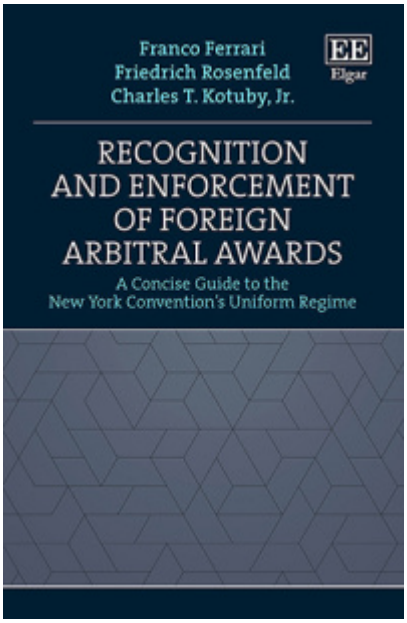
Review of: Recognition and Enforcement of Foreign Arbitral Awards (Ferrari, Rosenfeld, & Kotuby Jr.)

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.

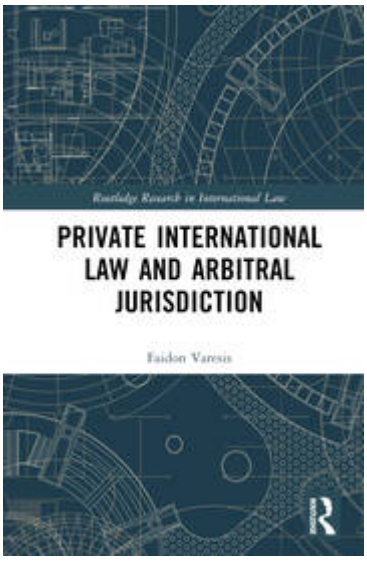
Chapter Nine then discusses public policy requirements, which .the authors rightly note as being applied narrowly or on justifiable grounds to promote international commercial arbitration.

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.

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



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

The book is organized in three parts (which are not evident from the Table of Contents). Varesis first discusses the importance of commercial disputes in a globalized world, focusing on the private and regulatory interests involved. He then looks more closely at the issue of jurisdiction and the interplay between litigation and arbitration at what he identifies as “jurisdictional intersections”

(referring to a range of different situations in which state courts or arbitral tribunals need to resolve questions of adjudicative jurisdiction), before discussing the concept of party autonomy and its expression in an arbitration agreement. In the second part, Varesis then develops a theoretical model for the distribution of jurisdiction between arbitration and litigation that puts the arbitration agreement at its centre. In the third and final part, the author then tests this model against the current legal framework in England and Wales and demonstrates how it would enable courts and arbitral tribunals alike to solve questions arising at the aforementioned jurisdictional intersections in a global-law spirit.

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

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

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

In two recent English cases, the High Court has granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. This article compares the position on anti-suit injunctive relief under the Brussels I Regulation Recast and the English common law rules, and the operation of the latter in a post-Brexit landscape. It considers whether anti-suit injunctions to protect forum selection clauses will become the new norm, and suggests that there is Supreme Court authority militating against the grant of such injunctive relief as a matter of course. Finally, it speculates as to the European response to this new English practice. In particular, it questions whether the nascent European caselaw on anti anti-suit injunctions foreshadows novel forms of order designed to protect European proceedings.

Anti-suit injunctions under the Brussels I Regulation Recast

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

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

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

In the subsequent Case 185/07 Allianz v West Tankers [2009] ECR I-00663, the question arose as to whether it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention

country on the basis that such proceedings would be contrary to an English arbitration agreement. In its decision, the Grand Chamber of the European Court of Justice found that notwithstanding that Article 1(2)(d) excludes arbitration from the scope of the Brussels I Regulation, an anti-suit injunction may have consequences which undermine the effectiveness of that regime. An anti-suit injunction operates to prevent the court of another Contracting State from exercising the jurisdiction conferred on it by the Brussels I Regulation, including its exclusive jurisdiction to determine the very applicability of that regime to the dispute. The decision in Allianz v West Tankers represents an extension of Turner v Grovit insofar as it prohibits the issue of anti-suit injunctions in support of English arbitration as well as jurisdiction agreements.

Anti-suit injunctions under the common law rules

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

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

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

Proceedings in violation of English arbitration agreement

In QBE Europe SA/NV v Generali España de Seguros Y Reaseguros [2022] EWHC

2062 (Comm), a yacht allegedly caused damage to an underwater power cable which resulted in hydrocarbon pollution. The claimant had issued a liability insurance policy to the owners in respect of the yacht. That policy contained a multi-faceted dispute resolution and choice of law clause, which provided *inter alia* that any dispute arising between the insurer and the assured was to be referred to arbitration in London.

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

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

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

Proceedings in violation of exclusive English jurisdiction agreement

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

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

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

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

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

As in QBE Europe, the court approached the discretion to award injunctive relief on the basis that the court will ordinarily restrain proceedings brought in breach

of a jurisdiction agreement unless the defendant can show strong reasons to refuse the relief. No sufficiently strong reasons were shown. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining the Belgian proceedings.

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

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

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

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

> In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate

> course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum. But in the present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC.

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

The European response: anti anti-suit injunctions?

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

It is more plausible that European courts would deploy anti anti-suit injunctions to unwind offending English orders. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 50] Assuming that the grant of anti-suit injunctions becomes a regular practice of the English courts in these circumstances, this could provide the impetus for legal developments in this

direction across the Channel. In recent years both French and German courts have issued orders of this kind in the context of patent violation. In a December 2019 judgment, the Higher Regional Court of Munich issued an anti anti-suit injunction to prevent a German company from making an application in US proceedings for an anti-suit injunction (see Continental v Nokia, No. 6 U 5042/19). In a March 2020 judgment, the Court of Appeal of Paris issued an anti anti-suit injunction ordering various companies of the Lenovo and Motorola groups to withdraw an application for an anti-suit injunction in US proceedings (see IPCom v Lenovo, No. RG 19/21426).

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

RECOGNITION AND ENFORCEMENT OF JUDGMENTS AWARDING DAMAGES FOR BREACH OF A CHOICE-OF-

COURT AGREEMENT: A QUASI ANTI-SUIT INJUNCTION? – The Supreme Court of Greece refers question to the CJEU for a preliminary ruling.

This post was contributed by *Eirini Tsikrika, Master 2 Paris 1 Panthéon-Sorbonne, Ph.D candidate at the National and Kapodistrian University of Athens*

On the 25th of June the Supreme Court of Greece has rendered a provisional judgment to request preliminary ruling of the CJEU on the question of compatibility of the right to damages for breach of a choice-of-court agreement with the European ordre public. The judgment forms part of the group of decisions related to the Alexandros T case [Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG ([2014] EWCA Civ 1010)]. The case has also been reported by Apostolos Anthimos, who had already stressed out the importance of an EU level solution, see his blog posts concerning *Decisions Nr. 371/2019 and Nr. 89/2020 of the Piraeus Court of Appeal* respectively. Also, the procedural history of the case in England is meticulously exposed in the post of Dr. Martin Ilmer.

The facts of the case

The dispute arose out of a marine insurance contract, which contained a choice-of-court agreement designating the courts of London as competent. After the shipwreck of the ship, the ship owners brought proceedings against the insurers before the High Court of Justice, which were finally ended with the parties reaching an out-of-court settlement. The settlement agreement itself contained also a prorogation clause in favor of the English courts.

At a later stage, the ship owners brought action before the courts of Piraeus, alleging damages suffered due to the conduct of the other party in the English proceedings. This conduct consisted of the systematic discrediting of the seaworthiness of the ship by using false evidence.

As a response, the insurers contested the jurisdiction of the Greek courts, by invoking the prorogation clauses contained in both the insurance contract and the settlement agreement. Furthermore and while proceedings before the court of Piraeus were still pending, the insurers filed a damages claim before the High Court of Justice for breach of the choice-of-court agreements, seeking recovery for the legal costs and expenses incurred in the Greek proceedings.

Their action was fully accepted by virtue of *the [2014] EWHC 3028 (Comm)* decision of the High Court of Justice, as the latter acknowledged the existence of a valid, exclusive choice-of-court agreement in favor of the English jurisdiction. Subsequently, the courts of Piraeus declined jurisdiction and dismissed the claim of the ship owners on the grounds of the res judicata effect of the English judgment, while refusing the existence of grounds for non recognition of the English judgment in Greece *(Dec. Nr. 899/2016, 28.3.2016, Piraeus Court of First Instance).*

–

The decision of the Court of Appeal

The ship owners formed an appeal against the decision of the Court of First Instance, alleging that the latter was wrong to recognize a decision granting compensation for breach of a choice-of-court agreement, on the grounds of violation of the principle of mutual trust and of the European ordre public. Therefore, the decision of the Court of Appeal *(Dec. Nr. 465/2020, 07.03.2019, Piraeus Court of Appeal)* was focused on two points:

1. The affinity of a decision recognizing the right to damages for breach of a choice-of-court agreement with the anti-suit injunctions.
2. The violation of the procedural ordre public as ground for non recognition and enforcement of such decisions, under the Articles 34 (1) and 45 (1) of the EU Regulation 44/2001 (Brussels I Regulation).

As far as it concerns the first point, the Court of Appeal refused to draw a parallel

between the right to damages for breach of a choice-of-court agreement and the anti-suit injunctions, which have been explicitly banned from the system of the Brussels I Regulation by virtue of the CJEU's *Turner v. Grovit and West Tankers v. Allianz* decisions (although *West Tankers* concerned an arbitration agreement, dealing primarily with the question of the Regulation's scope of application). According to the Greek courts, such decisions do not aim at the international jurisdiction of a foreign court but they refer exclusively to the non-execution of the prorogation agreement-as it would be with the failure to comply with any other contractual obligations- and consequently to the existence or non-existence of contractual liability lying with the violating party. (For a different view on the question of compatibility with the principle of mutual trust, see the analysis included in the doctoral thesis of Dr. Mukarrum Ahmed).

Proceeding with the second point, the court stresses that each decision admitting violation of a choice-of-court agreement and consequently international jurisdiction of the forum prorogatum cannot but correlatively refuse international jurisdiction of the forum yet seized. Hence, that is perfectly tolerated by the European ordre public, since it doesn't constitute an illegitimate interference in the adjudicatory jurisdiction of a foreign court but results from the mere application of the rules of the Brussels I Regulation. And the Court went on, to point out that even a false application of the rules of the Regulation could not justify the non recognition of the decision of a Member State, since a violation of the rules on international jurisdiction does not establish a violation of the procedural public order. It is clear-the court continues- that the misinterpretation or false application of the rules on international jurisdiction is overridden by the objective of the free circulation of judgments within the European judicial area.

Based on these assertions, the Court of Appeal declared lack of jurisdiction of the Greek courts to rule on the merits of the case, confirming the decision of the Court of First Instance.

The exequatur procedure and the preliminary reference to the CJEU

In the meantime, a parallel exequatur procedure has been initiated at the insurers' initiative, who sought to execute the English judgment in Greece. The relevant exequatur request was fully accepted, while the application for refusal of enforcement filed by the ship owners, was rejected. Finally, the ship owners seized the Supreme Court pursuant to Article 44 and Annex IV of the Regulation,

so that the question shall be resolved by means of a final and irrevocable decision. The Supreme Court, requesting a preliminary ruling, addressed to the CJEU - almost verbatim- the following questions *(Dec. Nr. 820/2021, 25.6.2021, Supreme Court of Greece):*

1. In addition to the conventional anti-suit injunctions, are there any other decisions or orders which, even implicitly, impede the applicant's right to judicial protection by the courts of a Member State and therefore fall under the scope of the Articles 34 (1) and 45 (1) of the Brussels I Regulation? And more specifically, can a decision granting compensation for breach of a choice-of-court agreement, be considered as being against the European public order?

1. In case of a negative answer to the first question, do such decisions still fall under the scope of the Articles 34 (1) and 45 (1) of the EU Regulation 44/2001, once they are considered as being against the national public policy of Greece, so that the objective of the free movement of civil judgments within the European Union c?uld be overridden in that case?

It needs to be noted that the English, Spanish courts and recently the German BGH have already acknowledged the right to damages for breach of a jurisdiction clause. Yet the CJEU had not the chance to take position on such question, since the forum derogatum was in the previous cases a non EU member-state, where the principle of mutual trust does not apply. It remains to be seen whether the solution adopted by the national courts, will be expanded to the European judicial area. A highly anticipated decision with secondary implications also on the key issue of the nature of a choice-of-court agreement.

Report on the ERA conference of

29-30 October 2020 on ‘Recent Developments in the European Law of Civil Procedure’

This report has been prepared by Carlos Santaló Goris, a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg.

On 29-30 October 2020, ERA – the Academy of European Law – organized a conference on “Recent Developments in the European Law of Civil Procedure”, offering a comprehensive overview of civil procedural matters at the European and global level. The program proved very successful in conveying the status quo of, but also a prospective outlook on, the topics that currently characterise the debates on cross-border civil procedure, including the Brussels I-bis Regulation and 2019 HCCH Judgments Convention, the digitalisation of access to justice, the recent developments on cross-border service of documents and taking of evidence, and judicial cooperation in civil and commercial matters in the aftermath of Brexit.

For those who did not have the opportunity to attend this fruitful conference, this report offers a succinct overview of the topics and ideas exchanged over this two-day event.

Day 1: The Brussels I (Recast) and Beyond

The Brussels regime, its core notions and the recent contributions by the CJEU via its jurisprudence were the focus of the first panel. In this framework, Cristina M. Mariottini (Max Planck Institute Luxembourg) tackled the core notion of civil and commercial matters (Art. 1(1)) under the Brussels I-bis Regulation. Relying, in particular, on recent CJEU judgments, among which C-551/15, *Pula Parking*; C-308/17, *Kuhn*; C-186/19, *Supreme Site Services*, she reconstructed the functional test elaborated by the CJEU in this area of the law, shedding the light on the impact of recent developments in the jurisprudence of the Court, i.a., with respect to immunity claims raised by international organizations.

Marta Pertegás Sender (Maastricht University and University of Antwerp)

proceeded then with a comprehensive overview of the choice-of-court agreement regimes under the Brussels I-bis Regulation and the 2005 Hague Convention on choice of court agreements. Relying, inter alia, on the CJEU case law on Article 25 of the Brussels I-bis Regulation (C-352/13, *CDC Hydrogen*; C-595/17, *Apple Sales*; C-803/18, *Balta*; C-500/18, *AU v. Reliantco*; C-59/19, *Wikingerhof* (pending)), she highlighted the theoretical and practical benefits of party autonomy in the field of civil and commercial matters.

The interface between the Brussels I-bis Regulation and arbitration, and the boundaries of the arbitration exclusion in the Regulation, were the focus of Patrick Thieffry (International Arbitrator; Member of the Paris and New York Bars) in his presentation. In doing so he analysed several seminal cases in that subject area (C-190/89, *Marc Rich*; C-391/95, *Van Uden*; C-185/07, *West Tankers*; C?536/13, *Gazprom*), exploring whether possible changes were brought about by the Brussels I-bis Regulation.

The evolution of the CJEU's jurisprudence vis-à-vis the notions of contractual and non-contractual obligations were at the heart of the presentation delivered by Alexander Layton (Barrister, Twenty Essex; Visiting Professor at King's College, London). As Mr Layton effectively illustrated, the CJEU's jurisprudence in this field is characterized by two periods marking different interpretative patterns: while, until 2017, the CJEU tended to interpret the concept of contractual matters restrictively, holding that "all actions which seek to establish the liability of a defendant and which are not related to a contract" fall within the concept of tort (C-189/87, *Kalfelis*), the Court interpretation subsequently steered towards an increased flexibility in the concept of "matters relating to a contract" (C-249/16, *Kareda*; C-200/19, *INA*).

The principle of mutual trust of the European Area of Freedom, Security and Justice vis-à-vis the recent Polish judicial reform (and its consequential backlash on the rule of law) was the object of the presentation delivered by Agnieszka Fr?ckowiak-Adamska (University of Wroc?aw). Shedding the light on the complex status quo, which is characterized by several infringement actions initiated by the European Commission (C?192/18, *Commission v Poland*; C?619/18, *Commission v Poland*; C?791/19 R, Commission v Poland (provisional measures)) as well as CJEU case law (e.g. C?216/18 PPU, *Minister for Justice and Equality v LM*), Ms

Fr?ckowiak-Adamska also expounded on the decentralised remedies that may be pursued by national courts in accordance with the EU civil procedural instruments, among which public policy, where available, and refusal by national courts to qualify Polish judgments as "judgments" pursuant to those instruments.

The second half of the first day was dedicated to the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. In this context, it is of note that the EU, among others, has opened a Public Consultation into a possible accession to the Convention (see, esp., Thomas John's posting announcing the EU's public consultation). While Ning Zhao (Senior Legal Officer, HCCH) gave an overview of the *travaux preparatoires* of the 2019 HCCH Convention and of the main features of this instrument, Matthias Weller (University of Bonn) delved into the system for the global circulation of judgments implemented with the Convention, highlighting its traditional but also innovative features and its potential contributions, in particular to cross-border dealings.

The roundtable that followed offered the opportunity to further expound on the 2019 HCCH Judgments Convention. Namely, Norel Rosner (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission) explained that the EU has a positive position towards the Convention, notably because it facilitates the recognition and enforcement of EU judgments in third countries and because it will help create a more coherent system of recognition and enforcement in the EU Member States of judgments rendered in other (of course, non-EU) Contracting States. The roundtable also examined the features and objectives of Article 29, which puts forth an "opt-out" mechanism that allows Contracting States to mutually exclude treaty obligations with those Contracting States with which they are reluctant to entertain the relations that would otherwise arise from the Convention. As Ms Mariottini observed, this provision – which combines established and unique characters compared to the systems put forth under the previous HCCH Conventions – contributes to defining the "territorial geometry" of the Convention: it enshrines a mechanism that counterbalances the unrestricted openness that would otherwise stem from the universality of the Convention, and is a valuable means to increase the likelihood of adherence to the Convention. Matthias Weller proceeded then to explore the consequences of limiting a Contracting State's objection window to 12 months from adherence to the Convention by the other Contracting State and raised the case of a Contracting State whose circumstances change so dramatically, beyond

the 12-month window, that it is no longer possible to assure judicial independence of its judiciary. In his view, solutions as the ones proposed by Ms Fr?ckowiak-Adamska for the EU civil procedural instruments may also apply in such circumstances.

Day 2: European Civil Procedure 4.0.

Georg Haibach (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission), opened the second day of the conference with a detailed presentation on the ongoing recast of the Service Regulation (Regulation (EC) No 1393/2007). Emphasizing that the main objective of this reform focuses on digitalization – including the fact that the proposed recast prioritises the electronic transmission of documents – Mr Haibach also shed the light on other notable innovations, such as the possibility of investigating the defendant's address.

The Evidence Regulation (Council Regulation No. 1206/2001), which is also in the process of being reformed, was at the core of the presentation delivered by Pavel Simon (Judge at the Supreme Court of the Czech Republic, Brno) who focuses not only on the status quo of the Regulation as interpreted by the CJEU (C-283/09, Wery?ski; C-332/11, ProRail; C-170/11, Lippens), but also tackled the current proposals for a reform: while such proposals do not appear to bring major substantive changes to the Regulation, they do suggest technological improvements, for instance favouring the use of videoconference.

In her presentation, Xandra Kramer (University of Rotterdam and Utrecht University) analysed thoroughly two of the CJEU judgments on "satellite" instruments of the Brussels I-bis Regulation: the EAPO Regulation (Regulation No. 655/2014); and the EPO Regulation (Regulation No. 1896/2006). C-555/18, was the very first judgment that the CJEU rendered on the EAPO Regulation. Xandra Kramer remarked the underuse of this instrument. In the second part of her lecture, she identified two trends in the judgments on the EPO Regulation (C?21/17, Caitlin Europe; Joined Cases C?119/13 and C?120/13, ecosmetics; Joined Cases C?453/18 and C?494/18, Bondora), observing that the CJEU tries, on the one hand, to preserve the efficiency of the EPO Regulation, while at the same

time seeking to assure an adequate protection of the debtor's position.

In the last presentation of the second day, Helena Raulus (Head of Brussels Office, UK Law Societies) explored the future judicial cooperation in civil matters between the EU and the United Kingdom in the post-Brexit scenario. Ms Raulus foresaw two potential long-term solutions for the relationship: namely, relying either on the 2019 Hague Convention, or on the Lugano Convention. In her view, the 2019 Hague Convention would not fully answer the future challenges of potential cross-border claims between EU Member States and the UK: it only covers recognition and enforcement, while several critical subject areas are excluded (e.g. IP-rights claims); and above all, from a more practical perspective, it is still an untested instrument. Ms Raulus affirmed that the UK's possible adherence to the Lugano Convention is the most welcomed solution among English practitioners. Whereas this solution has already received the green light from the non-EU Contracting States to the Lugano Convention (Iceland, Norway, and Switzerland), she remarked that to date the EU has not adopted a position in this regard.

The conference closed with a second roundtable, which resumed the discussions on the future relations between the EU and the UK on judicial cooperation in civil law matters. Christophe Bernasconi (Secretary General, HCCH) offered an exhaustive review on the impact of the UK withdrawal from the EU on all the existing HCCH Conventions. From his side, Alexander Layton wondered if it might be possible to apply the pre-existing bilateral treaties between some EU Member States and the UK: in his view, those treaties still have a vestigial existence in those matters non-covered by the Brussels I-bis Regulation, and thus they were not fully succeeded. In Helena Raulus's view, such treaties would raise competence issues, since the negotiating of such treaties falls exclusively with the EU (as the CJEU found in its Opinion 1/03). As Ms Raulus observed, eventually attempts to re-establish bilateral treaties between the Member States and the UK might trigger infringement proceedings by the Commission against those Member States. The discussion concluded by addressing the 2005 Hague Convention and it is applicability to the UK after the end of the transition period.

Overall, this two-day event was characterized by a thematic and systematic approach to the major issues that characterize the current debate in the area of judicial cooperation in civil and commercial matters, both at the EU and global level. By providing the opportunity to hear, from renowned experts, on both the

theoretical and practical questions that arise in this context, it offered its audience direct access to highly qualified insight and knowledge.

Rivista di diritto internazionale privato e processuale (RDIPP) No 4/2019: Abstracts

The
fourth issue of 2019 of the *Rivista di diritto internazionale privato e processuale* (RDIPP,
published by CEDAM) was just released. It features:

Costanza Honorati,
Professor at the University Milan-Bicocca, **La
tutela dei minori migranti e il diritto internazionale privato: quali rapporti tra Dublino III e Bruxelles II-bis?** (The Protection of Migrant Minors and Private International Law: Which Relationship between the Dublin III and Brussels IIa Regulations?; in Italian)

- Few studies have investigated the relation between Migration Law and PIL. Even less have focused on the interaction between Brussels IIa and Dublin III Regulations. The present study, moving from the often declared assumption that 'a migrant minor is first of all a minor' focuses on the coordination between the two Regulations and the possible application of Brussels IIa to migrant minors in order to adopt protection measures to be eventually recognized in all EU Member States or to possibly place a minor in another EU Member State.

Francesca C.

Villata,
Professor at the University of Milan, **Predictability First! *Fraus Legis*, Overriding Mandatory Rules and *Ordre Public* under EU Regulation 650/2012 on Succession Matters** (in English)

- This paper aims at investigating: (i) how *fraus legis*, overriding mandatory rules and *ordre public* exceptions position themselves within the system of the Succession Regulation; (ii) whether they are meant to perform their traditional function or to pursue any alternative or additional objective; and (iii) which limits are imposed on Member States in the application of said exceptions and to what extent Member States can avail themselves of the same to preserve, if not to enforce, their respective legal traditions in this area, as acknowledged in Recital 6 of Regulation No 650/2012. The assumption here submitted is that the traditional notions to which those exceptions refer have been reshaped or, rather, adjusted to the specific needs of Regulation No 650/2012 and of the entire EU private international law system, which increasingly identifies in predictability the ultimate policy goal to pursue.

In addition to the foregoing, the following comments are featured:

Michele Grassi,
Research Fellow at the University of Milan, **Sul riconoscimento dei matrimoni contratti all'estero tra persone dello stesso sesso: il caso *Coman*** (On the Recognition of Same-Sex Marriages Entered into Abroad: The *Coman* Case; in Italian)

- With its judgment in the *Coman* case, the Court of Justice of the European Union has extended the scope of application of the principle of mutual recognition to the field of family law and, in particular, to same-sex marriages. In that decision the Court has ruled that the refusal by the authorities of a Member State to recognise (for the sole purpose of granting a derived right of residence) the marriage of a third-country national to a Union citizen of the same sex, concluded in accordance with the law of another Member State, during the period of their residence in

that State, is incompatible with the EU freedom of movement of persons. The purpose of this paper is to analyse the private-international-law implications of the *Coman* decision and, more specifically, to assess the possible impact of the duty to recognise same-sex marriages on the European and Italian systems.

Francesco Pesce,
Associate Professor at the University of Genoa, **La nozione di «matrimonio»: diritto internazionale privato e diritto materiale a confronto** (The Notion of 'Marriage': Private International Law and Substantive Law in Comparison; in Italian)

- This paper tackles the topical and much debated issue of the notions of 'marriage' and 'spouse' under EU substantive and private international law. Taking the stand from the different coexisting models of family relationships and from the fragmented normative approaches developed at the domestic level, this paper (while aware of the ongoing evolutionary trends in this field) focuses on whether it is possible, at present, to infer an autonomous notion of 'marriage' from EU law, either in general or from some specific areas thereof. The response to this question bears significant consequences in terms of defining the scope of application of the uniform rules on the free movement of persons, on the cross-border recognition of family statuses and on the ensuing patrimonial regimes. With specific regard to the current Italian legal framework, this paper examines to which extent characterization issues are still relevant.

Carlo De Stefano, PhD, **Corporate Nationality in International Investment Law: Substance over Formality** (in English)

- Since incorporation is usually codified in IIAs as sole criteria for the definition of protected corporate 'investors', arbitral tribunals have traditionally interpreted and applied such provisions without requiring any thresholds of substantive bond between putatively covered investors and their alleged home State. By taking issue with the current status of international investment law and arbitration, the Author's main proposition is that States revise treaty provisions dealing with the determination of corporate nationality so as to insert real seat and (ultimate) control prongs in coexistence with the conventional test of

incorporation. This proposal, which seems to be fostered in the recent state practice, is advocated on the grounds of legal and policy arguments with the aim to combat questionable phenomena of investors' 'treaty shopping', including 'round tripping', and, consequently, to strengthen the legitimacy of investor-State dispute settlement.

Ferdinando Emanuele, Lawyer in Rome, *Milo Molfa*, Lawyer in London, and *Rebekka Monico*, LL.M. Candidate, **The Impact of Brexit on International Arbitration** (in English)

- This article considers the effects of the United Kingdom's withdrawal from the EU on international arbitration. In principle, Brexit will not have a significant impact on commercial arbitration, with the exception of the re-expansion of anti-suit injunctions, given that the *West Tankers* judgment will no longer be binding. With respect to investment arbitration, because the BITs between the United Kingdom and EU Member States will become extra-EU BITs, the *Achmea* judgment will no longer be applicable following Brexit. Furthermore, English courts will enforce intra-EU BIT arbitration awards pursuant to the 1958 New York Convention. Investment treaties between the EU and third countries will not be applicable to the United Kingdom.

Finally, the issue features the following case notes:

Cinzia Peraro, Research Fellow at the University of Verona, **Legittimazione ad agire di un'associazione a tutela dei consumatori e diritto alla protezione dei dati personali a margine della sentenza *Fashion ID*** (A Consumer-Protection Association's Legal Standing to Bring Proceedings and Protection of Personal Data in the Aftermath of the *Fashion ID* Judgment; in Italian)

Gaetano Vitellino, Research Fellow at

Università Cattaneo LIUC of Castellanza, **Litispendenza e accordi confliggenti di scelta del foro nel caso *BNP Paribas c. Trattamento Rifiuti Metropolitani*** (*Lis Pendens* and Conflicting Choice of Court Agreements in *BNP Paribas v. Trattamento Rifiuti Metropolitani*; in Italian)

Gaetano Vitellino, Research Fellow at Università Cattaneo LIUC of Castellanza, **Note a margine di una pronuncia del Tribunale di Torino in materia societaria** (Remarks on a Decision of the Turin Tribunal on Corporate Matters; in Italian)

Research Handbook on EU Private International Law

A new Research Handbook on EU Private International Law, within the Edward Elgar Research Handbooks in European Law series has just been published. It is edited by *Peter Stone*, Professor and *Youseph Farah*, Lecturer, School of Law, University of Essex, UK.

It contains the following contributions:

1. Internet Transactions and Activities
Peter Stone
2. A Step in the Right Direction! Critical Assessment of Forum Selection Agreements under the Revised Brussels I: A Comparative Analysis with US Law
Youseph Farah and Anil Yilmaz-Vastardis
3. Fairy is Back – Have you got your Wand Ready?
Hong-Lin Yu

4. Frustrated of the Interface between Court Litigation and Arbitration? Don't Blame it on Brussels I! Finding Reason in the Decision of West Tankers, and the Recast Brussels I
Youseph Farah and Sara Hourani

5. Does Size Matter? A Comparative Study of Jurisdictional Rules Applicable to Domestic and Community Intellectual Property Rights
Edouard Treppoz

6. Article 4 of the Rome I Regulation on the Applicable Law in the Absence of Choice – Methodological Analysis, Considerations
Gülin Güneysu-Güngör

7. International Sales of Goods and Rome I Regulation”
Indira Carr

8. The Rome I Regulation and the Relevance of Non-State Law”
Olugbenga Bamodu

9. The Interaction between Rome I and Mandatory EU Private Rules – EPIL and EPL: Communicating Vessels?
Xandra E. Kramer

10. Choice of Law for Tort Claims”
Peter Stone

11. Defamation and Privacy and the Rome II Regulation
David Kenny and Liz Heffernan

12. Corporate Domicile and Residence
Marios Koutsias

More information is available on the publisher’s website.

Arbitration and EU-Procedural Law: Two Advocate Generals of the

CJEU Promote Diverging Views

Prof. Dr. Burkhard Hess, Director of the MPI Luxembourg, has very kindly accepted to have his view on two recent AG's opinions published in CoL. Comments are welcome.

Two recent opinions, the one rendered by AG Wathelet on December 8, 2014, in *Gazprom* (Case C-536/13), and the other one given by AG Jääskinen, on December 11, 2014, in *CDC* (Case C-352/13) address the interplay between arbitration and EU law, especially in the context of the Brussels I Regulation. Interestingly, the two opinions adopted different perspectives and, therefore, propose different solutions. Moreover, both cases relate to similar issues on the merits: the enforcement of mandatory Union law in the areas of cartel and of energy law. Accordingly, it appears that the two opinions are also based on diverging conceptions on the role of arbitration *vis-à-vis* mandatory Union law. Therefore, I would like to compare the opinions in order see how EU-law and arbitration should be delineated. As the two cases are currently pending in the CJEU, it is finally up to the Court to decide which direction should be taken.

The opinion in Gazprom: Giving preference to arbitration proceedings

Gazprom is about the admissibility of anti-suit injunctions rendered by an arbitral tribunal (seated in a EU Member State) against civil proceedings pending in civil courts within the European Judicial Area. On the merits, the case is of a highly political significance: it relates to the long-term supply of gas to 90% of the population of Lithuania by the Russian energy giant. According to a framework agreement of 1999 a Lithuanian company (Lietuvos dujos) whose majority was held by Gazprom and the minority by the government was in charge of buying gas from Gazprom and distributing it in Lithuania. In spring 2011, the Lithuanian Ministry of Energy initiated an investigation on price manipulation against Lieutuvos and its directors and tried to change the management. Under Lithuanian company law, it brought an action in the Lithuanian civil courts in order to secure the investigations against the company. As the shareholder agreement provided for arbitration under the Stockholm Chamber of Commerce, Gazprom initiated arbitration proceedings there. On 31 July 2012, the arbitral tribunal made a "final award" and ordered the Ministry of Energy to withdraw parts of its requests in the Lithuanian court. Finally, the Lithuanian court asked

the ECJ whether these orders (which amounted to anti-suit injunctions) were compatible with its empowerment to decide on its jurisdiction under the Regulation Brussels I.

As a starting point, it should be mentioned that the case-law of the CJEU regarding anti-suit injunctions seems to be well settled: In cases C-159/02 *Turner* and C-185/07 *Allianz* (*West Tankers*), the CJEU held that anti-suit injunctions rendered by a court of a EU-Member State against the proceedings pending in another EU-Member State are incompatible with two fundamental principles of EU procedural law. According to the first principle each court has to assess freely whether it has jurisdiction under the Regulation. Furthermore, anti-suit injunctions are incompatible with the principle of mutual trust according to which each court in the European Judicial Area relies, as a matter of principle, on the appropriateness of the judicial systems in other EU-Member States (on this principle, see recently, the Opinion 2/13 of the ECJ of December 18, 2014, on the Accession of the Union to the European Convention of Human Rights, at paras 181 – 195). However, the issue of whether anti-suit injunctions of an arbitral tribunal may impede the proper functioning of European procedural law has not been addressed so far.

In his opinion, AG Wathelet proposed to interpret the Regulation Brussels I in a different way. The Advocate General came to the conclusion that any proceeding where the validity of an arbitration agreement is contested is excluded from the scope of the Brussels I Regulation (para 125). In this respect, the AG proposed to qualify an anti-suit injunction a decision on the validity of the arbitration clause and, consequently, to exclude it from the realm of the Brussels I Regulation. Furthermore, the opinion proposes to reverse the decision of the Grand Chamber in case C-185/07 *Allianz/West Tankers* (paras 126 – 135). According to the Opinion of AG Wathelet, anti-suit injunctions issued by an arbitral tribunals do not create any problem of compatibility with EU law (para 140).

This result is based on the following arguments: Firstly, the AG denies any legal impact of an anti-suit injunction, being an instrument of English law (para 64), on the Lithuanian government because it could only enforced in England (para 65). Secondly, the Opinion refers to the new Brussels I Regulation 1215/2012 (although temporarily not applicable in the present case, see its Article 66 (1), at para 88). However, the Opinion proposes to apply the (old) Regulation Brussels I as to "be taken into account" (para 89). The AG refers to paragraph 2 of the

Recital 12 of the Recast, according to which Art. 1 (2) lit d) of the Brussels I Regulation should be interpreted as excluding "that a ruling regarding the existence and the validity of an arbitration agreement could circulate under the (new) Regulation." According to AG Wathelet, the new Recital should be interpreted as a reinforcement of the arbitration exclusion, in light of which an anti-suit injunction should no longer give rise to the problems of compatibility which had been highlighted by the CJEU in case C-185/07 *Alliance*. Accordingly, under the Recast, anti-suit injunctions by state courts are generally permitted (at para 140). Furthermore, the Opinion proposes that the courts of EU Member States have to refrain from any decision-making when an arbitration clause is invoked unless the clause is considered as obviously void (at para 142). In this respect, it comes close to the French doctrine of the positive competence-competence of arbitral tribunals (paras 149, 151 ff.). Finally, the conclusions deny any application of the principle of mutual trust to arbitral tribunals – even to arbitral tribunal seated in the European union and applying mandatory EU law – because arbitral tribunal are not bound by the Brussels I Regulation (paras 153 ff). Eventually, the AG states that an anti-suit injunction cannot be qualified as a ground of non-recognition for a violation of public policy under article V (2)(b) NYC (paras 160 ff).

If this line of reasoning was endorsed by the Grand Chamber, the case law of the CJEU regarding arbitration would change significantly. However, the conclusions are more directed towards the new Regulation 1215/2012 (temporarily not applicable) than to the case under consideration. Although I do not want to criticize the line of reasoning here in its entirety, I would briefly express the following doubts: First, the origins of anti-suit injunctions in English law do not say anything about their cross-border effects. However, the fact that they are more and more often used in international arbitration tells a lot about their impact on litigation (and there are cases where they had been enforced). Second, the legal value of a Recital should not be over-estimated. They are not part of the operative provisions of a Regulation and cannot be interpreted in a way that impedes the efficiency of the Regulation (see in this respect case C-43/13, *Pantherwerke*, para 20). Furthermore, in the legislative process, there was a consensus that the Recitals are not intended to change the status quo (see e.g. *Pohl*, IPRax 2013, 110; *Hartley*, ICLQ 2014, 861). In addition, Recital 12, 2nd paragraph itself does not address proceedings of a court confronted with an arbitration clause (and an injunction prohibiting a party from continuing litigation

in its court room), but with the recognition of decisions on the validity of arbitration clauses. Finally, Recital 12 does not endorse the French concept of positive competence-competence. Quite to the contrary, the original proposal of the EU-Commission (elaborated by an expert group) providing for an explicit solution of this issue and designed to comply with specifics of French law was rejected by the Parliament and by the Council in the legislative process.

Yet, it remains to be seen whether the CJEU will endorse this "separation" of arbitration from litigation under the Brussels I Regulation. As a result, it may entail a considerable limitation of the effectiveness of the Brussels I system. The opinion mainly addresses the effectiveness of arbitration (paras 98, 148), the effectiveness of the Brussels I Regulation is only considered to the extent that it corresponds to the NYC (see para 142).

The opinion in CDC: Preserving efficient enforcement of EU-law in front of an arbitration clause

Only three days later, in case CDC, AG Jääskinen addressed the interpretation of an arbitration agreement (or of a jurisdiction agreement falling outside of the scope of Article 23 of Brussels I). "CDC" is about the decentralized enforcement of EU-cartel law by actions for damages in the civil courts of EU-Member States. CDC SA is a Belgian corporation which bought claims from 32 pulp and paper companies which had sustained damages by buying hydrogen peroxyde from a Europe wide cartel between 1994 and 2000. CDC brought legal action against six members of the former cartel in the District Court of Dortmund; the jurisdiction of the court is based on articles 5 no 3 and 6 no 1 of the Brussels' I Regulation (2001). The damage claimed amounts of more than EUR 475 million (plus interests).

The defendants contest the jurisdiction of the Dortmund court inter alia by relying on jurisdiction and arbitration clauses found in the general terms of sales contracts on hydrogen peroxide. They assert that these clauses include action for cartel damages and apply to CDC which had acquired the damage claims by assignments. The German court asked the CJEU whether these clauses included damage claims for infringements of Article 101 TFEU.

To this question, AG Jääskinen gave the following answer: First, he explicitly held that the Dortmund court may interpret the scope of the arbitration clauses (para

98). Second, he stated that party autonomy includes the right to agree jurisdiction and arbitration clauses (para 119). This consideration applies especially when parties are aware of the claims which are included into these agreements. Furthermore, the scope of each clause has to be determined according to its wording. However, the Advocate General concluded that jurisdiction and arbitration clauses should not be interpreted in a way to impede the full effectiveness and the enforcement of mandatory cartel law (para 126). As a result, arbitration and jurisdiction clauses should be interpreted in a way that delictual claims for breaches of article 101 TFEU are excluded.

Again, I do not want to criticize these conclusions in detail (as I have to disclose my involvement in this case). However, the approach of AG Jääskinen seems to differ considerably from the views of AG Wathelet as the former is mainly addressing the efficiency of mandatory EU law (to be implemented by the national courts) and the latter is mainly concerned about the efficiency of arbitration. It remains to be seen what the CJEU will decide. It is to be hoped that the court will draw a fair line between arbitration and litigation bringing both in a balanced situation which permits the efficient enforcement of EU law in dispute resolution.

English Court of Appeal confirms Damages Award for Breach of a Jurisdiction Agreement

By Martin Illmer

In a recent decision, the English Court of Appeal confirmed a damages award for breach of a jurisdiction agreement ([2014] EWCA Civ 1010); another judgment in the Alexandros T saga, which has been unfolding before the English courts. The judgment was delivered after the Supreme Court had, in November 2013 ([2013] UKSC 70), on appeal from an earlier Court of Appeal judgment in the Alexandros T saga, held that arts 27 and 28 of Brussels I did not apply in relation to the 2006

proceedings, vis-à-vis the 2011 proceedings (see the facts below) because the claims in those proceedings did not concern the same cause of action, but merely arose out of the same factual setting and might raise common issues.

Facts

In May 2006, the vessel Alexandros T, owned by Starlight Shipping Company, sank. Starlight filed a claim with their insurers, who initially denied liability, primarily on the basis that, to Starlight's knowledge, the vessel was unseaworthy. Starlight disputed this argument and in turn alleged that the insurers had improperly influenced witnesses, had spread false and malicious rumors and, in failing to comply with their obligations to pay Starlight under the insurance policies, had caused them consequential financial loss. Accordingly, in 2006, Starlight brought an action against the insurers before the English High Court under the exclusive jurisdiction clauses in the insurance policies. Shortly before the trial, the parties settled the claim on the basis of Tomlin Orders which provided for a stay of the action save for the purposes of carrying into effect the agreed terms of the settlement. The settlement agreements were expressed to be in full and final settlement of all and any claims under the insurance policies, and contained English choice of law and exclusive English jurisdiction clauses. In addition, Starlight agreed to indemnify the insurers in respect of any claims which might be made against them in relation to the loss of the vessel or under the policies. In 2011, however, Starlight brought proceedings in Greece against the insurers, alleging breaches of the Greek Civil and Criminal Code, relying on the factual allegations concerning witness evidence and loss made in the 2006 proceedings. In response to that claim, the insurers sought to lift the stay of the 2006 proceedings under the Tomlin Orders, and commenced proceedings before the English High Court seeking (1) a declaration that the Greek claims are covered by the releases of the settlement agreements, (2)a declaration that bringing the Greek claims was a breach of the releases in the settlement agreements as well as a breach of the jurisdiction clauses in both the policies and settlement agreements, and, (3) payments based on the indemnity clauses and damages for breach of the release and jurisdiction clauses. At first instance the High Court granted summary judgment on the insurers' claims. Starlight appealed to the Court of Appeal.

Judgment

The relevant passages of the judgment of the Court of Appeal read as follows:

> ***'Do the claims for damages infringe EU law?***

[15] The owners assert that these claims for damages interfere with the jurisdiction of the Greek court to determine its own jurisdiction and, if appropriate, the merits of the owners' claims. For this purpose they rely on Turner v Grovit [2004] 2 Lloyds Rep. 169. This reliance is, however, misplaced because Turner v Grovit related to anti-suit injunctions and no such injunction is claimed in the present case. The vice of anti-suit injunctions is that they render ineffective the mechanisms which the Jurisdiction and Judgments Regulation provides for dealing with lites alibi pendentes and related actions. One of those mechanisms is provided by Article 27 which requires any court other than the court first seised to stay proceedings involving the same cause of action. Our earlier decision did precisely that because we considered that the Greek proceedings did involve the same cause of action as the English proceedings but the Supreme Court has now held that we were wrong about that and has also refused a stay under Article 28. There is therefore no question of any interference with the jurisdiction of the Greek court.

[16] The Greek court is free to consider the Greek claims; it will, of course, have to decide whether to recognise any judgment of the English court that the Greek claims fall within the terms of the Settlement Agreement and have therefore been released. It will also have to decide whether to recognise any judgment awarding damages for breach of the Settlement Agreements and the jurisdiction clauses in both the settlement agreements and the insurance policies. But that is not an interference with the jurisdiction of the Greek court but rather an acknowledgment of the Greek court's jurisdiction. In these circumstances there is no infringement of EU law, nor is there any need for a reference to the Court of Justice of the European Union despite the owners' repetition of their request for such a reference in their new solicitors' letter of 26th June 2014.

[17] In fact the owners appear almost to recognise that this is the position since they expressly accept that the claim for an indemnity pursuant to the Settlement Agreements is not contrary to EU law (see their supplemental skeleton, para 48).

That is plainly right (see also the observations of Lord Neuberger at para 132 of his judgment in the Supreme Court). But if the claims to an indemnity do not infringe EU law, it is very hard to see why claims to damages should infringe that law.'

Short Note

The judgment of the Court of Appeal raises a number of interesting questions, which cannot all be addressed here. From a European perspective, the crucial aspect is the compatibility of such a damages award with the ECJ's judgment in *Turner v Grovit,* and potentially also West Tankers (although the latter concerned an arbitration agreement, raising the additional problem that arbitration is excluded from the Regulation's substantive scope). Although the Court of Appeal's judgment builds partially upon the prior decision of the Supreme Court on the issue of arts 27 and 28 of Brussels I – in particular, the finding of the Supreme Court that the claims in the two proceedings did not concern the same cause of action – it is likely that the Court of Appeal would have reached the same decision irrespective of the Supreme Court's prior decision. What is most striking about the Court of Appeal's judgment is the fact that Longmore LJ, in the first sentence of para 15, refers to the Greek court's right to determine its own jurisdiction whereas subsequently, after having explained the Supreme Court's decision on jurisdiction, the court simply refers to an interference with the Greek court's jurisdiction, which is of course not the same. Even though the Supreme Court held that arts 27 and 28 of Brussels I do not apply, a damages claim may still interfere with the right of the Greek court to determine its jurisdiction, or, more generally speaking, the threat of such a damages claim may deter parties from even bringing a claim in a foreign forum which would have the same effect as an anti-suit injunction. One may well argue that if an anti-suit injunction that amounts to specific performance of the jurisdiction agreement should no longer be granted, damages may equally not be awarded.

In light of the principle of effectiveness, the ECJ might well find an incompatibility of a damages award with the Brussels I Regime, and it is therefore somewhat surprising that the Court of Appeal did not refer the matter to the ECJ for a preliminary ruling. The Court of Appeal simply held, by way of its own interpretation, that there is no infringement of EU law, even though the matter

has not yet been decided by the ECJ nor resolved by EU legislation. It is mentioned, in passing, that the English courts, in the litigation that followed the ECJ's West Tankers ruling, appear to be very reluctant to refer matters to the ECJ for a preliminary ruling (see also the issue of enforcement of an arbitral award by entering judgment in terms of the award under section 66(2) Arbitration Act 1996 in West Tankers v Allianz [2011] EWHC 829, confirmed by [2012] EWCA Civ 27). It seems that certain of the ECJ's decisions, such as West Tankers, Turner, and Gasser were so shocking to English courts that they want to avoid a repetition by all means. Moreover, the English courtsequally do not want to see the alternatives to anti-suit injunctions that are provided by English law (some even exclusively by English law) to be destroyed by the ECJ for an incompatibility with the Brussels I Regime.

The matter is somewhat different with regard to arbitration agreements, since arbitration is excluded from the Regulation's scope and there is consequentially no lis pendens mechanism that applies to it. While a state court appears to be barred from granting damages for breach of an arbitration agreement for incompatibility with the ECJ's West Tankers judgment, an arbitral tribunal may well award such damages. While arbitral tribunals are bound by substantive EU law (see ECJ Case C-126/97 Eco Swiss v Benetton [1999] ECR I-3055), they are not bound by procedural EU law that is specifically intended and designed to apply only to the Member States' courts. Consequently, the procedural principles underlying the Brussels I regime do not bind arbitral tribunals even if seated in a Member State, so as to foster mutual trust in other Member States' courts, by allowing them to rule independently on their jurisdiction. The matter was recently heard before the English High Court, which held that the Brussels I Regulation does not apply to an arbitral tribunal, and accordingly that it may award damages for breach of an arbitration agreement free from any restraints due to the principles of the Brussels I Regime (West Tankers v Allianz [2012] EWHC 854). Interestingly, the Swiss Supreme Court reached the same result, (although it was of course not restrained by EU law) when it dealt with an arbitral award rendered by a tribunal whose members included Lord Hoffmann.

First Issue of 2014's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The first issue of 2014 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features three articles, one comment and two reports.

Alberto Malatesta, Professor at the University Cattaneo-LIUC in Castellanza, examines the interface between the new Brussels I Regulation and arbitration in **"Il nuovo regolamento Bruxelles I-bis e l'arbitrato: verso un ampliamento dell'*arbitration exclusion*"** (The New Brussels I-bis Regulation and Arbitration: Towards an Extension of the Arbitration Exclusion; in Italian).

> *This article covers the "arbitration exclusion" as set out in the new EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, recasting the old "Brussels I" Regulation, No 44/2001. The new Regulation apparently retains the same solutions adopted by the latter by providing only for some clarifications in lengthy Recital No 12. However, a careful analysis shows that under the new framework the above "exclusion" is more far reaching than in the past and it impinges on some controversial and much debated issues. After reviewing the current background and the 2010 Proposal of the European Commission on this issue – rejected by the Parliament and by the Council –, this article focuses mainly on the following aspects: i) the actions or the ancillary proceedings relating to arbitration; ii) parallel proceedings before State courts and arbitration and the overcoming of the West Tankers judgment stemming from Recital No 12; iii) the circulation of the Member State courts' decisions ruling whether or not an arbitration agreement is "null and void, inoperative or incapable of being performed"; iv) the recognition and enforcement of a Member State judgment on the merits resulting from the determination that the arbitration agreement is not effective; v) the potential conflicts between State*

judgments and arbitral awards.

Pietro Franzina, Associate Professor at the University of Ferrara, addresses the issue of lis pendens involving a non-EU Member State in **"Lis Pendens Involving a Third Country under the Brussels I-bis Regulation: An Overview"** (in English).

The paper provides an account of the provisions laid down in Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-bis) to deal with proceedings concurrently pending in a Member State and in a third country (Articles 33 and 34). It begins by discussing the reasons for addressing the issue of extra-European lis pendens and related actions within the law of the European Union. Reference is made, in this connection, to the relevance accorded to third countries' proceedings and the judgments emanating therefrom under the Brussels Convention of 1968 and Regulation (EC) No 44/2001, as evidenced inter alia by the rule providing for the non-recognition of decisions rendered in a Member State if irreconcilable with a prior decision coming from a third country but recognized in the Member State addressed. The paper goes on to analyse the operation of the newly enacted provisions on extra-European lis pendens and related actions, in particular as regards the conditions on which proceedings in a Member State may be stayed; the conditions on which a Member State court should, or could, dismiss the claim before it, once a decision on the merits has been rendered in the third country; the relationship between the rules on extra-European and intra-European lis pendens and related actions in cases where several proceedings on the same cause of actions and between the same parties, or on related actions, have been instituted in two or more Member States and in a third country.

Chiara E. Tuo, Researcher at the University of Genoa, examines the recognition of foreign adoptions in the framework of cultural diversities in **"Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali"** (Recognition of the Effects of Foreign Adoptions and Respect for Cultural Diversity; in Italian).

This paper focuses on the protection of cultural identities (or of cultural pluralism) in the context of proceedings for the recognition of the effects of

adoptive relationships established abroad. The subject is dealt with in light of the case-law of the European Court of Human Rights (ECtHR) as it has recently developed with regard to Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, as it is well known, enshrines the right to family life. According to the ECtHR's case-law, a violation of Art. 8 of the Convention may be ascertained when personal status legally and stably constituted abroad are denied transnational continuity. Thus, on the basis of said ECtHR jurisprudence, this paper raises some questions (and tries to provide for the related answers) with regard to the consistency therewith of the conditions that familial relationships created abroad must satisfy when their recognition is sought pursuant to the relevant provisions currently applicable within the Italian legal system.

In addition to the foregoing, the following comment is featured:

Sara Tonolo, Associate Professor at the University of Trieste, **"La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore"** (The Registration of Birth Certificates Resulting from Surrogacy: Public Policy and Best Interests of the Child; in Italian).

Nowadays surrogacy is a widespread practice for childless parents. Surrogacy laws vary widely from State to State. Some States require genetic parents to obtain a judicial order to have their names on the original birth certificate, without the name of the surrogate mother. Other States (e.g. Ukraine) allow putting the name of the intended parents on the birth certificate. In Italy all forms of surrogacy are forbidden, whether traditional or gestational, commercial or altruistic. Act No 40 of19 February 2004, entitled "Rules on medically-assisted reproduction", introduces a prohibition against employing gametes from donors, and specifically incriminates not only intermediary agencies and clinics practicing surrogacy, but also the intended parents and the surrogate mother. Other penal consequences are provided by the Criminal Code for the registration of a birth certificate where parents are the intended ones, as provided by the lex loci actus (Art. 567 of the Italian Criminal Code, concerning the false representation or concealment of status). In the cases decided by the Italian Criminal Courts of First Instance (Milan and Trieste), the judges excluded the criminal responsibility of the intended parents applying for the registration of foreign birth certificates which were not exactly genuine

(due to the absence of genetic ties for the intended mothers), affirming in some way that subverting the effectiveness of the Italian prohibition of surrogacy may be justified by the best interests of the child. Apart from the mentioned criminal problems, several aspects of private international law are involved in the legal reasoning of the courts in these cases: among these, probably, the one that the principle of the child's best interests should have been read not like an exception to the public policy clause but like a basic value of this clause, in light, among others, of the case law of the European Court of Human Rights.

Finally, this issue of the Rivista di diritto internazionale privato e processuale features two reports on recent German case-law on private international and procedural issues, and namely:

Georgia Koutsoukou, Research Fellow at the Max Planck Institute Luxembourg, **"Report on Recent German Case-Law Relating to Private International Law in Civil and Commercial Matters"** (in English).

Stefanie Spancken, PhD Candidate at the University of Heidelberg, **"Report on Recent German Case-Law Relating to Private International Law in Family Law Matters"** (in English).

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.