordarsi o soccombere* (*Reaching an Agreement or Losing the Case*; in Italian)

Settlement rates are still relatively low compared to the percentage of cases that go to trial. Against this backdrop, the Spanish legislator has committed to reversing the trend. After some early efforts that were in vain, the legislator resorted to two instruments: the mandatory mediation attempt as a prerequisite to instituting judicial proceedings (as an alternative to mediation, parties may opt for other extrajudicial dispute resolution methods), and a new scheme for the allocation of judicial costs. The paper investigates correlations between judicial decisions on cost allocation and mandatory or voluntary extrajudicial settlement attempts. Furthermore, it examines the impact of the aforementioned attempts on the determination of judicial costs, with a special focus on relevant case law. Oftentimes, the risk or likelihood of obtaining an unfavourable – or only partially favourable – decision on the allocation of costs prompts the parties to reach an out-of-court settlement. In fact, if it is not the case, the winning party to litigation stands to lose more than they would gain financially.

**Stefania Brun** (Professor at the University of Trento), ***'Proceduralizzazione' dei poteri datoriali e mediazione sindacale. Il laboratorio trentennale in materia di licenziamenti collettivi*** (*Trade Union Mediation in Collective Dismissal. A Study of its Application over Three Decades*; in Italian)

This article reviews the three-decade history and present-day application of Law No 223 of 1991 on collective dismissal. While providing an overall positive evaluation of this law, the article seeks to examine the role of the judicial and legislative branches in promoting best practices in its application. In this regard, it emphasizes the role of trade union mediation in the phase preceding collective dismissal as an effective means for reducing

judicial scrutiny and ensuring greater legal certainty.

**Antonio Cassatella** (Professor at the University of Trento), ***Il procedimento amministrativo come strumento di giustizia consensuale. Potenzialità e limiti*** (*Administrative Procedure as a Means to Reach Consensual Justice. Strengths and Limitations*; in Italian)

This paper focuses on settlements reached by an individual and the public administration in the course of an administrative procedure as governed by Law No 241 of 1990. According to the author, these types of settlement are only possible if the administrative procedure is not seen as a unilateral exercise of the public administration's power, but rather as a way of settling disputes between the administration and citizens. The author argues that the administrative procedure can be considered an alternative dispute resolution mechanism from a theoretical point of view. However, Article 11 of the aforementioned law cannot be considered an effective legal basis for settlement between an individual and the public administration due to its intrinsic limitations. Therefore, the author proposes that the Italian legislator reforms Law No 241 of 1990 taking the German and French legislations as a model.

**Observatory on Legislation and Regulations**

**Lorenzo Bianchi** (PhD, University of Parma), ***La conciliazione giudiziale tributaria. Criticità applicative e prospettive di riforma*** (*Judicial Conciliation in Tax Disputes. Inherent Limits and Reform Proposals*; in Italian)

This paper analyzes the mechanism of judicial conciliation in tax disputes and its relationship with out-of-court dispute resolution tools. The author examines the historical evolution of judicial conciliation and its current regulation. While exploring the main characteristics of tax disputes, particular attention is given to the inherent limits on reaching an agreement between the parties to litigation and the judicial power to promote settlement. In conclusion, the analysis focuses on the recent Italian reform proposals of the judicial proceedings regarding tax disputes and conciliation mechanisms as incentivized by the Next Generation EU plan.

**Observatory on Practices**

**Dilyara Nigmatullina** (Postdoctoral Researcher at the University of Antwerp) and **Ruohan Zhu** (Project manager at the Shanghai Arbitration Commission), ***A Study on the Use of Mediation in Combination with Arbitration. The Experience of East Asia with Focus on Mainland China***

The article analyses the results of an empirical study about the current use of mediation in combination with arbitration (combinations) in international commercial dispute resolution. This study follows up the original study conducted by one of the article's authors in 2014-2015, the results of which suggested the existence of a link between the practitioners' legal culture and their use of a combination where the same neutral acts as a mediator and an arbitrator. The follow-up study further tests the hypothesis about the existence of the mentioned link by involving practitioners based in the East Asia region, predominantly in mainland China, while those taking part in the original questionnaire practiced in Continental Europe and common law jurisdictions in the Asia Pacific region. The article discusses the results of the follow-up study in the context of the findings of the original study before concluding that these results provide further support to the hypothesis that the use of a combination where the same neutral acts as a mediator and an arbitrator varies throughout the world and can be linked to the practitioners' legal culture.

**Francesca Valastro** (Case Manger, Milan Chamber of Arbitration), ***La mediazione in videoconferenza. Dalla situazione emergenziale agli orizzonti futuri. Dati e note a margine di un'indagine empirica*** (*Online Mediation: From Necessity to the Norm. An Empirical Study*; in Italian)

The outbreak of the Covid-19 pandemic in March 2020 affected the way mediations in civil and commercial matters were conducted, transforming online mediation into an absolute necessity. Two years on, the world has changed and in this post-Covid time, it would be advisable to assess how the pandemic has affected the practice of mediation. Will mediation return to be conducted face to face or will online mediation be the future? This article presents the results of the empirical research collected through interviews

with fifty attorneys assisting clients in mediation and fifty professional mediators of the Mediation Service at Milan Chamber of Arbitration. Based on the analysis of their responses, the author argues that online mediation will have a pivotal role in the post pandemic world. However, further research and analysis is still necessary to develop best practices and guidelines for effectively managing mediation remotely.

In addition to the foregoing, this issue features the following book review by ***Giuseppe Buffone*** *(*Judge, Justice and Home Affairs Counsellor, Permanent *Representation* of Italy to the European Union, *Brussels):* **Maria MARTELLO**, ***Una giustizia alta e altra. La mediazione nella nostra vita e nei tribunali*** (*Mediation in Our Courts and in Our Daily Lives. An Empowering Alternative*), Roma, Paoline Editoriale Libri, 2022, 1-160.

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# Traveling Judges and International Commercial Courts

*Written by Alyssa S. King and Pamela K. Bookman*

International commercial courts—domestic courts, chambers, and divisions dedicated to commercial or international commercial disputes such as the Netherlands Commercial Court and the never-implemented Brussels International Business Court—are the topic of much discussion these days. The NCC is a division of the Dutch courts with Dutch judges. The BIBC proposal, however, envisioned judges who were mostly "part-timers" who may include specialists from outside Belgium. While the BIBC experiment did not pass Parliament, other commercial courts around the world have proliferated, and some hire judges from outside their jurisdictions.

In a new paper forthcoming in the American Journal of International Law, we set out to determine how many members of the Standing International Forum of Commercial Courts hire such "traveling judges," who they are, why they are hired, and why they serve.

Based on new empirical data and interviews with over 25 judges and court personnel, we find that traveling judges are found on commercially focused courts around the world. We identified nine jurisdictions with such courts, in Hong Kong, Singapore, Dubai, Abu Dhabi, Qatar, Kazakhstan, and the Caribbean (the Cayman Islands and the BVI), and The Gambia. These courts are designed to accommodate foreign litigants and transnational litigation—and inevitably, conflicts of laws.

One may assume that these judges largely resemble arbitrators (as was likely intended for the BIBC). But whereas studies show arbitrators are mostly white, male lawyers from "developed" countries that may be based in the common law or civil law tradition, traveling judges are even more likely to be white and male, vastly more likely to have prior judicial experience and common-law legal training, and are overwhelmingly from the UK and its former dominion colonies. In the subset of commercially focused courts in our study, just over half of the traveling judges were from England and Wales specifically. Nearly two-thirds had at least one law degree from a UK university.

Below is a chart showing the home jurisdiction of the judges in our study. This includes traveling judges sitting on the BVI commercial division, Hong Kong Court of Final Appeal, Dubai International Financial Centre (DIFC) Courts, Qatar International Court, Cayman Islands Financial Services Division, Singapore International Commercial Court, Abu Dhabi Global Market (ADGM) Courts, and Astana International Financial Centre (AIFC) Courts as of June 2021.

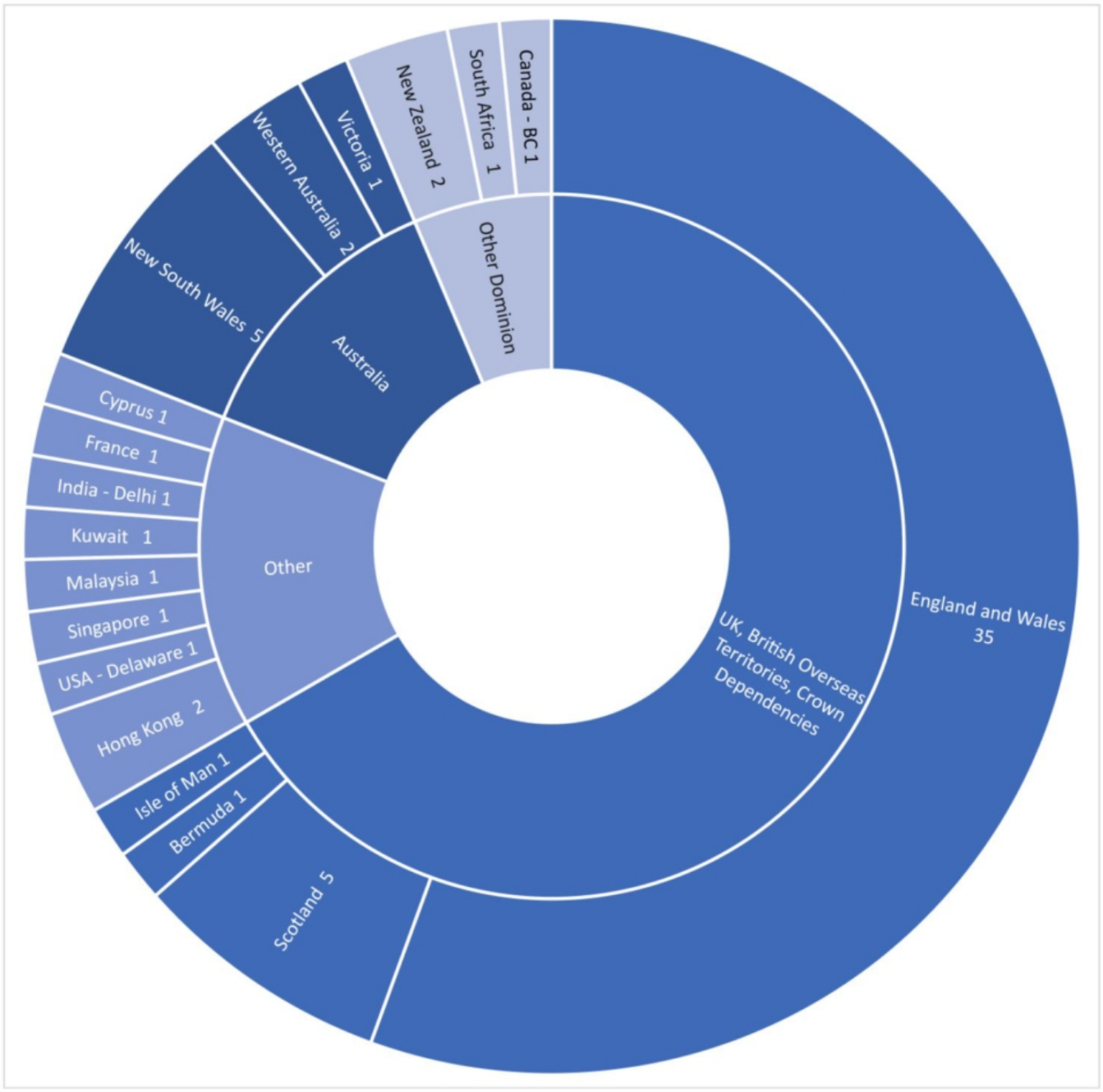


Figure 2. Traveling Judges by Home Jurisdiction Excluding Non-Commercial ECSC and The Gambia—June 2021

A look at traveling judges' backgrounds suggests that traveling judges might be a phenomenon limited to common-law countries, but only half of hiring jurisdictions are in common law states. Almost all hiring *jurisdictions*, however, are common law jurisdictions. Moreover, almost all are or aspire to be market-dominant small jurisdictions (MDSJ). For example, the DIFC Courts are located in a common law jurisdiction within a non-common-law state that has been identified as a MDSJ.

Traveling judges are a phenomenon rooted not only in the rise of international commercial arbitration, but also in the history of the British colonial judicial

service. Today, traveling judges may be said to bring their expertise and knowledge of best practices in international commercial dispute resolution. But traveling judges also offer hiring jurisdictions a method of transplanting well-respected courts, like London's commercial court, on their shores. In doing so, judges reveal these jurisdictions' efforts to harness business preferences for English common law into their domestic court systems. They also provide further opportunities for convergence on global civil procedure norms, or at least common law ones. Many courts have adopted some version of the English Civil Procedure Rules, looking for something international lawyers find familiar and reliable. Judges also report learning from each other's approaches.

Our article suggests that traveling judges are a nearly entirely common law phenomenon—only a handful of judges were from mixed jurisdictions and only one was a civil law judge. Common law courts may be especially amenable to traveling judges. In contrast to judges in continental civil law systems, common law judges are not career bureaucrats. They come to the judiciary late, usually after having built successful litigation practices. Moreover, the sociologist, and judge, Antoine Garapon observes that common law style-judging can be more personalized, with more room for individual authority rather than that of the office. All these differences are a matter of degree, with exceptions that come readily to mind. Still, as a result, common law judges are more likely have reputations independent of the office they serve. That reputation, in turn, is valuable to hiring governments eager to demonstrate their commercial law bona fides.

These efforts to harness English common law contrast with the efforts to build international commercial courts in the Netherlands or Belgium. The NCC advertises itself as an English-language court built on the foundation of the Dutch judiciary's strong reputation. As such, it has no need for foreign judges or common law experience. The BIBC likely also would not have relied as heavily on retired English judges, both because its designers envisioned more lay adjudicators (not retired judges) and likely a greater civil law influence. In that sense, its roster of judges might have more closely resembled that of the new international commercial court in Bahrain.

The Dutch, Belgian, and Bahraini examples do share something else in common with the network of courts profiled in *Traveling Judges*, however. Despite their apparent similarities to arbitration, these courts are domestic courts, and they

exist in significantly different political environments. The differences between Dutch and Belgian national politics influenced the NCC's success in being established and the BIBC's failure. In Belgium, for instance, the BIBC was maligned as a "caviar court" for foreign companies and the Belgian Parliament ultimately decided against the proposal. As one of us recounts in a related article on arbitration-court hybrids, similar arguments were raised in the Dutch Parliament, but they did not win the day. Several courts in our study, such as those established in the special economic zones in the UAE, did not face such constraints. But they may face others, such as how local courts will recognize and cooperate with a new court operating according to a different legal system and in a different language. The new court in Bahrain overcame local obstacles to its establishment, but it may face yet another set of political constraints and pressures as it proceeds to hear its first cases. Wherever traveling judges travel, local politics will affect both hiring jurisdictions' ability to achieve their goals and traveling judges' ability to judge in the way they are accustomed.

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# Giustizia consensuale (Consensual Justice): Report on the Journal's Inaugural Conference

*This report was kindly prepared by Federica Simonelli, a research fellow funded by the P.O.N. UNI4Justice project at the University of Trento, Italy, and a member of the editorial staff of* Giustizia consensuale *(Consensual Justice).*

On 10 June 2022, the University of Trento, Faculty of Law celebrated the first anniversary of the launch of ***Giustizia consensuale***, founded and edited by Professor Silvana Dalla Bontà and Professor Paola Lucarelli.

In recent years, the debate surrounding consensual justice and party autonomy has received increasing attention in the national and international arenas and has

raised a broad array of questions. What is the very meaning of consensual justice? Is the idea of consensual justice feasible? What is its role in a globalized world increasingly characterized by cross-border disputes? The rationale behind *Giustizia consensuale* lies in the pressing need to observe this phenomenon from different perspectives.

For those who did not have the opportunity to attend this informative event, this report offers a succinct overview of the topics and ideas exchanged during this well-attended, hybrid conference.

**First session**

Opening the symposium with an incisive preamble, Professor **Silvana Dalla Bontà** (University of Trento, Italy), editor-in-chief of *Giustizia consensuale* and chair of the first session, provided a context for the reasoning behind this new editorial project and some of the research areas it intends to focus on. Notably, with the aim of meeting the needs of an increasingly complicated and multi-faceted society, *Giustizia consensuale* endeavours to investigate the meaning of consensual justice, its relationship with judicial justice, and the potential for integrating, rather than contrasting, these two forms of justice.

Professor Dalla Bontà's introductory remarks were followed by Professor **Paola Lucarelli** (University of Florence, Italy), co-editor of the *Giustizia consensuale*, on the topic of *Mediating conflict: a generous push towards change,* strongly reaffirming the importance of promoting and strengthening consensual justice instruments, not only to reduce the judicial backlog but also to empower the parties to self-tailor the solution of their conflict, by fostering responsibility, self-determination, awareness, and trust.

Professor **Francesco Paolo Luiso** (University of Pisa, Italy – Academician of the *Order of Lincei*) then proceeded to effectively illustrate the essential role played by lawyers in changing the traditional paradigm of dispute resolution which sees court adjudication as the main (if not, the sole) way of settling disputes. Conversely, the judicial function is a precious resource, and its use must be limited to instances where the exercise of the judge's adjudicatory powers is strictly necessary, thus directing all other disputes toward amicable, out-of-court dispute resolution mechanisms. Hence, lawyers are in the privileged position of presenting clients with a broad array of avenues to resolve disputes and guiding

them to the choice of the most appropriate dispute resolution instrument.

Professor **Antonio Briguglio** (University of Rome Tor Vergata, Italy) then continued with an interesting focus on the relationship between conciliation and arbitration within the overall ADR system. After examining when and how conciliation is attempted during the course of the arbitral proceedings, he shed light on the interesting, and often unknown to the public, 'conciliatory' dynamics which often occur amongst members of arbitral tribunals in issuing the arbitration award. In an attempt to find common ground between different viewpoints, conciliatory and communicative skills of arbitrators play a decisive role, in particular in international commercial arbitrations on transnational litigation.

*Procedure, Party agreement, and Contract* was the focus of a very thorough presentation by Professor **Neil Andrews** (University of Cambridge, UK) who underlined that consensual justice is a highly stimulating and significant meeting point between substance and procedure, as well as being an important perspective within technical procedural law. He stated that there are three points of interaction between agreement and procedure. Firstly, the parties are free to agree to self-impose preliminary 'negotiation agreements' and/or mediation agreements. Secondly, the parties can take a further step to specify or modify the elements of the relevant formal process, albeit court proceedings or arbitration. Thirdly, parties can dispose of or narrow the dispute through a settlement.

The first session concluded with an insightful presentation from Professor **Domenico Dalfino** (University of Bari Aldo Moro, Italy) who explored the long-debated issue of which party bears the burden of initiating the mandatory mediation in proceedings opposing a payment order. While expressing his criticism towards mandatory mediation, he maintained that voluntariness is the very essence of mediation and the promise of its success.

**Second session**

The event continued with a second session chaired by Professor **Paola Lucarelli**. From the perspective of the Brazilian legal system, Professor **Teresa Arruda Alvim** (Pontifical Catholic University of São Paulo, Brazil) began the session by illustrating that in the last few decades, ADR has afforded parties the possibility to self-tailor a solution to their conflict while significantly diminishing the case

overload of the judiciary. Nevertheless, the obstacles to the growth of ADR are multiple, ranging from the lack of preparation of mediators to the traditional adversarial approach of attorneys. She concluded by stating that legal systems must invest, on the one hand, in training highly qualified mediators while on the other, providing new educational paths for attorneys to acquire new negotiation and mediation skills.

The session proceeded to address Online Dispute Resolution (ODR), examining the strengths and weaknesses of using new technologies to solve disputes. Professor **Silvia Barona Vilar** (University of Valencia, Spain) highlighted the positive and negative aspects of the increasing use of ODR in our digital and algorithmic society. While ODR devices are considered as ensuring access to justice and favouring social peace and citizens' satisfaction, there are also complex issues around the use of Artificial Intelligence and algorithms such as their accountability, accurate assessment, and transparency.

The relationship between the use of technology and access to justice was explored in depth by Professor **Amy J. Schmitz** (The Ohio State University, USA), who based her presentation on a thorough empirical study of ODR as a means to advance access to justice for  poor or vulnerable individuals who would otherwise be unable to have their 'day in court.'

Potential applications of new technologies used in resolving disputes were then examined by Professor **Colin Rule** (Stanford Law School, USA), who highlighted that ODR, originally created to help e-commerce companies build trust with their users, is now being integrated into the courts to expand access to justice and reduce costs. While admitting there are many questions that still need to be answered, Rule predicted that ODR will play a major role in the justice systems of the future through the expansion of Artificial Intelligence and machine learning.

Showing a more critical approach Professor **Maria Rosaria Ferrarese** (National School of Administration, Italy) shed light on the threat posed by the use of digital technologies in resolving disputes, after having edited the Italian version of a book by Antoine Garapon and Jean Lassègue – *Justice digital. Révolution graphique et rupture anthropologique* (Digital Justice. Graphic Revolution and Anthropologic Disruption). While acknowledging that Artificial Intelligence and algorithms can deliver a fast and cheap justice, she underlines that justice is not only about settling a case in a rapid and inexpensive way but also about

reinforcing values of a given society and ensuring a creative application of the law.

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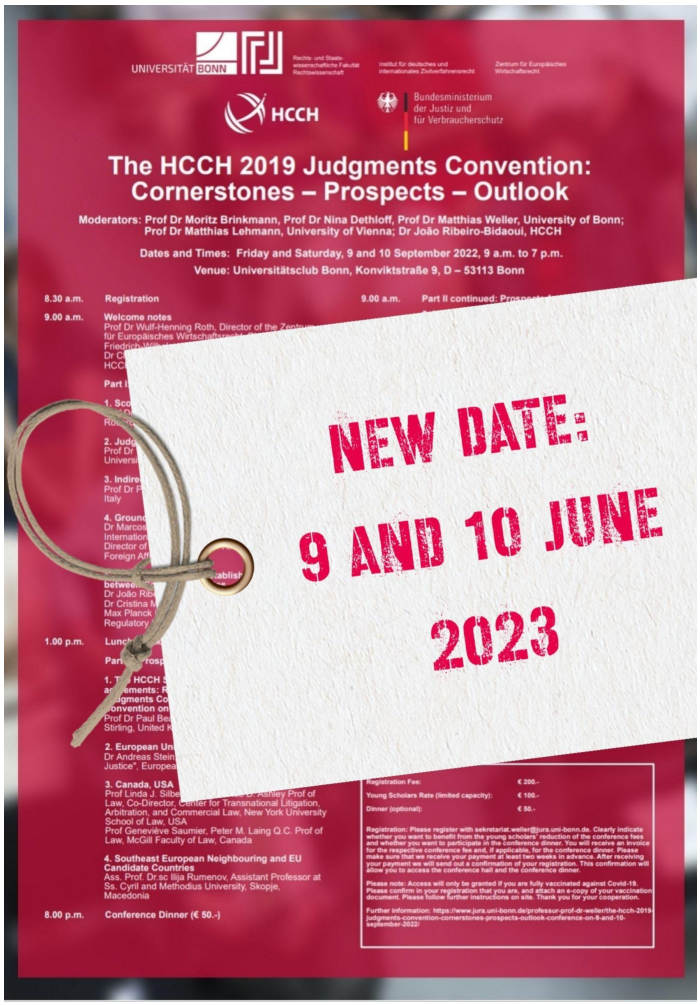
# Conference on “The HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook” – Rescheduled to 9 and 10 June 2023




Dear Friends and Colleagues,

Due to a conflicting conference on the previously planned date (9 and 10 September 2022) and with a view to ongoing developments on the subject-matter in the EU, we have made the decision to reschedule our Conference to **Friday and Saturday, 9 and 10 June 2023.** This new date should bring us closer to the expected date of accession of the EU and will thus give the topic extra momentum. Stay tuned and register in time (registration remains open)!

On 23 June 2022, the European Parliament by adopting JURI Committee Report A9-0177/2022 gave its consent to the accession of the European Union to the HCCH 2019 Judgments Convention. The Explanatory Statement describes the convention with a view to the "growth in international trade and investment flows" as an "instrument […] of outmost importance for European citizenz ans businesses" and expressed the hope that the EU's signature will set "an example for other countries to join". However, the Rapporteur, Ms. Sabrina Pignedoli, also expresses the view that the European Parliament should maintain a strong role when considering objections under the bilateralisation mechanism provided for in Art. 29 of the Convention. Additionally, some concerns were raised regarding the protection of employees and consumers under the instrument. For those interested in the (remarkably fast) adoption process, the European Parliament's vote can be rewatched here. Given these important steps towards accession, June 2023 should be a perfect time to delve deeper into the subject-matter, and the Conference is certainly a perfect opportunity for doing so:

The list of speakers of our conference includes internationally leading scholars, practitioners and experts from the most excellent Universities, the Hague Conference on Private International Law (HCCH), the United Nations Commission on International Trade Law (UNCITRAL), and the European Commission (DG Trade, DG Justice). The Conference is co-hosted by the Permanent Bureau of the HCCH.

The Organizers kindly ask participants to contribute with EUR 200.- to the costs of the event and with EUR 50.- to the conference dinner, should they wish to participate. There is a limited capacity for young scholars to contribute with EUR 100.- to the conference (the costs for the dinner remain unchanged).

Please register with sekretariat.weller@jura.uni-bonn.de. Clearly indicate whether you want to benefit from the young scholars' reduction of the conference fees and whether you want to participate in the conference dinner. You will

receive an invoice for the respective conference fee and, if applicable, for the conference dinner. Please make sure that we receive your payment at least two weeks in advance. After receiving your payment we will send out a confirmation of your registration. This confirmation will allow you to access the conference hall and the conference dinner.

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

**Dates and Times**:

Friday, 9 June 2023, and Saturday, 10 September 2023, 9 a.m. to 7 p.m.

**Venue**:

Universitätsclub Bonn, Konviktstraße 9, D – 53113 Bonn

**Registration**:

sekretariat.weller@jura.uni-bonn.de

**Registration fee: EUR 200.-**

**Programme**

**Friday, 9 June 2023**

**8.30 a.m. Registration**

**9.00 a.m. Welcome notes**

Prof Dr Wulf-Henning Roth, Director of the Zentrum für Europäisches Wirtschaftsrecht, Rheinische Friedrich-Wilhelms-Universität Bonn, Germany

Dr Christophe Bernasconi, Secretary General of the HCCH

**Part I: Cornerstones**

**1. Scope of application**

Prof Dr Xandra Kramer, Erasmus University Rotterdam, Netherlands

**2. Judgments, Recognition, Enforcement**

Prof Dr Wolfgang Hau, Ludwig-Maximilians-Universität Munich, Germany

**3. Indirect jurisdiction**

Prof Dr Pietro Franzina, Catholic University of Milan, Italy

**4. Grounds for refusal**

Dr Marcos Dotta Salgueiro, Adj. Professor of Private International Law, Law Faculty, UR, Uruguay; Director of International Law Affairs, Ministry of Foreign Affairs, Uruguay

**5. Trust management: Establishment of relations between Contracting States**

Dr João Ribeiro-Bidaoui, First Secretary, HCCH / Dr Cristina Mariottini, Senior Research Fellow at the Max Planck Institute for International, European and Regulatory Law Luxemburg

**1.00 p.m. Lunch Break**

**Part II: Prospects for the World**

**1. The HCCH System for choice of court agreements: Relationship of the HCCH Judgments Convention 2019 to the HCCH 2005 Convention on Choice of Court Agreements**

Prof Dr Paul Beaumont, University of Stirling, United Kingdom

**2. European Union**

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

**3. Canada, USA**

Prof Linda J. Silberman, Clarence D. Ashley Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York

University School of Law, USA

Prof Geneviève Saumier, Peter M. Laing Q.C. Professor of Law, McGill Faculty of Law, Canada

**4. Southeast European Neighbouring and EU Candidate Countries**

Ass. Prof. Dr.sc Ilija Rumenov, Assistant Professor at Ss. Cyril and Methodius University, Skopje, Macedonia

**8.00 p.m. Conference Dinner (EUR 50.-)**

**Saturday, 10 June 2023**

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

**5. Middle East and North Africa (including Gulf Cooperation Council)**

Prof Dr Béligh Elbalti, Associate Professor at the Graduate School of Law and Politics at Osaka University, Japan

**6. Sub-Saharan Africa (including Commonwealth of Nations)**

Prof Dr Abubakri Yekini, University of Manchester, United Kingdom

Prof Dr Chukwuma Okoli, University of Birmingham, United Kingdom

**7. Southern Common Market (MERCOSUR)**

Prof Dr Verónica Ruiz Abou-Nigm, Director of Internationalisation, Senior Lecturer in International Private Law, School of Law, University of Edinburgh, United Kingdom

**8. Association of Southeast Asian Nations (ASEAN)**

Prof Dr Adeline Chong, Associate Professor of Law, Yong Pung How School of Law, Singapore Management University, Singapore

**9. China (including Belt and Road Initiative)**

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

**1.00 p.m. Lunch Break**

**Part III: Outlook**

**1. Lessons from the Genesis of the Judgments Project**

Dr Ning Zhao, Senior Legal Officer, HCCH

**2. International Commercial Arbitration and Judicial Cooperation in civil matters: Towards an Integrated Approach**

José Angelo Estrella-Faria, Principal Legal Officer and Head, Legislative Branch, International Trade Law Division, Office of Legal Affairs, United Nations; Former Secretary General of UNIDROIT

**3. General Synthesis and Future Perspectives**

Hans van Loon, Former Secretary General of the HCCH

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# Update: HCCH 2019 Judgments Convention Repository

## HCCH 2019 Judgments Convention Repository

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

**Update of 22 June 2022: New entries are printed bold.**

Please also check the “official” Bibliography of the HCCH for the instrument.

I. Explanatory Reports

| | |
|---|---|
| Garcimartín Alférez, Francisco; Saumier, Geneviève | „Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Explanatory Report“, as approved by the HCCH on 22 September 2020 (available here) |
| Garcimartín Alférez, Francisco; Saumier, Geneviève | “Judgments Convention: Revised Draft Explanatory Report”, HCCH Prel.-Doc. No. 1 of December 2018 (available here) |
| Nygh, Peter; Pocar, Fausto | “Report of the Special Commission”, HCCH Prel.-Doc. No. 11 of August 2000 (available here), pp 19-128 |

II. Bibliography

| **Ahmed, Mukarrum** | **“Brexit and the Future of Private International Law in English Courts”, Oxford 2022** |
|---|---|
| Åkerfeldt, Xerxes | ”Indirekta behörighetsregler och svensk domsrätt – Analys och utredning av svensk domstols behörighet i förhållande till 2019 års Haagkonvention om erkännande och verkställighet” (Examensarbete inom juristprogrammet, avancerad nivå, Örebro Universitet, 2021 ; available here)<br><br>“Indirect jurisdiction and Swedish law – Analysis and inquiry of the jurisdiction of Swedish courts in relation to the 2019 Hague Convention on Recognition and Enforcement” |

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|---|---|
| **Al-Jubouri, Zina Hazem** | **“Modern trends for the recognition and enforcement of foreign judgments in civil and commercial matters accordance the 2019 Hague Convention”, Tikrit University Journal for Rights (TUJR) 2022-03, pp. 79-109 (available here)** |
| Amurodov, Jahongir | “Some issues of Ratification of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019) by the Republic of Uzbekistan”, Uzbek Law Review 2020-03, pp. 11-116 (available here) |
| **Arslan, Ilyas** | **“The 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters”, Uluslararasi Ticaret ve Tahkim Hukuku Dergisi 10 (2021), pp. 329-402** |
| Badr, Yehya Ibrahim | “The Hague 2019 Convention for the Recognition and Enforcement of Foreign Judicial Decisions: A Comparative Study”, International Journal of Doctrine, Judiciary, and Legislation (IJDJL) 2 (2021), pp. 427-468 (available here) |
| Balbi, Francesca | “La circolazione delle decisioni a livello globale: il rogetto di convenzione della Conferenza dell’Aia per il riconoscimento e l’esecuzione delle sentenze straniere” (Tesi di dottorato, Università degli Studi di Milano-Bicocca, 2019; available: here) |
| Beaumont, Paul | “*Forum non Conveniens* and the EU rules on Conflicts of Jurisdiction: A Possible Global Solution”, Revue Critique de Droit International Privé 2018, pp 433-447 |
| Beaumont, Paul R. | “Judgments Convention: Application to Governments”, Netherlands International Law Review (NILR) 67 (2020), pp 121-137 |
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| ASIL | “The Promise and Prospects of the 2019 Hague Convention”, 25-26 June 2020 (full recording available here and here) |
| Department of Justice Hong Kong; HCCH | “Inaugural Global Conference – 2019 HCCH Judgments Convention: Global Enforcement of Civil and Commercial Judgments”, 9 September 2019 (recording available here) |
| HCCH | “HCCH a\|Bridged: Innovation in Transnational Litigation – Edition 2021: Enabling Party Autonomy with the HCCH 2005 Choice of Court Convention”, 1 December 2021 (full recording available here) |
| HCCH | “22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention”, 2 July 2020 (short documentary video available here) |
| JPRI; HCCH; UNIDROIT; UNCITRAL | “2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments”, 12 November 2020 (recording available here) |

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| UIHJ; HCCH | "3rd training webinar on the Hague Conventions on service of documents (1965) and recognition and enforcement of judgements (2019)", 15/18 March 2021 (full recording available here in French and here in English) |
| University of Bonn; HCCH | "Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries", 29 October 2020 (full recording available here) |
| Lex & Forum Journal; Sakkoula Publications SA | « The Hague Conference on Private International Law and the European Union – Latest developments », 3 December 2021 (full recording available here) |

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# Prestige of Spanish judgment over the UK arbitral award – not on the principle, but on the conditions to it

This morning, the CJEU has pronounced on the interplay between the Brussels I bis Regulation and arbitration, this time in the context of the recognition in the UK of a judgment given by a Spanish court.

**I. Facts**

This case C-700/20 results from the event taking place two decades ago. Some of you may recall that in November 2002, the Greek-owned and Bahamas-operated oil tanker Prestige encountered a storm in the seas close to Galicia coast in Spain. Being damaged, the tanker eventually sunk leaving oil spill and causing significant damage to northern coast of Spain and the western coast of France.

The Spanish state and some other parties sought damage compensation, in the context of the criminal proceedings before the Audiencia Provincial de A Coruña commenced against the master, owners, and the London P&I Club, the liability insurer of both the vessel and its owners, in 2003. In 2012, the London P&I Club commenced arbitration proceedings in London seeking a declaration that, pursuant to the arbitration clause in the insurance contract concluded with the owners of the Prestige, the Spanish state was required to pursue its claims in the arbitration proceedings, and that it could not be liable to the Spain in respect of those claims due to the 'pay to be paid' clause.

The arbitration was quicker and the award was made in 2013, upheld the claims also limiting the the London P&I Club's liability up to USD 1 billion. The P&I Club applied to the High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court), under Section 66 (1) and (2) of the Arbitration Act 1996, for leave to enforce the arbitral award in that jurisdiction in the same manner as a judgment or order and for a judgment to be entered in the terms of that award. The leave was granted in 2013 along with a judgment in the terms of the award.

The Spanish proceedings ended in 2018 by the judgment of the Tribunal Supremo whereby it confirmed that the master, ship owners and the P&I Club were liable to over 200 parties, including the Spanish state, subject, in the case of the P&I Club, to the contractual limit of liability of USD 1 billion. In 2019, the Audiencia Provincial de A Coruña issued an order setting out the amounts that each of the claimants was entitled to obtain from the respective defendants, entitling the Spanish State to be paid approximately EUR 2.3 billion, subject in the case of the P&I Club to the limit of EUR 855 million. Soon after, the Spanish state made an application to the High Court of Justice (England & Wales), Queen's Bench Division, on the basis of Article 33 of the Brussels I Regulation, for recognition of the latter enforcement order. Slightly prior to the expiration of the Brexit transition period, the UK court made a reference for preliminary ruling concerning the Brussels I Regulation, Article 1(2)(d) – exclusion of arbitration, and Article 34(1) and (3) – grounds for refusal of recognition and/or enforcement.

## II. The Issues

At issue was whether that recognition or enforcement could be refused on the basis of the existence, in the UK, of a judgment entered in the terms of an arbitral award and the effects of which are irreconcilable with those of the abovementioned judicial ruling (first and second question). And, if not, whether recognition or enforcement may be refused as being contrary to public policy on the ground that it would disregard the force of *res judicata* acquired by the judgment entered in the terms of an arbitral award (third question).

## III. Decision and Reasoning

Not following the opinion of AG Collins delivered in May this year, the CJEU held that a judgment entered by a court of a MS (in this case, UK) in the terms of an arbitral award cannot prevent the recognition there of a judgment given in another MS (in this case, Spain) where a judicial decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of the first MS without infringing the provisions and the fundamental objectives of the Brussels I Regulation. In the case at hand, this means that the Spanish judgment could have been refused recognition and enforcement only if the UK judgment entered by the UK court in the terms of an arbitral award could have been adopted by a UK court without infringing the provisions and the fundamental objectives of that Regulation.
However, the CJEU went on to explain that such fundamental objectives include the principles of free movement of judgments in civil matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice (para. 56). It added another requirement –that such judgment should not violate the right to an effective remedy guaranteed in Article 47 of the EU Charter of Fundamental Rights (para. 58).

Turning to the facts of the case, the CJEU concludes that the respective UK judgment could not have been rendered on the basis of the Brussels I Regulation without infringing two fundamental rules of the Regulation: first, the rule on the relative effect of an arbitration clause included in an insurance contract which does not extend to claims against a victim of insured damage who bring a direct action against the insurer, in tort, delict or quasi-delict, before the courts for the

place where the harmful event occurred or before the courts for the place where the victim is domiciled and, second, the rule on lis pendens which coordinates parallel proceedings based on the priority principle favouring the court first seised.

In answering the third question, the CJEU has relied on the opinion of the AG Collins, who stated the EU legislature intended to regulate exhaustively the issue of the force of *res judicata* acquired by a judgment given previously and, in particular, the question of the irreconcilability of the judgment to be recognised with that earlier judgment by means of Article 34(3) and (4) of the Brussels I Regulation, thereby excluding the possibility that recourse be had, in that context, to the public-policy exception set out in Article 34(1) of that Regulation. Therefore, *res judicata* cannot be contained in the notion of public policy for the purpose of recognition and enforcement of judgments under Article 34 of the Brussels I Regulation.

Undoubtedly, this judgment will provoke different reactions, but one thing is certain this is a one-hit wonder in UK given that UK is no longer bound by the Brussels regime.

The CJEU judgment has been made availalbe online yet, but the CJEU issued the Press Release.

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# The Supreme Court's Decision in ZF Automotive et al. v. Luxshare, Ltd.: A U.S. Perspective

*This is a guest post by Izaak Weaver-Herrera, JD student at the University of Pittsburgh School of Law*

Third-party discovery in the United States pursuant to 28 U.S.C. § 1782 has often represented a pragmatic, if contentious, tool for international counsel. However,

in a decision this week, the U.S. Supreme Court held that § 1782 discovery may be ordered only if the assembled "foreign or international tribunal" is a body which has been conferred governmental or intergovernmental authority. There has already been a wealth of reaction to this decision, including on this site. This post will offer a few additional perspectives.

As a bit of background, *ZF Automotive* arrived on the Court's docket as a consolidation of two cases: *ZF Automotive US, Inc., et al. v. Luxshare, Ltd. and Alixpartners, LLP, et al., v. the Fund for Protection of Investor's Rights in Foreign States*. Both cases questioned an open aspect of § 1782's use: whether the phrase "foreign or international tribunal" included private commercial arbitrations between parties of different States and whether it included arbitral panels assembled pursuant to bilateral investment treaties. The Court ruled that since neither panel was conferred governmental authority, § 1782 discovery would be inappropriate in both instances.

Justice Barrett, writing for a unanimous Court, adopted a textual approach to the question. In other words, this was less of a decision on international policy, and more a reflection of what Congress said and meant. The Court paid particular attention to the use of "foreign" and "international" as modifiers to the word "tribunal." The latter was more critical than the former. The term "[t]ribunal" has peculiar governmental or sovereign connotations, the Court said, "so 'foreign tribunal' more naturally refers to a body belonging to a foreign nation than to a tribunal that is simply located in a foreign nation." Similarly, the Court found that "international tribunal" under the statute more naturally referred to tribunals between nations, rather than arbitral panels composed of or adjudicating issues between nationals of different States.

The Court also reasoned that this understanding of the statute more uniformly aligned with principles underlying both § 1782's origin and the Federal Arbitration Act. The express purpose of § 1782 was to foster international comity. An overly broad application of § 1782, the Court's view, would permit the use of district court resources in furtherance of "purely private bodies adjudicating purely private disputes abroad," positioning the U.S. court system as a persistent presence in potentially limitless international disputes. The Court's opinion also recognized the tension such a reading would create between the discovery permitted under the FAA. While the FAA restricts discovery to the discretion of arbitration panels, § 1782 permits both the tribunal itself and any "interested

person" to submit requests for discovery. Thus, the Court reasoned, a narrower reading of § 1782 also serves to harmonize the scope of arbitration in the United States.

With these observations, the private arbitral tribunal in *ZF Automotive* was not a "foreign or international tribunal" under § 1782. This was deemed "straightforward." The Court found the arbitration panel in the *Alixpartners* dispute more complicated, but ultimately reached the same conclusion. The opinion noted the BIT "simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum," and therefore did not confer permanent sovereign authority on the ad hoc tribunal. Rather, Lithuania simply consented to an arbitration much in the same way two private entities might. Thus, although the *Alixpartners* tribunal could render a judgment against Lithuania based on its consent in a treaty, it had not been conferred permanent sovereign authority and could not be considered a "foreign or international tribunal."

The Court did not "foreclose[] the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority." So although Mixed Claims Commissions of years' past didn't quit analogize to modern BIT tribunals, the Court acknowledged that the former may indeed fall on the permissible side of the Court's new bright line. As international tribunals keep specializing and proliferating (think of the proposed Multilateral Investment Court, or bodies entrusted to handle international criminal law), future questions as to whether a body is "imbued with governmental authority" will for sure arise—but, of course, private commercial arbitration is clearly outside the bounds of section 1782.

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# U.S. Supreme Court Restricts Discovery Assistance to

# International Arbitral Tribunals

*Written by Matthias Lehmann, University of Vienna (Austria)*

On 13 June 2022, the U.S. Supreme Court ruled that U.S. courts may not help arbitral tribunals sitting abroad in the taking of evidence. This is because in the opinion of the Court, such an arbitral tribunal is not a „foreign or international tribunal" in the sense of 28 U.S.C. § 1782, which allows federal district courts to order the production of evidence for use in proceedings before such tribunals.

The decision concerned an institutional and an ad-hoc arbitration. The first, ZF v. Luxshare, was a commercial arbitration between two companies under the rules of the German Arbitration Institution (DIS). The second, AlixPartners v. Fund for Protection of Investors' Rights in Foreign States, was an investment arbitration involving a disgruntled Russian investor and a failed Lithuanian bank; it was conducted under the UNCITRAL Arbitration Rules.

The opinion, written by Amy Coney Barrett, rejects assistance by U.S. courts in both cases, whether in the pre-arbitration phase or in the main arbitration proceedings. It was unanimously adopted by the Court.

The Supreme Court first relies on a dubious literal interpretation of § 1782. While it does not dispute that arbitral tribunals may be "tribunals", this would change by the addition of the adjectives "foreign or international", as this would require that one or several nations have imbued the tribunal with governmental authority. Alas, the drafters of the New York Convention on recognition and enforcement of "foreign" arbitral awards were wrong, and so apparently were the signatories – among them the U.S. As for the term "international", numerous treatises on "international commercial arbitration" will now supposedly have to be rewritten or newly titled.

The opinion further argues that the "animating purpose" of § 1782 would be "comity" with other nations, and that it would be "difficult to see how enlisting district courts to help private bodies would help that end". Yet other nations also have an interest in efficient arbitration proceedings, as evidenced by the New York Convention. This is even particularly clear for investment arbitration because of the involvement of a state party, but it is also true in commercial arbitration. What is decisive from the point of view of many countries is that

arbitration as a dispute resolution method is equivalent to litigation, and should not be treated less favourably.

The Supreme Court further argues that if § 1782 were to be extended to commercial arbitral "panels", it would cover everything, including even a university's student disciplinary tribunal. Yet the absurdity of this *argumentum ad absurdum* lies not in the inclusion of arbitration in § 1782 but in the extension made by the Court, which was only asked about the former and not about the latter. If need be, it would have been easy to distinguish commercial and investment arbitral tribunals established under national or international rules and covered by international agreements such as the New York Convention from student disciplinary "tribunals" (rather: panels).

Finally, the Court notes that allowing district courts to proffer evidence to a foreign arbitral tribunal would create a mismatch with the Federal Arbitration Act (FAA), which does not foresee such assistance for domestic arbitral tribunals. Yet the solution of this mismatch should have better been left to the legislator, who could either extend the FAA to discovery or exclude foreign and international arbitral tribunals from the scope of § 1782. At any rate, the worse situation of domestic arbitral tribunals does not seem a sufficient justification to also deprive arbitral tribunals abroad, who may have particular difficulties in gathering evidence in the U.S., of assistance by U.S. courts.

All in all, this is disappointing news from Capitol Hill for international arbitration. Whether on arbitration or abortion, the current Supreme Court seems to be willing to upend legal precedent and to question customary legal terminology. At least for arbitration, the consequences will not be life-threatening, because the practice will be able to adapt. But one can already see the next questions coming to the Supreme Court. How about this one: Are ICSID tribunals imbued with governmental authority?

# Call for Papers: German Conference for Young Scholars in Private International Law 2023

The **fourth German Conference for Young Scholars in Private International Law**, held on site at the Sigmund Freud University in Vienna on **23 and 24 February 2023** (we have posted about the event previously here), has issued a call for papers. Proposals are invited for conference presentations (20 min.; to be published) and short presentations (5-10 min.; non-published). Furthermore, the organizers proudly announced that the keynote lecture will be delivered by **Professor Horatia Muir Watt** (Sciences Po).

The organizers describe the purpose of these proposals and the goals of the conference as follows (emphasis added):

"The theme of the conference will be

## Deference to the foreign – empty phrase or guiding principle of private international law?

As part of any legal system, rules of private international law are determined by the principles of the respective national jurisdiction, but they also open up the national system to foreign rules. This creates the challenge of reconciling foreign law and foreign values with the national legal system. At the conference, we will seek to explore whether and to what extent deference to the foreign is a pervasive principle in private international law. In doing so, we will look at the methods of private international law as well as interdisciplinary approaches to the justification and implementation of said principle.

The theme invites discussion of **fundamental questions**:

- What is the history of deference to the foreign in private international law?
- Does European Union law lead to a new understanding of the foreign and, in particular, to a stronger delineation from third countries?
- To what extent does mutual trust function as a basis of deference to the foreign in the pro- cess of internationalisation and Europeanisation?
- What is the relationship between deference to the foreign and escape clauses, overriding mandatory provisions, preliminary questions, local data theory *(Datumtheorie)*, renvoi, and public policy clauses?
- What is the role of fundamental and human rights in the context of deference to the foreign?
- Are there tendencies in private international law, specific to or across different areas of law, towards a decline of the principle of deference to the foreign?
- Which levels of acceptance, integration, or assimilation are recognised in private interna- tional law?
- What is the importance of deference to the foreign in the European area of justice?

Contributions can also focus on the **relationship between deference to the foreign and the methods of private international law**:

- What is the role of methods and private international law concepts in implementing the principle of deference to the foreign (e.g. substitution or recognition)?
- Which insights does legal pluralism offer in relation to deference to the foreign?
- What are the insights of interdisciplinary approaches to the justification and methodological implementation of the principle of deference to the foreign?
- Are there parallels between the conflict of laws approach to deference to the foreign and approaches in other sciences or arts?

**Various examples** can serve as illustrations of whether and how private

international law imple- ments the principles of deference to the foreign in specific areas, for instance:

- The influence of EU freedom of movement on the recognition of legal situations or a per- son's status, such as same-sex marriages or parenthood
- The recognition of foreign citizenship of multinationals
- The importance of deference to the foreign in the regulation of international supply chains
- Deference to the foreign in economic law within the EU, g. by means of the European Passport in banking and capital market law

We are looking forward to contributions which take up the theme of deference to the foreign. The examples given above are mere suggestions and should not limit the scope of suitable topics. We welcome contributions from **all areas of private international law** and **international civil procedure** as well as from **international arbitration** and **uniform law**.

**Formalities**

Speakers are invited to give a **presentation** of approximately 20 minutes (in either German or English). The written contributions will later be published in a **conference volume** with Mohr Siebeck.

The conference programme will also include smaller discussion rounds in which **short presentations** of approximately 5-10 minutes can be given. These contributions will **not be published**. We are also looking forward to abstracts for such short presentations.

The deadline for the submission of proposals is **12 September 2022**. Please send your proposal to *ipr@sfu.ac.at*. The proposal should contain:

- an **anonymised abstract** (not exceeding 800 words) in pdf format, and
- a short **cover letter**, preferably in the e-mail, containing the speaker's name, address, and institutional affiliation, as well as
- the indication whether the abstract proposes a **conference presentation**

(20 minutes)

**and/or a short presentation** in the smaller discussion rounds.

Please do not hesitate to contact us, if you have any further questions (ipr@sfu.ac.at).

We are very much looking forward to your proposals.

Kind regards:
Andreas Engel | Florian Heindler | Katharina Kaesling | Ben Köhler
Martina Melcher | Bettina Rentsch | Susanna Roßbach | Johannes Ungerer

More information is available at https://tinyurl.com/YoungPIL."

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# Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2022: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

*P. Hay:* **On the Road to a Third American Restatement of Conflicts Law**

American private international law (Conflict of Laws, “Conflicts Law”) addresses procedure (jurisdiction of courts, recognition of judgments) as well as the choice of the applicable law. The last of these has been a mystery to many scholars and practitioners – indeed, even in the United States. Since 2014 the American Law Institute now seeks to draft a new “Restatement” – the Third – of the subject, with the aim to clarify and perhaps to bring more uniformity to the resolution of conflict-of-laws problems. The following comments first recall the role of restatements in American law. The second part provides some historical background (and an assessment of the current state of American conflicts law, as it relates to choice of law) in light of the Second Restatement, which was promulgated in 1971. The third part addresses the changes in methodology adopted and some of the rules so far proposed by the drafters of the future new Restatement. Examples drawn from existing drafts of new provisions may serve to venture some evaluation of these proposed changes. In all of this, it is important to bear in mind that much work still lies ahead: it took 19 years (1952–1971) to complete the Second Restatement.

*L. Hübner:* **Climate change litigation at the interface of private and public law – the foreign permit**

The article deals with the interplay of private international law, substantive law, and public law in the realm of international environmental liability. It focuses on the question, whether the present dogmatic solution for the cognizance of foreign permits in “resident scenarios” can be extended to climate change scenarios. Since there exists significant doubts as to the transferability of this concept, the article considers potential solutions under European and public international law.

*C. Kohler:* **Recognition of status and free movement of persons in the EU**

In Case C-490/20, V.M.A., the ECJ obliged Bulgaria to recognise the Spanish birth certificate of a child in which two female EU citizens, married to each other, were named as the child’s parents, as far as the implementation of the free movement of persons under EU law was concerned, but left the determination of the family law effects of the certificate to Bulgarian law. However, the judgment extends the effects of the recognition to all rights founded in Union law, including in

particular the right of the mobile Union citizen to lead a “normal family life” after returning to his or her country of origin. This gives the ECJ the leverage to place further effects of recognition in public law and private law under the protection of the primary and fundamental rights guarantees of EU law without regard to the law applicable under the conflict rules of the host Member State. The author analyses these statements of the judgment in the light of European and international developments, which show an advance of the recognition method over the traditional method of referral to foreign law in private international law.

### *W. Hau:* **Interim relief against contracting authorities: classification as a civil and commercial matter, coordination of parallel proceedings and procedural autonomy of the Member States**

After a Polish authority awarded the contract for the construction of a road to two Italian companies, a dispute arose between the contracting parties and eventually the contractors applied for provisional measures in both Poland and Bulgaria. Against this background, the ECJ, on a referral from the Bulgarian Supreme Court of Cassation, had to deal with the classification of the proceedings as a civil and commercial matter and the coordination of parallel interim relief proceedings in different Member States. The case also gave the ECJ reason to address some interesting aspects of international jurisdiction under Article 35 of the Brussels Ibis Regulation and the relationship between this provision and the procedural laws of the Member States.

### *M. Thon:* **Jurisdiction Clauses in General Terms and Conditions and in Case of Assignment**

Choice of court agreements are one of the most important instruments of international civil procedure law. They are intended to render legal disputes plannable and predictable. The decision under discussion comes into conflict with these objectives. In DelayFix, the CJEU had to deal with the question of whether (1.) Art. 25 of the Brussels Ibis Regulation is to be interpreted as precluding a review of unfairness of jurisdiction clauses in accordance with Directive 93/13/EEC and whether (2.) an assignee as a third party is bound by a jurisdiction clause agreed by the original contracting parties. The first question is in

considerable tension between consumer protection and the unification purpose of the Brussels Ibis Regulation considering that the Member States may adopt stricter rules. For the latter question, the CJEU makes it a prerequisite that the assignee is the successor to all the initial contracting party's rights and obligations, which regularly occurs in the case of a transfer of contract, but not an assignment. In this respect, too, the CJEU's decision must be critically appraised.

### *C.F. Nordmeier:* International jurisdiction and foreign law in legal aid proceedings – enforcement counterclaims, section 293 German Code of Civil Procedure and the approval requirements of section 114 (1) German Code of Civil Procedure

The granting of legal aid in cases with cross-border implications can raise particular questions. The present article illustrates this with a maintenance law decision by the Civil Higher Regional Court of Saarbrücken. With regard to international jurisdiction, a distinction must be made between an enforcement counterclaim and a title counterclaim. The suspension of legal aid proceedings analogous to section 148 of the German Code of Civil Procedure with pending preliminary ruling proceedings before the European Court of Justice in a parallel case is possible. When investigating foreign law in accordance with section 293 of the German Code of Civil Procedure, the court may not limit itself to "pre-ascertaining" foreign law in legal aid proceedings. In principle, the party seeking legal aid is not obliged to provide information on the content of foreign law. If the desired decision needs to be enforced abroad and if this is not possible prospectively, the prosecution can be malicious. Regardless of their specific provenance, conflict-of-law rules under German law are not to be treated differently from domestic norms in legal aid proceedings.

### *R.A. Schütze:* Security for costs under the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America

The judgment of the Regional Court of Appeal Munich deals with the application of the German-American Treaty of Friendship, Commerce and Navigation as regards the obligation to provide security of costs in German civil procedure,

especially the question whether a branch of plaintiff in Germany reliefs him from his obligation under section 110 German Code of Civil Procedure. The Court has based its judgment exclusively on article VI of the Treaty and section 6 and 7 of the protocol to it and comes to the conclusion that any branch of an American plaintiff in Germany reliefs him from the obligation to put security of costs.

Unfortunately, the interpretation of the term “branch” by the Court is not convincing.

The court has not taken into regard the ratio of section 110 German Code of Civil Procedure. The right approach would have been to distinguish whether the plaintiff demands in the German procedure claims stemming from an activity of the branch or from an activity of the main establishment.

### *P. Mankowski:* **Whom has the appeal under Art. 49 (2) Brussels Ibis Regulation to be (formally) lodged with in Germany?**

Published appeal decisions in proceedings for the refusal of enforcement are a rare breed. Like almost anything in enforcement they have to strike a fine balance between formalism and pragmatism. In some respects, they necessarily reflect a co-operative relationship between the European and the national legislators. In detail there might still be tensions between those two layers. Such a technical issue as lodging the appeal to the correct addressee might put them to the test. It touches upon the delicate subject of the Member States’ procedural autonomy and its limits.

### *K. Beißel/B. Heiderhoff:* **The closer connection under Article 5 of the Hague Protocol 2007**

According to Article 5 of the Hague Protocol 2007 a spouse may object to the application of the law of the creditor’s habitual residence (Article 3 of the Protocol) if the law of another state has a “closer connection” with the marriage. The Local Court of Flensburg had to decide whether there was a “closer connection” to the law of the state, in which the spouses had lived together for five years in the beginning of their marriage. The criteria which constitute a

“closer connection” in the sense of Article 5 of the Protocol have received comparatively little discussion to date. However, for maintenance obligations, the circumstances at the end of marriage are decisive in order to ascertain the claim. Therefore, they should also have the greatest weight when determining the closest connection. This has not been taken into account by the Local Court of Flensburg, which applied the law of the former common habitual residence, the law of the United Arab Emirates (UAE).

The authors also take a critical stance towards the Court’s assessment of public policy under Article 13 of the Protocol. As the law of the UAE does not provide for any maintenance obligations of the wife (as opposed to maintenance obligations of the husband), the Court should not have denied a violation.

### *M. Lieberknecht:* **Transatlantic tug-of-war – The EU Blocking Statute’s prohibition to comply with US economic sanctions and its implications for the termination of contracts**

In a recent preliminary ruling, the European Court of Justice has fleshed out the content and the limitations of the EU’s Blocking Statute prohibiting European companies from complying with certain U.S. economic sanctions with extraterritorial reach. The Court holds that this prohibition applies irrespective of whether an EU entity is subject to a specific order by U.S. authorities or merely practices anticipatory compliance. Moreover, the ruling clarifies that a termination of contract – including an ordinary termination without cause – infringes the prohibition if the terminating party’s intention is to comply with listed U.S. sanctions. As a result, such declarations may be void under the applicable substantive law. However, the Court also notes that civil courts must balance the Blocking Statute’s indirect effects on contractual relationships with the affected parties’ rights under the European Charter of Fundamental Rights.

### *E. Piovesani:* **The Falcone case: Conflict of laws issues on the right to a name and post-mortem personality rights**

By the commented decision, the LG Frankfurt dismissed the action of two Italian claimants, namely the sister of the anti-mafia judge Falcone and the Falcone

Foundation, for protection of their right to a name and the said judge's postmortem personality right against the owner of a pizzeria in Frankfurt. The decision can be criticized on the grounds that the LG did not apply Italian law to single legal issues according to the relevant conflict of laws rules. The application of Italian law to such legal issues could possibly have led to a different result than that reached by the court.

*M. Reimann*: **Jurisdiction in Product Liability Litigation: The US Supreme Court Finally Turns Against Corporate Defendants, Ford Motor Co. v. Montana Eighth Judicial District Court / Ford Motor Company v. Bandemer (2021)**

In March of 2021, the US Supreme Court handed down yet another important decision on personal jurisdiction, once again in a transboundary product liability context. In the companion cases of Ford Motor Co. v. Eighth Montana District Court and Ford Motor Co. v. Bandemer, the Court subjected Ford to jurisdiction in states in which consumers had suffered accidents (allegedly due to a defect in their vehicles) even though their cars had been neither designed nor manufactured nor originally sold in the forum states. Since the cars had been brought there by consumers rather than via the regular channels of distribution, the "stream-of-commerce" theory previously employed in such cases could not help the plaintiffs (see World-Wide Volkswagen v. Woodson, 444 U.S. 286, 1980). Instead, the Court predicated jurisdiction primarily on the defendant's extensive business activities in the forum states. The problem was that these in-state activities were not the cause of the plaintiffs' harm: the defendant had done nothing the forum states that had contributed to the plaintiffs' injuries. The Court nonetheless found the defendant's business sufficiently "related" to the accidents to satisfy the requirement that the defendant's contacts with the forum state be connected to the litigation there. The consequences of the decision are far-reaching: product manufacturers are subject to in personam jurisdiction wherever they are engaged in substantial business operations if a local resident suffers an accident involving merely the kind of product marketed in the forum state, regardless how the particular item involved arrived there. This is likely to apply against foreign corporations, especially automobile manufacturers, importing their products into the United States as well. The decision is more generally remarkable for three reasons. First, it represents the first (jurisdictional) victory

of a consumer against a corporation in the Supreme Court in more than half-a-century. Second, the Court unanimously based in personam jurisdiction on the defendant's extensive business activities in the forum state; the Court thus revived a predicate in the specific-in-personam context which it had soundly rejected for general in personam jurisdiction just a few years ago in Daimler v. Baumann (571 U.S. 117, 2014). Last, but not least, several of the Justices openly questioned whether corporations should continue to enjoy as much jurisdictional protection as they had in the past; remarkably these Justices hailed from the Court's conservative camp. The decision may thus indicate that the days when the Supreme Court consistently protected corporations against assertions of personal jurisdiction by individuals may finally be over.

### *R. Geimer:* **Service to Foreign States During a Civil War: The Example of an Application for a Declaration of Enforceability of a Foreign Arbitral Award Against the Libyan State Under the New York Convention**

With the present judgment, the UK Supreme Court confirms a first-instance decision according to which the application to enforce an ICC arbitral award against the state of Libya, and the later enforcement order (made ex parte), must have been formally served through the Foreign, Commonwealth and Development Office under the State Immunity Act 1978, despite the evacuation of the British Embassy due to the ongoing civil war. The majority decision fails to recognize the importance of the successful claimant's right of access to justice under Art 6(1) ECHR and Art V of the 1958 New York Convention.

### *K. Bälz:* **Arbitration, national sovereignty and the public interest – The Egyptian Court of Cassation of 8 July 2021 ("Damietta Port")**

The question of whether disputes with the state may be submitted to arbitration is a recurrent topic of international arbitration law. In the decision Damietta Port Authority vs DIPCO, the subject of which is a dispute relating to a BOT-Agreement, the Egyptian Court of Cassation ruled that an arbitral award that (simultaneously) rules on the validity of an administrative act is null and void. The reason is that a (private) arbitral tribunal may not control the legality of an administrative decision and that the control of the legality of administrative action

falls into the exclusive competency of the administrative judiciary. This also applies in case the legality of the administrative decision is a preliminary question in the arbitral proceedings. In that case, the arbitral tribunal is bound to suspend the proceedings and await the decision of the administrative court. The decision of the Egyptian Court of Cassation is in line with a more recent tendency in Egypt that is critical of arbitration and aims at removing disputes with the state from arbitration in order to preserve the “public interest”.