Call for Abstracts on Transnational Dispute Resolution in an increasingly digitalized world.

The call for abstracts for the '**Transnational Dispute Resolution in an Increasingly Digitalized World**' conference is now open until 1 December 2021. This **online conference** will be hosted by the Center for the Future of Dispute Resolution at Ghent University on Thursday **24 March 2022**.

The increased digitalization in the field dispute resolution, which received a boost from the Covid-19 pandemic, raises a number of important questions in terms of privacy, cybersecurity, data protection and artificial intelligence, going from rather practical concerns (how to protect the information exchanged, how to organize the taking of evidence, how to comply with the various obligations, etc.) to more fundamental inquiries (does it scare litigants off, does it foster or rather compromise efficiency, etc.).

The goal of the conference is to bring together academics, practitioners and policy makers with expertise in the field of dispute resolution (arbitration, transnational litigation, mediation, other ADR mechanisms) and technology law. That is why we are particularly (but not exclusively) interested in contributions that focus on

- Obligations of the actors of justice
- Challenges and opportunities of (partial) online proceedings
- Evidentiary issues related to cybersecurity and data protection
- The (ab)use of these instruments as a dispute resolution strategy

and discuss these forward-looking dispute resolution topics in light of the various privacy, data protection, cybersecurity and AI regulations.

Ph.D. candidates, senior researchers and legal practitioners are invited to **submit an abstract** (on one of the topics above or on a topic of their own choice relating to the general theme) **by 1 December 2021** to Maud.Piers@ugent.be and Wannes.Vandenbussche@ugent.be. Abstracts should be no longer than 1000 words. Authors of selected abstracts will be notified by 10 January 2022.

All contributions should be in English. This online conference is intended to serve as a first opportunity to present and discuss the authors' ideas. Publication venues for the final papers will also be explored.

Should you have any questions please do not hesitate to contact the two members of the organizing committee.

Maud Piers

Wannes Vandenbussche

Service of process on a Russian defendant by e-mail. International treaties on legal assistance in civil and family matters and new technologies

Written by Alexander A. Kostin, Senior Research Fellow at the Private Law Research Centre (Moscow, Russia) and counsel atAvangard law firm

and Valeria Rzyanina, junior associate, Avangard Law Firm

The Decree of the Arbitrazh (Commercial) Court of the Volga District of December 23, 2019 N F06-55840 / 2019 docket numberN A12-20691 / 2019, addresses service of process on the Russian party by the Cypriot court by e-mail and thus the possibility of further recognition of a foreign judgment.

1. Factual background

1.1. Within the framework of the court proceedings, the Russian party (the defendant in the Cypriot proceedings) was notified by the Cypriot court by

sending a writ of service of process to the known e-mail addresses of the defendant. In order to substantiate the manner of service, the Cypriot court referred to Art. 9 of Decree 5 of the Rules of Civil Procedure (Cyprus), according to which "In any case, when the court considers that, for any reason, the service provided for in Rule 2 of this Decree will not be timely or effective, the court may order a substitute for personal service, or other service, or substitute for a notice of service in any way that will be found to be fair and correct in accordance with the circumstances".

1.2. After the default judgment of the Cypriot court was rendered, an application for its recognition was lodged with the Arbitrazh Court of the Volgograd Region. In addressing the issue of compliance with the notification rules, the Russian court referred to paragraph 2 of Art. 24 of the Treaty on Legal Assistance of the USSR-Cyprus 1984 on civil and family matters, according to which judgments are recognized and enforced if the party against whom the judgment was made, who did not appear and did not take part in the proceedings, was promptly and duly notified under the laws of the Contracting Party in the territory of which the judgment was made. The foreign judgment in question was recognized and enforced by the Russian court based on the fact that the proper manner of the notification was confirmed by the opinion of experts under Cypriot law. The Ruling of the Supreme Court of the Russian Federation of March 27, 2020 N 306-ES20-2957 in case N A12-20691 / 2019 left the acts of the lower courts unchanged.

2. Analysis of the Decree of the Arbitration Court of the Volga District of December 23, 2019 N F06-55840 / 2019 in the case N A12-20691 / 2019

2.1. At first glance the logic of the Supreme Court and lower courts appears to be flawless. Nevertheless we find it important to correlate the provisions of paragraph 2 of Art. 24 of the 1984 Legal Aid Treaty with the provisions of Art. 8 of the Treaty. Article 8 requires that: "the requested institution carries out the service of documents in accordance with the rules of service in force in its state, if the documents to be served are drawn up in its language or provided with a certified translation into this language. In cases where the documents are not drawn up in in the language of the requested Contracting Party and are not provided with a translation, they are handed over to the recipient if only he agrees to accept them. "

2.2. In this regard, it should be taken into account that when using the wording “notified under the laws of a Contracting Party,” the Treaty States simultaneously tried to resolve the following situations:

1) where the parties were in the state of the court proceedings at the time of the consideration of the case. In this case, the national (“domestic”) law of the State in which the dispute was resolved shall apply;

2) where the parties were in different states at the time of the consideration of the case. In this case, the provisions of the relevant international treaty shall apply, since the judicial notice is [a] subject to service in a foreign state and, therefore, it affects its sovereignty.

2.3. In this regard, attention should be paid to the fact that under the doctrine and case law of the countries of continental law, the delivery of a judicial notice is considered as an interference with the sovereignty of the respective state. The following are excerpts from case law. Excerpts from legal literature are provided for reference purposes:

1. a) “The negotiating delegations in The Hague faced two major controversies: first, some civil law countries, including Germany, view the formal service of court documents as an official act of government; accordingly, they view any attempt by a foreign plaintiff to serve documents within their borders as an infringement on their sovereignty ” – Volkswagen Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988);
2. b) “The exclusive competence to carry out acts of state power on its own territory follows from the sovereignty of states. As a rule, a state cannot perform actions of this kind within the borders of another state without violating its sovereignty and, therefore, without violating international law. An act is compatible with this right only if it is permitted by a specific international regulation, for example, if it is agreed in a treaty concluded between the states concerned, or if it is unilaterally accepted by the state in which it is carried out. When the notification is given abroad without permission under international law, this notification is invalid under Swiss domestic law due to its supremacy – Decision of the Swiss Federal Court of 01.07.2008 in case No. BGer 4A_161 / 2008.
3. c) “According to the traditional German law approach, delivery is considered to be an act of sovereignty.”- Rasmussen-Bonne H-E., The

pendulum swings back: the cooperative approach of German courts to international service of process P. 240;

4. d) “From prospective of the Japanese state, certain judicial acts of foreign courts, such as the service of court notices and the receipt of evidence, are considered as a manifestation of sovereignty.”- Keisuke Takeshita, “Sovereignty and National Civil Procedure: An Analysis of State Practice in Japan,” Journal of East Asia and International Law 9, no. 2 (Autumn 016): 361-378

2.4. In light of the above, the interpretation of the Treaty on Legal Assistance of the USSR-Cyprus 1984, according to which a party located in the territory of Russia is subject to notification in accordance with Art. 8 of the Treaty, seems to be preferable.

We welcome further discussion on this intricate matter.

New Principles of Sovereign Immunity from Enforcement in India: The Good, The Bad, And The Uncertain (Part II)

This post was written by Harshal Morwale, an India-qualified international arbitration lawyer working as an associate with a premier Indian law firm in New Delhi; LLM from the MIDS Geneva Program (2019-2020); alumnus of the Hague Academy of International Law.

Recently, the issue of foreign sovereign immunity became a hot topic in India due to the new judgment of the Delhi High Court (“DHC”) in the case of (*KLA Const Tech v. Afghanistan Embassy*). The previous part of the blog post analyzed the decision of the DHC. Further, the post focused on the relevance of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

The post also explored the interplay between state immunity and diplomatic immunity.

This part focuses on two further issues which emanate from the decision of the DHC. Firstly, the post deals with the impact of the consent to arbitrate on immunity from enforcement. Then, the post explores the issue of attachment of state's property for satisfying the commercial arbitral award against a diplomatic mission.

Consent to Arbitrate: Waiver Of Immunity From Enforcement?

As highlighted in the last post, one of the main arguments of the KLA Const Technologies ("claimant") was that the Embassy of the Islamic Republic of Afghanistan's ("respondent", "Embassy") consent to arbitrate resulted in the waiver of the sovereign immunity. The DHC accepted the argument and ruled that a separate waiver of immunity is not necessary to enforce an arbitral award in India as long as there is consent to arbitrate. The DHC also stated that this position is in consonance with the growing International Law principle of restrictive immunity while referring to the landmark English case (*Trendtex Trading Corp. v. Central Bank of Nigeria*).

However, there's more to the issue than what catches the eye. First of all, the *Trendtex* case was decided before the English Sovereign Immunity Act ("UKSIA") came into effect. Therefore, the DHC could have examined the relevant provisions under UKSIA and the more recent cases to track the jurisprudential trend on sovereign immunity under English law. For example, Section 13(2) of the UKSIA recognizes the difference between jurisdictional immunity and immunity from enforcement and requires an express waiver of immunity from enforcement. Even the ICJ has noted the requirement of an express waiver of immunity from enforcement in the *Jurisdictional Immunities* case. (para 118).

Furthermore, there was an opportunity to undertake a more detailed cross-jurisdictional analysis on the issue. In fact, the issue of arbitral consent as a waiver of immunity from enforcement was dealt with by the Hong Kong Courts in *FG Hemisphere v. Democratic Republic Of The Congo*. Reyes J, sitting in the Court of First Instance, ruled that consent of the state to arbitrate does not in itself imply the waiver of immunity from enforcement. The ruling on the issue was confirmed by the majority decision of the Court of Final Appeal. The position has

also been confirmed by scholars.

However, this position is not the settled one. The DHC's decision is in line with the approaches adopted in France (*Creighton v. Qatar*), Switzerland (*United Arab Republic v. Mrs. X*) that no separate waiver of immunity from enforcement would be required in the existence of an arbitration agreement.

However, the decision made no reference to the reasoning of the cases from these jurisdictions. Regardless of the conclusion, the DHC's decision could have benefited from this comparative analysis, and there would have been a clearer answer as to the possible judicial approaches to the issue in India.

Attachment of State's Property for Satisfying an Award Against A Diplomatic Mission

In the current case, the DHC ordered the respondent to declare not only its assets and bank accounts in India but also all its commercial ventures, state-owned airlines, companies, and undertakings in India, as well as the commercial transactions entered into by the respondent and its state-owned entities with the Indian companies.

It is not entirely clear whether the Islamic Republic of Afghanistan's ("Afghanistan") properties and commercial debts owed by private Indian companies to the state-entities of Afghanistan would be amenable to the attachment for satisfying the award against the Embassy. To resolve the issue of attaching Afghanistan's property to fulfill the liability of the Embassy, a critical question needs to be considered – while entering into the contract with the claimant, was the respondent (Embassy) acting in a commercial capacity or as an agent of the state of Afghanistan?

The contract between the claimant and the respondent was for the rehabilitation of the Afghanistan Embassy. The DHC found that the respondent was acting in a commercial capacity akin to a private individual. Additionally, there's no indication through the facts elaborated in the judgment that the contract was ordered by, or was for the benefit of, or was being paid for by the state of Afghanistan. In line with these findings, it can be concluded that the contract would not be a sovereign act but a diplomatic yet purely commercial act, independent from the state of Afghanistan. Consequently, it is doubtful how the properties of state/state-entities of Afghanistan can be attached for fulfilling the

award against the Embassy.

The attachment of the state's property to fulfill the liability of the Embassy would break the privity of contract between the claimant and the respondent (Embassy). According to the privity of contract, a third party cannot be burdened with liability arising out of a contract between the two parties. Therefore, the liability of the Embassy cannot be imposed on the state/state-entities of Afghanistan because they would be strangers to the contract between the claimant and the respondent.

That said, there are a few well-known exceptions to the principle of privity of contract such as agency, third party beneficiary, and assignment. However, none of these exceptions apply to the case at hand. It is accepted that an embassy is the agent of a foreign state in a receiving state. However, in this case, the contract was entered into by the Embassy, in its commercial capacity, not on behalf of the state but in the exercise of its diplomatic yet commercial function. Afghanistan is also not a third-party beneficiary of the contract as the direct benefits of the contract for the rehabilitation of the Afghanistan Embassy are being reaped by the Embassy itself. Additionally, there is no indication from the facts of the case as to the assignment of a contract between the state of Afghanistan and the Embassy. Therefore, the privity of contract cannot be broken, and the liability of the Embassy will remain confined to its own commercial accounts and ventures.

In addition to the above, there also lacks guidance on the issues such as mixed accounts under Indian law. Regardless, the approach of the DHC remains to be seen when the claimant can identify attachable properties of the respondent. It also remains to be seen if the respondent appears before the DHC and mounts any sort of defence.

Conclusion

There remains room for growth for Indian jurisprudence in terms of dealing with issues such as immunity from the enforcement of arbitral awards. An excellent way to create a more conducive ecosystem for this would be to introduce stand-alone legislation on the topic as recommended by the Law Commission of India in its 176^{th} report. Additionally, the issues such as the use of state's properties to satisfy the commercial liability of diplomatic missions deserve attention not only

under Indian law but also internationally.

(*The views expressed by the author are personal and do not represent the views of the organizations he is affiliated with. The author is grateful to Dr. Silvana Çinari for her feedback on an earlier draft.*)

New Principles of Sovereign Immunity from Enforcement in India: The Good, The Bad, And The Uncertain (Part I)

This post was written by Harshal Morwale, an India-qualified international arbitration lawyer working as an associate with a premier Indian law firm in New Delhi; LLM from the MIDS Geneva Program (2019-2020); alumnus of the Hague Academy of International Law.

Sovereign immunity from enforcement would undoubtedly be a topic of interest to all the commercial parties contracting with state or state entities. After all, an award is only worth something when you can enforce it. The topic received considerable attention in India recently, when the Delhi High Court ("DHC") ruled on the question of immunity from enforcement in case of commercial transactions (*KLA Const Tech v. Afghanistan Embassy*). This ruling is noteworthy because India does not have a consolidated sovereign immunity law, and this ruling is one of the first attempts to examine immunity from enforcement.

This post is part I of the two-part blog post. This part examines the decision of the DHC and identifies issues emanating from it. The post also delves into the principles of international law of state immunity and deals with the relevance of diplomatic immunity in the current context. The second part (forthcoming) will explore the issue of consent to the arbitration being construed as a waiver of immunity from enforcement and deal with the problem of whether the state's

property can be attached to satisfy the commercial arbitral award against a diplomatic mission.

DHC: No Sovereign Immunity From Enforcement In Case Of Commercial Transactions

In the case of *KLA Const Tech v. Afghanistan Embassy*, KLA Const Technologies ("claimant") and the Embassy of the Islamic Republic of Afghanistan in India ("respondent") entered into a contract containing an arbitration clause for rehabilitation of the Afghanistan Embassy. During the course of the execution of works, a dispute arose between the parties. The claimant initiated the arbitration. An *ex parte* award was passed in favor of the claimant by the Sole Arbitrator. Since the respondent did not challenge the award, the claimant seeks its enforcement in India in line with Section 36(1) of the Arbitration & Conciliation Act 1996, whereby enforcement cannot be sought until the deadline to challenge the award has passed. In the enforcement proceedings, the DHC inter alia focused on immunity from enforcement of the arbitral award arising out of a commercial transaction.

The claimant argued that the respondent is not entitled to state immunity because, in its opinion, entering into an arbitration agreement constitutes "waiver of Sovereign Immunity." Further, relying on Articles 10 and 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property ("UNCJIS"), the claimant argued that the states cannot claim immunity in case of commercial transactions and the UNCJIS expressly restricts a Foreign State from invoking sovereign immunity against post-judgment measures, such as attachment against the property of the State in case of international commercial arbitration.

After analyzing the claimant's arguments and relevant case laws, the DHC reached the following decision:

1. In a contract arising out of a commercial transaction, a foreign state cannot seek sovereign immunity to stall the enforcement of an arbitral award rendered against it.
2. No separate consent for enforcement is necessary, and consent to arbitrate is sufficient to wave the immunity. The DHC opined that this ruling is in "consonance with the growing International Law principle of

restrictive immunity."

The DHC ordered the respondent to declare inter alia all its assets, bank accounts in India, etc., by a stipulated date. Since the respondent did not appear and did not make any declaration by that date, the DHC has granted time to the claimant to trace the attachable properties of the respondent.

The decision has been well received in the Indian legal community and has been lauded as a pro-arbitration decision as it promotes prompt enforcement of arbitral awards in India, regardless of the identity of the award-debtor. The decision is also one of the first attempts to define immunity from 'enforcement' in India. The existing law of sovereign immunity in India is limited to section 86 of the Indian Civil Procedure Code, which requires the permission of the Central Government in order to subject the sovereign state to civil proceedings in India. Therefore, the DHC's decision is critical in the development of sovereign immunity jurisprudence in India.

Difference Between Jurisdictional Immunity And Enforcement Immunity Under The UNCJIS

It is worth noting that the DHC did not explicitly address the claimant's argument regarding the UNCJIS. Regardless, it is submitted that the claimant's argument relying on articles 10 and 19 of the UNCJIS is flimsy. This is particularly because the UNCJIS recognizes two different immunities – jurisdiction immunity and enforcement immunity. Article 10 of the UNCJIS, which provides for waiver of immunity in case of commercial transactions, is limited to immunity from jurisdiction and not from enforcement. Further, Article 20 of the UNCJIS clearly states that the state's consent to be subjected to jurisdiction shall not imply consent to enforcement. As argued by the late Professor James Crawford, "waiver of immunity from jurisdiction does not per se entail waiver of immunity from execution."

Notwithstanding the above, even the DHC itself refrained from appreciating the distinction between immunity from jurisdiction and immunity from enforcement. The distinction is critical not only under international law but also under domestic statutes like the English Sovereign Immunity Act ("UKSIA"). It is submitted that Indian jurisprudence, which lacks guidance on this issue, could have benefitted from a more intricate analysis featuring the rationale of different immunities, the

standard of waivers, as well as the relevance of Article 20 of UNCJIS.

Curious Framing Of The Question By The DHC

In the current case, the DHC framed the question of sovereign immunity from enforcement as follows: Whether a Foreign State can claim Sovereign Immunity against enforcement of arbitral award arising out of a commercial transaction? On the face of it, the DHC decided a broad point that the award is enforceable as long as the underlying transaction is commercial. The real struggle for the claimants would be to determine and define which property would be immune from enforcement and which wouldn't.

The framing of the issue is interesting because the sovereign state immunity from enforcement has generally been perceived as a material issue rather than a personal issue. In other words, the question of state immunity from enforcement has been framed as 'what subject matter can be attached' and not 'whether a particular debtor can claim it in a sovereign capacity'. In one of the case laws analyzed by the DHC (*Birch Shipping Corp. v. The Embassy of the United Republic of Tanzania*), the defendant had argued that under the terms of the US Foreign Sovereign Immunities Act, its "property" was "immune from the attachment." Further, in the operative part of the judgment, the US District Court stated, "the property at issue here is not immune from attachment." Unlike the DHC's approach, the question of immunity from enforcement in the *Birch Shipping* case was argued and ruled upon as a material issue rather than a personal one.

While the decision of the DHC could have a far-reaching impact, there is a degree of uncertainty around the decision. The DHC ruled that as long as the transaction subject to arbitration is commercial, the award is enforceable. There remains uncertainty on whether this ruling means that all properties of the sovereign state can be attached when the transaction is commercial. Would this also mean diplomatic property could be attached? The DHC still has the opportunity to clarify this as the specific properties of the respondent for the attachment are yet to be determined, and the claimant has been granted time to identify the attachable properties.

Diplomatic Immunity or Sovereign Immunity: Which One Would Apply?

While state immunity and diplomatic immunity both provide protection against

proceedings and enforcements in the foreign court or forum, the subjects of both immunities are different. While sovereign immunity aims to protect the sovereign states and their instrumentalities, diplomatic immunity specifically covers the diplomatic missions of the foreign states. The law and state practice on sovereign immunity are not uniform. On the other hand, the law of diplomatic immunity has been codified by the Vienna Convention on Diplomatic Relations ("VCDR"). Unlike the UNCJIS, the VCDR is in force and has been adopted by over 190 states, including India and Afghanistan.

Since the party to the contract, the arbitration, and the enforcement proceedings in the current case is an embassy, which is independently protected by the diplomatic immunity, the decision of the DHC could have featured analysis on the diplomatic immunity in addition to the state immunity. Like the UNCJIS, the VCDR recognizes the distinction between jurisdictional and enforcement immunities. Under Article 32(4) of the VCDR, the waiver from jurisdictional immunity does not imply consent to enforcement, for which a separate waiver shall be necessary.

Additionally, the DHC had an opportunity to objectively determine whether the act was sovereign or diplomatic. In *Re P (Diplomatic Immunity: Jurisdiction)*, the English Court undertook an objective characterization of the entity's actions to determine whether they were sovereign or diplomatic. The characterization is critical because it determines the kind of immunity the respondent is subject to.

In the current case, the contract for works entered into by the embassy appears to be an act undertaken in a diplomatic capacity. Hence, arguably, the primary analysis of the DHC should have revolved around diplomatic immunity. It is not to argue that the conclusion of the DHC would have been different if the focus was on diplomatic immunity. However, the analysis of diplomatic immunity, either independently or together with the sovereign immunity, would have substantially bolstered the significance of the decision considering that the interplay between sovereign and diplomatic immunities under Indian law deserves more clarity.

One might argue that perhaps the DHC did not deal with diplomatic immunity because it was raised neither by the claimant nor by the non-participating respondent. This raises the question – whether the courts must raise the issue of immunity *proprio motu*? The position of law on this is not entirely clear. While section 1(2) of the UKSIA prescribes a duty of the Court to raise the question of

immunity *proprio motu*, the ICJ specifically rejected this approach in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) (para 196). Both of these approaches, however, relate to sovereign immunity, and there lacks clarity on the issue in the context of diplomatic immunity.

Conclusion

As noted above, despite being one of the first Indian decisions to deal with state immunity from an international law perspective, the decision leaves several questions open, such as the determination of attachable properties and the relevance of diplomatic immunity in the current context. It remains to be seen what approach the DHC takes to resolve some of these issues in the upcoming hearings.

The next part of the post explores the issue of consent to the arbitration being construed as a waiver of immunity from enforcement. The next part also deals with the problem – whether the state's property can be attached to satisfy the commercial arbitral award against a diplomatic mission.

Conference International Commercial Courts in Europe and Asia

On **17 September 2021** the conference '**Taking Stock: International Commercial Courts in Europe and Asia**' will take place (hybrid, online/London). Renowned academic experts and practitioners will discuss new developments, experiences, the interaction with arbitration, and global challenges.

In recent years, International Commercial Courts have been established across Europe and in Asia. Now that these courts have been dealing with international cases for a while, it is time to take stock and look at various questions: the reasons behind the recent proliferation of these courts and their international features in terms of court language, judicial composition, parties and disputes; the perspectives of court users and judges on key features of these courts, their suitability for specific kinds of disputes and the handling of international commercial disputes in practice; the interface between International Commercial Courts and arbitration, in particular in jurisdictions with well-developed arbitration centres; and the ever more important question how these courts deal with global challenges such as Covid 19, Digitalisation & AI.

The conference is co-organized by BIICL, Erasmus University Rotterdam (ERC project team Building EU Civil Justice) and the University of Lausanne. The conference takes place in a hybrid format, online and in London (limited places). **You can register through the website of BIICL.**

More information and the program are available **here**.

Forum Selection Clauses and Cruise Ship Contracts

On August 19, 2021, the U.S. Court of Appeals for the Eleventh Circuit issued its latest decision on foreign forum selection clauses in cruise ship contracts. The case was *Turner v. Costa Crociere S.P.A.* The plaintiff was an American cruise ship passenger, Paul Turner, who brought a class action in federal district court in Florida alleging that the cruise line's "negligence contributed to an outbreak of COVID-19 aboard the Costa Luminosa during his transatlantic voyage beginning on March 5, 2020."

The cruise line moved to dismiss the case on the basis of a forum selection clause in the ticket mandating that all disputes be resolved by a court in Genoa, Italy. The contract also contained a choice-of-law clause selecting Italian law. By way of

background, it is important to note that (1) the parent company for the cruise line was headquartered in Italy, (2) its operating subsidiary was headquartered in Florida, (3) the cruise was to begin in Fort Lauderdale, Florida, and (4) the cruise was to terminate in the Canary Islands.

The Eleventh Circuit never reached the merits of the plaintiffs' claims. Instead, it sided with the cruise line, enforced the Italian forum selection clause, and dismissed the case on the basis of *forum non conveniens*. A critique of the Eleventh Circuit's reasoning in *Turner* is set forth below.

Years ago, the U.S. Congress enacted a law imposing limits on the ability of cruise lines to dictate terms to their passengers. 46 U.S.C. § 30509 provides in relevant part:

The owner . . . of a vessel transporting passengers . . . between a port in the United States and a port in a foreign country, may not include in a . . . contract a provision limiting . . . the liability of the owner . . . for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents . . . . A provision described in paragraph (1) is void.

Boiled down to its essence, the statute provides that any provision in a cruise ship contract that caps the damages in a personal injury case is void. If the cruise ship were to write an express provision into its passenger contracts capping the damages recoverable by plaintiffs such as Paul Turner at $500,000, that provision would be void as contrary to U.S. public policy.

The cruise lines are sharp enough, however, to know not to write express limitations directly into their contracts. Instead, they have sought to achieve the same end via a choice-of-law clause. The contract in *Turner* had a choice-of-law clause selecting Italian law. Italy is a party to an international treaty known as the Athens Convention. The Athens Convention, which is part of Italian law, caps the liability of cruise lines at roughly $568,000 in personal injury cases. If a U.S. court were to give effect to the Italian choice-of-law clause and apply Italian law on these facts, therefore, it would be required to apply the liability cap set forth in the Athens Convention. It seems highly unlikely that any U.S. court would enforce an Italian choice-of-law clause on these facts given the language in Section 30509.

Enter the forum selection clause. If the forum selection clause is enforced, then

the case must be brought before an Italian court. An Italian court is likely to enforce an Italian choice-of-law clause and apply the Athens Convention. If the Athens Convention is applied, the plaintiff's damages will be capped at roughly $568,000. To enforce the Italian forum selection clause, therefore, is to take the first step down a path that will ultimately result in the imposition of liability caps in contravention of Section 30509. The question at hand, therefore, is whether the Eleventh Circuit was correct to enforce the forum selection clause knowing that this would be the result.

While the court clearly believed that it reached the right outcome, its analysis leaves much to be desired. In support of its decision, the court offered the following reasoning:

[B]oth we and the Supreme Court have directly rejected the proposition that a routine cruise ship forum selection clause is a limitation on liability that contravenes § 30509(a), even when it points to a forum that is inconvenient for the plaintiff. Shute, 499 U.S. at 596–97 ("[R]espondents cite no authority for their contention that Congress' intent in enacting § [30509(a)] was to avoid having a plaintiff travel to a distant forum in order to litigate. The legislative history of § [30509(a)] suggests instead that this provision was enacted in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by means of a clause providing that 'the question of liability and the measure of damages shall be determined by arbitration.' There was no prohibition of a forum-selection clause.")

The problem with this argument is that there was no evidence in *Shute*—none—suggesting that the enforcement of the forum selection clause in that case would lead to the imposition of a formal liability cap. Indeed, the very next sentence in the passage from *Shute* quoted above states that "[b]ecause the clause before us . . . *does not purport to limit petitioner's liability for negligence*, it does not violate [Section 30509]." This language suggests that if enforcement of a forum selection clause *would* operate to limit the cruise line's liability for negligence, it would not be enforceable. The Eleventh Circuit's decision makes no mention of this language.

The *Turner* court also cites to a prior Eleventh Circuit decision, *Estate of Myhra v. Royal Caribbean Cruises*, for the proposition that "46 U.S.C. § 30509(a) does not

bar a ship owner from including a forum selection clause in a passage contract, even if the chosen forum might apply substantive law that would impose a limitation on liability." I explain the many, many problems with the Eleventh Circuit's decision in *Myhra* here. At a minimum, however, the *Myhra* decision is inconsistent with the Supreme Court's admonition in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc* that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." There is no serious question that the cruise line is here attempting to use an Italian choice-of-law clause and an Italian forum selection clause "in tandem" to deprive the plaintiffs in *Turner* of their statutory right to be free of a damages cap. This attempt would seem to be foreclosed by the language in *Mitsubishi*. The Eleventh Circuit does not, however, cite *Mitsubishi* in its decision.

At the end of the day, the question before the Eleventh Circuit in *Turner* was whether a cruise company may deprive a U.S. passenger of rights guaranteed by a federal statute by writing an Italian choice-of-law clause and an Italian forum selection clause into a contract of adhesion. The Eleventh Circuit concluded the answer is yes. I have my doubts.

Rescheduled: "The HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil Matters between the EU and Third Countries" – Conference (now) on

9 and 10 September 2022, University of Bonn, Germany

HCCH 2019 Judgments Convention Repository

Rescheduled: "The HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil Matters between the EU and Third Countries" – Conference (now) on 9 and 10 September 2022, University of Bonn, Germany

As a result of the ongoing pandemic situation, we decided to reschedule the Conference **to Friday and Saturday**, **9 and 10 September 2022**. For further details and a (preliminary) programme, please visit the Conference Section on the website of the Institute for German and International Civil Procedure at the University of Bonn.

In preparation of the Conference on the HCCH 2019 Judgments Convention (now) on 9/10 September 2022, planned to be 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 2 August 2021: New entries are printed bold.

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

1. Explanatory Reports

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ASIL	**"The Promise and Prospects of the 2019 Hague Convention", 25-26 June 2020 (full recording available here and here)**
HCCH	"22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention", 2 July 2020 (short documentary video available here)
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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).*

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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.

Epic's Fight to #freefortnite: Challenging Exclusive Foreign Choice of Court Agreements under Australian Law

By Sarah McKibbin, University of Southern Queensland

Epic Games, the developer of the highly popular and lucrative online video game *Fortnite*, recently won an appeal against tech juggernaut, Apple, in Australia's Federal Court.[1] *Fortnite* is played by over three million Apple iOS users in Australia.[2] In April 2021, Justice Perram awarded Apple a temporary three-month stay of proceedings on the basis of an exclusive foreign choice of court agreement in favour of the courts of the Northern District of California. Despite awarding this stay, Justice Perram was nevertheless 'distinctly troubled in acceding to' Apple's application.[3] Epic appealed to the Full Court.

On 9 July, Justices Middleton, Jagot and Moshinsky found three errors of principle in Justice Perram's consideration of the 'strong reasons' given by Epic for the proceedings to remain in the Federal Court — despite the exclusive foreign choice of court agreement.[4] Exercising its own discretion, the Full Court then found 'strong reasons' for the proceedings to remain in the Federal Court, particularly because enforcement of the choice of court agreement would 'offend the public policy of the forum.'[5] They discerned this policy from various statutory provisions in Australia's competition law as well as other public policy considerations.[6] The appeal highlights the tension that exists between holding parties to their promises to litigate abroad and countenancing breaches of contract where 'serious issues of public policy' are at play.[7]

1 Exclusive Choice of Foreign Court Agreements in Australia

Australians courts will enforce an exclusive choice of court agreement favouring a foreign court either by granting a stay of local proceedings or by awarding damages for breach of contract. The usual approach is for the Australian court to enforce the agreement and grant a stay of proceedings '*unless* strong reasons are shown why it should not.'[8] As Justice Allsop observed in *Incitec v Alkimos Shipping Corp*, 'the question is one of the exercise of a discretion in all the circumstances, but recognising that the starting point is the fact that the parties have agreed to litigate elsewhere, and should, absent some strong countervailing circumstances, be held to their bargain.'[9] The burden of demonstrating strong reasons rests on the party resisting the stay.[10] Considerations of inconvenience and procedural differences between jurisdictions are unlikely to be sufficient as strong reasons.[11]

Two categories of strong reasons predominate. The first category is where, as stated in *Akai Pty Ltd v The People's Insurance Co Ltd*, enforcement 'offends the public policy of the forum whether evinced by statute or declared by judicial decision'.[12] This includes the situation 'where the party commencing proceedings in the face of an exclusive jurisdiction clause seeks to take advantage of what is or may be a mandatory law of the forum'.[13] The prohibition in Australian law against misleading and deceptive conduct is an example.[14] The second category justifying non-enforcement is where litigation in the forum

concerns issues beyond the scope of the choice of court agreement or concerns third parties to the agreement.[15] Where third parties are concerned, it is thought that 'the court should not start with the prima facie disposition in favour of a stay of proceedings'.[16]

2 Factual Background

The successful appeal represents the latest decision in an ongoing international legal battle between Apple and Epic precipitated by *Fortnite*'s removal from the Apple App Store in August last year. Epic released a software update for Apple iOS devices on 13 August 2020 making the *Fortnite*'s virtual currency (called V-Bucks) available for purchase through its own website, in addition to Apple's App Store, at a 20 per cent discount. Any new game downloads from the App Store 'came equipped with this new feature'.[17] While *Fortnite* is free to download, Epic's revenue is generated by players purchasing in-app content, such as dance moves and outfits, through a digital storefront. After the digital storefront takes a commission (usually 30 per cent), Epic receives the net payment.

App developers only have one avenue if they wish to distribute their apps for use on Apple iOS devices: they must use the Apple App Store and Apple's in-app payment system for in-app purchases from which Apple takes a 30 per cent revenue cut. Epic's co-founder and CEO Tim Sweeney has singled out Apple and Google for monopolising the market and for their 'terribly unfair and exploitative' 30 per cent commission for paid app downloads, in-app purchases and subscriptions.[18] While a 70/30 revenue split has been industry standard for many years, the case for an 88/12 revenue model is building.[19] Sweeney argues that 'the 30% store tax usually exceeds the entire profits of the developer who built the game that's sold'.[20]

3 Apple's App Developer Agreement

Epic's relationship with Apple is regulated by the Apple Developer Program License Agreement ('DPLA') under which Apple is entitled to block the distribution of apps from the iOS App Store 'if the developer has breached the App Store Review Guidelines'.[21] These Guidelines include the obligation to exclusively use Apple's in-app payment processing system. Clause 14.10 contains Epic's contractual agreement with Apple to litigate in the Northern District of

California:

Any litigation or other dispute resolution between You and Apple arising out of or relating to this Agreement, the Apple Software, or Your relationship with Apple will take place in the Northern District of California, and You and Apple hereby consent to the personal jurisdiction of and exclusive venue in the state and federal courts within that District with respect any such litigation or dispute resolution.

By introducing a custom payment facility, the August update breached the App Store Review Guidelines. Apple swiftly removed *Fortnite* from its App Store. There were three consequences of this removal: first, *Fortnite* could not be downloaded to an Apple device; secondly, previously installed iOS versions of *Fortnite* could not be updated; and, thirdly, Apple device users could not play against players who had the latest version of *Fortnite*.[22]

4 The Proceedings

On the same day as Apple removed *Fortnite* from the App Store, Epic commenced antitrust proceedings in the United States District Court for the Northern District of California, alleging Apple's 'monopolisation of certain markets' in breach of the United States' *Sherman Act* and other California legislation. The judgment in the US trial is expected later this year. Epic also sued Apple in United Kingdom, the European Union and Australia on competition grounds. In February, the United Kingdom's Competition Appeal Tribunal refused permission to serve Epic's claim on Apple in California because the United Kingdom was not a suitable forum (forum non conveniens).[23] Together with these legal actions, Epic commenced a marketing campaign urging the game's worldwide fanbase to 'Join the fight against @AppStore and @Google on social media with #FreeFortnite'.[24] Epic also released a video parodying Apple's famous 1984 commercial called 'Nineteen Eighty-Fortnite'.[25]

The Australian proceedings were brought in the Federal Court in November 2020. Epic's complaint against Apple is the same as in the US, the EU and the UK, but with the addition of a territorial connection, ie developers of apps for use on Australian iOS devices must only distribute their apps through Apple's Australian App Store and only use Apple's in-app payment processing system. As a

consequence, Epic alleges that Apple has contravened three provisions of Part IV of the *Competition and Consumer Act 2010* (Cth) concerning restrictive trade practices and the *Australian Consumer Law* for unconscionable conduct. In addition to injunctive relief restraining Apple from continuing to engage in restrictive trade practices and unconscionable conduct, Epic seeks ancillary and declaratory relief.

Apple applied for a permanent stay of the Federal Court proceedings, relying on the choice of court agreement in the DPLA and the doctrine of forum non conveniens. Epic unsuccessfully argued that its claims under Australian law did not 'relate to' cl 14.10 of the DPLA.[26] More critically, Justice Perram did not think Epic had demonstrated strong reasons. He awarded Apple a temporary three-month stay of proceedings 'to enable Epic to bring this case in a court in the Northern District of California in accordance with cl 14.10.'[27] Where relevant to the appeal, Justice Perram's reasoning is discussed below.

5 The Appeal: Three Errors of Principle

The Full Court distilled Epic's 17 grounds of appeal from Justice Perram's decision into two main arguments. Only the second argument — turning on the existence of 'strong grounds'[28] — was required to determine the appeal. Justices Middleton, Jagot and Moshinsky identified three errors of principle in Justice Perram's evaluation of 'strong reasons', enabling them to re-evaluate whether strong reasons existed.

The first error was Justice Perram's failure to cumulatively weigh up the reasons adduced by Epic that militated against the granting of the stay. Justice Perram had grudgingly granted Apple's stay application without evaluating the five concerns he had expressed 'about the nature of proceedings under Part IV which means they should generally be heard in this Court',[29] as he was required to do. The five concerns were:[30]

1. The public interest dimension to injunctive proceedings under the *Competition and Consumer Act*;
2. The 'far reaching' effect of the litigation on Australian consumers and Australian app developers as well as the nation's 'interest in maintaining

the integrity of its own markets';
3. The Federal Court's exclusive jurisdiction over restrictive trade practices claims;
4. '[D]icta suggesting that [restrictive trade practices] claims are not arbitrable'; and
5. That if the claim in California 'complex questions of [Australian] competition law will be litigated through the lens of expert evidence'.

The second error was Justice Perram's 'failure to recognise juridical disadvantages of proceeding in the US Court'.[31] The judge had accepted that litigating the case in California would be 'more cumbersome' since 'expert evidence about the content of Australian law' would be needed.[32] There was a risk that a California court 'might decline to hear the suit on forum non conveniens grounds.'[33] Despite that, he concluded that '[a]ny inconvenience flows from the choice of forum clause to which Epic has agreed. It does not sit well in its mouth to complain about the consequences of its own bargain'.[34] However, the Full Court viewed the inapplicability of 'special remedial provisions' of the Australian *Competition and Consumer Act* in the California proceedings as the loss of a legitimate juridical advantage.[35]

The third error concerned a third party to the exclusive jurisdiction clause. In *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd*, Justice Bell observed that the default enforcement position was inapplicable in cases where 'not all parties to the proceedings are party to an exclusive jurisdiction clause'.[36] Apple Pty Limited, an Australian subsidiary of Apple, was not a party to the DPLA. Yet it was responsible 'for the distribution of iOS-compatible apps to iOS device users' within the Australian sub-market in a manner consistent with Apple's worldwide conduct.[37] Moreover, Epic's proceedings included claims under the *Competition and Consumer Act* and the *Australian Consumer Law* against the Australian subsidiary 'for conduct undertaken in Australia in connection with arrangements affecting Australian consumers in an Australian sub-market.'[38] In this light, the Full Court rejected Justice Perram's description of the joinder of Apple Pty Limited as 'ornamental and 'parasitic on the claims Epic makes against Apple'.[39]

6 The Appeal: Strong Reasons Re-evaluated

The stay should have been refused. The Full Court found a number of public policy considerations that cumulatively constituted strong reasons not to grant a stay of Epic's proceedings. The judges discerned 'a legislative policy that claims pursuant to [the restrictive trade practices law] should be determined in Australia, preferably in the Federal Court' — although it was not the only court that could hear those claims.[40] Essentially, the adjudication of restrictive trade practices claims in the Federal Court afforded legitimate forensic advantages to Epic — benefits which would be lost if Epic were forced to proceed in California. These benefits included the availability of 'specialist judges with relevant expertise' in the Federal Court, the potential for the Australian Competition and Consumer Commission to intervene, and the opportunity for private litigants (as in this case) to 'develop and clarify the law'.[41] Indeed, the Federal Court has not yet interpreted the misuse of market power provision in the *Competition and Consumer Act* relied upon by Epic, which came into effect in 2017.[42] The litigation will also impact millions of Australians who play *Fortnite* and the state of competition in Australian markets.[43]

[1] *Epic Games, Inc v Apple Inc* [2021] FCAFC 122.

[2] *Epic Games, Inc v Apple Inc (Stay Application)* [2021] FCA 338, [7] (Perram J).

[3] Ibid, [64] (Perram J).

[4] *Epic Games, Inc v Apple Inc* (n 1) [48].

[5] Ibid.

[6] Ibid, [90].

[7] Ibid, [97]. See James O'Hara, 'Strategies for Avoiding a Jurisdiction Clause in International Litigation' (2020) 94(4) *Australian Law Journal* 267. *Compare* Mary Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely

Impact on Australian Practice' (2009) 5(2) *Journal of Private International Law* 181; Richard Garnett, 'Jurisdiction Clauses since *Akai*' (2013) 87 *Australian Law Journal* 134; Brooke Adele Marshall and Mary Keyes, 'Australia's Accession to the *Hague Convention on Choice of Court Agreements*' (2017) 41 *Melbourne University Law Review* 246.

[8] *A Nelson & Co Ltd v Martin & Pleasance Pty Ltd (Stay Application)* [2021] FCA 754, [10] (Perram J) (emphasis added). See also *Huddart Parker Ltd v Ship 'Mill Hill'* (1950) 81 CLR 502, 508–9 (Dixon J); *The Eleftheria* [1970] P 94, 99 (Brandon J); *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 427–9 (Dawson and McHugh JJ), 445 (Toohey, Gaudron and Gummow JJ).

[9] *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496, 505 [43].

[10] There was some argument about onus in *Epic Games (Stay Application)* (n 2) [35]–[40] (Perram J).

[11] *Incitec* (n 9) [49]; Andrew S Bell, 'Jurisdiction and Arbitration Agreements in Transnational Contracts: Part I' (1996) 10 *Journal of Contract Law* 53, 65. See generally O'Hara (n 7).

[12] (1996) 188 CLR 418, 445 (Toohey, Gaudron and Gummow JJ). See also Marshall and Keyes (n 7) 257.

[13] *Australian Health and Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419, 438 [80] (Bell P).

[14] Australian Consumer Law s 18.

[15] *Incitec* (n 9) 506 [47], [49] (Allsop J); Marshall and Keyes (n 7) 258.

[16] *Australian Health* (n 13) 423 [1] (Bathurst CJ and Leeming JA), 442 [90] (Bell J).

[17] *Epic Games (Stay Application)* (n 2) [6] (Perram J).

[18] @TimSweeneyEpic (Twitter, 29 July 2020, 1:29 pm AEDT) <https://twitter.com/TimSweeneyEpic/status/1288315775607078912>.

[19] See, eg, Nick Statt, 'The 70-30 Revenue Split is Causing a Reckoning in the Game Industry', *protocol* (Web Page, 4 May 2021)

<https://www.protocol.com/newsletters/gaming/game-industry-70-30-reckoning?rebelltitem=1#rebelltitem1>.

[20] @TimSweeneyEpic (Twitter, 26 June 2019, 10.13 am AEDT) <https://twitter.com/TimSweeneyEpic/status/1143673655794241537>.

[21] *Epic Games* (n 1) [5].

[22] *Epic Games (Stay Application)* (n 2) [7].

[23] *Epic Games, Inc v Apple Inc* [2021] CAT 4.

[24] '#FreeFortnite', *Epic Games* (Web Page, 13 August 2020) <https://www.epicgames.com/fortnite/en-US/news/freefortnite>.

[25] Fortnite, 'Nineteen Eighty-Fortnite – #FreeFortnite' (YouTube, 13 August 2020) <https://youtu.be/euiSHuaw6Q4>.

[26] *Epic Games (Stay Application)* (n 2) [11]–[12].

[27] Ibid, [66].

[28] *Epic Games* (n 1) [41], [47].

[29] Ibid, [57].

[30] *Epic Games (Stay Application)* (n 2) [59]–[63].

[31] *Epic Games* (n 1) [58].

[32] *Epic Games (Stay Application)* (n 2) [53].

[33] Ibid, [44].

[34] Ibid, [58].

[35] *Epic Games* (n 1) [62].

[36] *Australian Health* (n 13) 442 [90] (Bell P).

[37] *Epic Games* (n 1) [74].

[38] Ibid, [78].

[39] Ibid.

[40] Ibid, [99]. The Full Court clarified that 'other Australian courts may determine Pt IV claims, but within a limited compass and for specific reasons': [116].

[41] Ibid, [104], [107], [122].

[42] Ibid, [107].

[43] Ibid, [97].

HCCH First Secretary Ribeiro-Bidaoui's response re the debate surrounding the 2005 HCCH Choice of Court Convention

Dr. João Ribeiro-Bidaoui (First Secretary at the Hague Conference on Private International Law) has posted a compelling answer on the Kluwer Arbitration Blog to the debate sparked by Prof. Gary Born's criticism in a series of posts published on the same Blog (see Part I, Part II, and Part III). First Secretary Ribeiro-Bidaoui's response is masterfully crafted in drawing the boundaries between equally valuable and essential instruments, and certainly constitutes a most welcome contribution.

For further commentary on these exchanges, see also on the EAPIL Blog, here.