HCCH Monthly Update: March 2022

Documents & Publications

On 9 March 2022, the Permanent Bureau announced the launch of the **post-event publication of HCCH a|Bridged – Edition 2021**, focused on contemporary issues relating to the application of the 2005 Choice of Court Convention, including the promotion of party autonomy. More information is available here.

On 9 March 2022, the Permanent Bureau published the results of the **2022 survey for arbitration institutions** on the **2015 Principles on Choice of Law in International Commercial Contracts**. More information is available here.

On 16 March 2022, the Permanent Bureau of the HCCH published an Information Note on the subject of **"Children deprived of their family environment due to the armed conflict in Ukraine: Cross-border protection and intercountry adoption"**. More information is available here.

Vacancies

The Permanent Bureau is currently welcoming applications for the position of **Diplomat Lawyer (Secretary or First Secretary)**. The deadline for the submission of applications is 15 April 2022 (5.00 p.m. CEST). More information is available here.

Other

CEDEP's Choice of Law online course is now open to the public, featuring an introductory lecture on the ***Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales***, published year by the Secretariats of UNCITRAL, UNIDROIT and the HCCH. The lecture is available here, and more information about the course is available here.

These monthly updates are published by the Permanent Bureau of the Hague

Conference on Private International Law (HCCH), providing an overview of the latest developments. More information and materials are available on the HCCH website.

Determining the Appropriate Forum by the Applicable Law by Prof. Richard Garnett (1 April Online)

The Chinese University of Hong Kong' Cross-Border Legal issues Dialogue Seminar Series presents this online seminar by Professor Richard Garnett on 1st April 2022 12.30pm -2pm (Hong Kong time; GMT +8 hours).

The conflict of laws has traditionally drawn a sharp distinction between jurisdiction and applicable law. The conventional approach suggests that a court only reaches the question of the law to be applied to the merits after the tribunal has determined that it has the power to adjudicate the action. Common law systems have however long recognised that a court has a discretion to accept or decline jurisdiction (determine the appropriate forum) and that a relevant factor in this discretion is the applicable law.

The purpose of this presentation is to examine the current status of the applicable law in jurisdiction and forum disputes, noting the trend in countries such as Australia to give the factor substantial weight and significance.

About the speaker:

Richard Garnett is Professor of Private International Law at the University of Melbourne, Australia and a consultant in international disputes at Corrs Chambers Westgarth. Richard regularly advises on cross-border litigation and arbitration matters and has appeared as advocate (barrister) before several

tribunals including the High Court of Australia. Richard has written extensively in the fields of conflict of laws, foreign state immunity and international arbitration, with his work cited by leading tribunals around the world, including the International Court of Justice, the European Court of Human Rights, the English Court of Appeal, United States federal district courts, the Singapore Court of Appeal and Australian, Israeli and New Zealand courts. Richard has also served as expert member of the Australian Government delegation to the Hague Conference on Private International Law, to negotiate the 2005 Hague Convention on Choice of Court Agreements and the 2019 Convention on Recognition and Enforcement of Foreign Judgments.

Please register by 5 pm, 31 March 2022 (Hong Kong time; GMT +8 hours) to attend the seminar.

Conference on 'Regulation Brussels I-bis: a standard for free circulation of judgments and mutual trust in the EU', 21-22 April 2022

The Conference represents the final event of the JUDGTRUST Project, funded by the Justice Programme of the European Union. The objective of the Project is to identify best practices and to provide guidelines in the interpretation and application of Regulation 1215/2012 (BI-*bis*). The JUDGTRUST Project is coordinated by the T.M.C. Asser Instituut and carried out in partnership with the University of Hamburg, the University of Antwerp and the Internationaal Juridisch Instituut.

The Conference will host panels on, *inter alia*, the scope of application, relationship with other instruments, rules on jurisdiction, provisional measures, as well as enforcement and recognition of foreign judgments. Additionally, the key findings from the National Reports of the EU Member States will be presented. It aims to bring together academics, policy makers and legal practitioners. It will take place on 21 – 22 April 2022 at the T.M.C. Asser Instituut, The Hague.

Further information and a link for registration can be found @ T.M.C. Asser Instituut – Events.

Speakers:
Prof. Dr. Markus Tobias Kotzur, University of Hamburg
Dr. Vesna Lazic, Asser Institute, The Hague; Utrecht University
Prof. Dr. Burkhard Hess, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law
Mr. David Althoff, International Legal Institute, The Hague
Prof. Dr. Louise Ellen Teitz, Roger Williams University School of Law, Bristol, Rhode Island
Prof. Dr. Wolfgang Hau, Ludwig-Maximilians University of Munich
Prof. Dr. Antonio Leandro, University of Bari
Mr. Michiel de Rooij, Asser Institute, The Hague
Prof. Dr. Javier Carrascosa González, University of Murcia
Prof. Dr. Pietro Franzina, Catholic University of the Sacred Heart in Milan
Prof. Dr. Gilles Cuniberti, University of Luxembourg
Dr. Fieke van Overbeeke, International Legal Institute, The Hague
Dr. Mukarrum Ahmed, University of Lancaster
Prof. Dr. Jachin Van Doninck, Free University Brussels
Prof. Dr. Luis de Lima Pinheiro, University of Lisbon
Ms. Lisette Frohn, International Legal Institute, The Hague
Prof. Dr. Beatriz Añoveros Terradas, University of Barcelona
Dr. Pontian Okoli, University of Stirling
Prof. Dr. Francesca Clara Villata, University of Milan

Moderators:
Prof. Dr. Johan Meeusen, University of Antwerp
Prof. Dr. Marta Pertegás Sender, University of Antwerp
Dr. Fieke van Overbeeke, International Legal Institute, The Hague
Ms. Lisette Frohn, International Legal Institute, The Hague

Coordinator

JUDGTRUST is coordinated by Vesna Lazic, senior researcher in private international law at the Asser Institute. She is part of the 'Public interest(s) inside/within international and European institutions and their practices' research strand. She has published extensively on international trade law, international commercial arbitration, and European private international law.

Sydney Centre for International Law Year in Review Conference/Panel 3: Developments in Private International Law in 2022

The Sydney Centre for International Law at Sydney Law School is delighted to present the 2022 International Law Year in Review Conference, to be held online on Friday 25 February 2022.

This annual 'year in review' conference brings together expert speakers from around the world to give participants insight into the latest developments in international law over the preceding year, especially those most salient for Australia.

Panel 3 will cover Developments in Private International Law in 2022.

Speakers

Martin Jarrett (Max Planck Institute for Comparative Public Law and International Law and University of Heidelberg), *"Payment of Australian judgment debts as unlawful European state aid: international legal options for Australia against the European Union".*

Dr Aida Othman (ZICO Shariah and Messrs. Zaid Ibrahim & Co.), *"Arbitration of Shariah and Islamic finance disputes: are the Asian International Arbitration Centre's i-arbitration rules a game-changer?"*

Dr Sarah McKibbin (University of Southern Queensland), *"Implementation of the Singapore Convention on Mediation in Australian Law"*

Chair: **Associate Professor Dr. Jeanne Huang** (Sydney Law School)

Date/Time: 25 February, 1:30pm – 3:00 pm AEDT

View the program here. Register to attend here.

First Issue of Lloyd's Maritime and Commercial Law Quarterly 2022

The first issue of the *Lloyd's Maritime and Commercial Law Quarterly* for 2022 was just published. It features the following case notes and articles on private international law respectively:

SYC Leung and M Suen, The Extensive Jurisdiction in the Action on an Arbitral Award (case note)

D Foxton, The Jurisdictional Gateways – some (very) modest proposals:

This article reviews the history of the gateways for service out of the jurisdiction in England and Wales, and seeks to identify the rationales which underpin them. The case for abolishing the gateways altogether, and applying only a forum conveniens test for service out purposes, is examined, the article concluding that there are reasons of principle and policy for maintaining the gateway requirement. The article identifies a number of variations or amendments to the current gateways which are consistent with their rationales, and which would better give effect to them.

A Kennedy, An Exploration of the Operation and Rebuttal of the Presumption in *Enka v Chubb:*

The Supreme Court in Enka v Chubb clarified the choice of law rules which help determine the governing law of an arbitration agreement when the law of the contract containing it differs from the law of the arbitral seat. According to that framework, where parties have chosen the law which governs the main contract, that law is presumed also to govern the arbitration agreement. This article identifies, and seeks to provide preliminary answers to, questions surrounding the operation of, and rebuttal of, that presumption, on the basis that such questions are most likely soon to require a judicial answer.

COMMENTARIES ON PRIVATE INTERNATIONAL LAW: THE PILIG NEWSLETTER

A new issue of ***Commentaries on Private International Law***, (Vol 4. Issue 1), the newsletter of the American Society of International Law (ASIL) Private International Law Interest Group (PILIG) has been released.

The primary *purpose* of the newsletter is to communicate new developments on PIL rather than provide substantive analysis, to provide specific and concise raw information that readers can then use in their daily work. These new developments on PIL may include information on new laws, rules and regulations; new judicial and arbitral decisions; new treaties and conventions; new scholarly work; new conferences; proposed new pieces of legislation; and the like.

Commentaries includes sections dealing with regional issues, edited by specialists on the field: Africa, edited by Lamine Balde & Sedat Sirmen; Asia, by Yao-Ming Hsu & Charles Mak; the Americas by Juan Pablo Gomez (Central and South America and Mexico), and Carrie Shu Shang (North America); Europe, by Patricia Snell, Charles Mak & Christos Liakis; and Oceania, by Jeanne Huang.

This issue of *Commentaries* covers more countries and includes recent developments in PIL in each area of the world. Each regional section consists of a particular chapter devoted to new scholarly work, which is particularly important for those areas of the world. Those are not necessarily linked to a specific region or country in the world but are truly transnational or global.

Commentaries would not have been possible without Cristian Gimenez Corte (Universidad Nacional del Litoral, Santa Fe, Argentina), Jeanne Huang (University of Sydney Law School), Sedat Sirmen (Ankara University Faculty of Law), Yao-Ming Hsu (National Cheng- Chi University), Patricia Snell (Covington & Burling LLP), Charles Mak (University of Glasgow), Juan Pablo Gómez- Moreno (Cartagena Refinery), Lamine Balde (Shanghai Jiao Tong University), Christos Liakis (National & Kapodistrian University of Athens), and is coordinated by PILIG Co-Chairs Rekha Rangachari (New York International Arbitration Center) and Carrie Shu Shang (California State Polytechnic University, Pomona). In addition, PILIG is constantly looking forward to your suggestions to improve our services to our members.

Update: HCCH 2019 Judgments Convention Repository

In preparation of the Conference on the HCCH 2019 Judgments Convention on 9/10 September 2022, 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 16 February 2022: New entries are printed bold.

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

I. Explanatory Reports

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III. Recordings of Events Related to the HCCH 2019 Judgments Convention

HCCH	"HCCH a|Bridged: Innovation in Transnational Litigation – Edition 2021: Enabling Party Autonomy with the HCCH 2005 Choice of Court Convention", 1 December 2021 (full recording available here)
UIHJ; HCCH	"3rd training webinar on the Hague Conventions on service of documents (1965) and recognition and enforcement of judgements (2019)", 15/18 March 2021 (full recording available here in French and here in English)

ASADIP; HCCH	“Conferencia Internacional: Convención HCCH 2019 sobre Reconocimiento y Ejecución de Sentencias Extranjeras”, 3 December 2020 (full recording available here and here)
ASIL	“The Promise and Prospects of the 2019 Hague Convention”, 25-26 June 2020 (full recording available here and here)
JPRI; HCCH; UNIDROIT; UNCITRAL	“2020 Judicial Policy Research Institute International Conference – International Commercial Litigation: Recent Developments and Future Challenges, Session 3: Recognition and Enforcement of Foreign Judgments”, 12 November 2020 (recording available here)
University of Bonn; HCCH	“Pre-Conference Video Roundtable on the HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil and Commercial Matters between the EU and Third Countries”, 29 October 2020 (full recording available here)
Department of Justice Hong Kong; HCCH	“Inaugural Global Conference – 2019 HCCH Judgments Convention: Global Enforcement of Civil and Commercial Judgments”, 9 September 2019 (recording available here)
HCCH	“22nd Diplomatic Session of the HCCH: The Adoption of the 2019 Judgments Convention”, 2 July 2020 (short documentary video available here)

Are the Chapter 2 General

Protections in the Australian Consumer Law Mandatory Laws?

Neerav Srivastava, a Ph.D. candidate at Monash University offers an analysis on whether the Chapter 2 general protections in the Australia's Competition and Consumer Act 2010 are mandatory laws.

Online Australian consumer transactions on multinational platforms have grown rapidly. Online Australian consumers contract typically include exclusive jurisdiction clauses (EJC) and foreign choice of law clauses (FCL). The EJC and FCL, respectively, are often in favour of a US jurisdiction. Particularly when an Australian consumer is involved, the EJC might be void or an Australian court may refuse to enforce it.[1] And the 'consumer guarantees' in Chap 3 of the *Australian Consumer Law* (*'ACL'*) are explicitly 'mandatory laws'[2] that the contract cannot exclude. It is less clear whether the general protections at Chap 2 of the *ACL* are non-excludable. Unlike the consumer guarantees, it is not stated that the Chap 2 protections are mandatory. As Davies et al and Douglas[3] rightly point out that *may* imply they are not mandatory. In 'Indie Law For Youtubers: Youtube And The Legality Of Demonetisation' (2021) 42 *Adelaide Law Review*503, I argue that the Chap 2 protections are mandatory laws.

The Chap 2 protections, which are not limited to consumers, are against:

- misleading or deceptive conduct under s 18
- unconscionable conduct under s 21
- unfair contract terms under s 23

I. PRACTICALLY SIGNIFICANT

If the Chap 2 protections are mandatory laws, that is practically significant. Australian consumers and others can rely on the protections, and multinational platforms need to calibrate their approach accordingly. Australia places a greater emphasis on consumer protection,[4] whereas the US gives primacy to freedom of contract.[5] Part 2 may give a different answer to US law. For example, the YouTube business model is built on advertising revenue generated from content uploaded by YouTubers. Under the YouTube contract, advertising revenue is split

between a YouTuber (55%) and YouTube (45%). When a YouTuber does not meet the minimum threshold hours, or YouTube deems content as inappropriate, a YouTuber cannot monetise that content. This is known as demonetisation. On the assumption that the Chap 2 protections apply, the article argues that

- not providing reasons to a Youtuber for demonetisation is unconscionable
- in the US, it has been held that clauses that allow YouTube to unilaterally vary its terms, eg changing its demonetisation policy, are enforceable. Under Chap 2 of the *ACL*, such a clause is probably void.

If that is correct, it is relevant to Australian YouTubers. It may also affect the tactical landscape globally regarding the demonetisation dispute.

II. WHETHER MANDATORY

As to why the Chap 2 protections are mandatory laws, first, the *ACL* does not state that they are not mandatory. The Chap 2 protections have been characterised as rights that cannot be excluded.[6]

The objects of the *ACL*, namely to enhance the welfare of Australians and consumer protection, suggest[7] that Chap 2 is mandatory. A FCL, sometimes combined with an EJC, may alienate Australian consumers, the weaker party, from legal remedies.[8] Allowing this to proliferate would be inconsistent with the *ACL*'s objects. If Chap 2 is not mandatory, all businesses — Australian and international — could start using FCLs to avoid Chap 2 and render it otiose.

Further there is a public dimension to the Chap 2 protections,[9] in that they are subject to regulatory enforcement. It can be ordered that pecuniary penalties be paid to the government and compensation be awarded to non-parties. In this respect, Chap 3 is similar to criminal laws, which are generally understood to have a strict territorial application.[10]

As for policy being 'particularly' important where there is an inequality of bargaining power, both ss 21[11] and 23 are specifically directed at redressing inequality.[12]

Regarding the specific provisions:

- Authority on, at least, s 18 suggests that it is mandatory.[13]

- Section 21 on unconscionable conduct has been held to be a mandatory law, although that conclusion was not a detailed judicial consideration.[14] In any event, it is arguable that 'conduct' is broader than a contract, and parties cannot exclude 'conduct' provisions.[15] Unconscionability is determined by reference to 'norms' of Australian society and is, therefore, not an issue exclusively between the parties.[16]
- Whether s 23 on unfair contract terms is a mandatory law is debatable.[17] At common law, the proper law governs all aspects of a contractual obligation, including its validity. The counterargument is that s 23 is a statutory regime that supersedes the common law. As a matter of policy, Australia is one of the few jurisdictions to extend unfair terms protection to small businesses expressly, for example, a YouTuber. An interpretation that s 23 can be disapplied by a FCL would be problematic. A FCL designed to evade the operation of ss 21 or 23 might itself be unconscionable or unfair.[18] If s 23 is not mandatory, Australian consumers may not have the benefit of an important protection. Section 23 also has a public interest element, in that under s 250 the regulator can apply to have a term declared unfair. On balance, it is more likely than not that s 21 is a mandatory law.

The Chap 2 protections are an integral part of the Australian legal landscape and the market culture. This piece argues that the Chap 2 protections *are* mandatory laws. Whether or not that is correct, as a matter of policy, they should be.

FOOTNOTES

[1] A possibility implicitly left open by *Epic Games Inc v Apple Inc* [2021] FCA 338, [17]. See too *Knight v Adventure Associates Pty Ltd* [1999] NSWSC 861, [32]–[36] (Master Malpass); *Quinlan v Safe International Försäkrings AB* [2005] FCA 1362, [46] (Nicholson J), *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[2] 'laws the respect for which is regarded by a country as so crucial for safeguarding public interests (political, social, or economic organization) that they are applicable to any contract falling within their scope, regardless of the law which might otherwise be applied'. See Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 248.

[3] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 492 [19.48], Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation After *Valve*' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 201, 226-7.

[4] Richard Garnett, 'Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?' (2017) 39(4) *Sydney Law Review* 569, 570, 599.

[5] *Sweet v Google Inc* (ND Cal, Case No 17-cv-03953-EMC, 7 March 2018).

[6] *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[7] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10].

[8] See, eg, *Océano Grupo Editorial SA v Murciano Quintero* (C-240/98) [2000] ECR I-4963.

[9] *Epic Games Inc v Apple Inc* (2021) 392 ALR 66, 72 [23] (Middleton, Jagot and Moshinsky JJ).

[10] John Goldring, 'Globalisation and Consumer Protection Laws' (2008) 8(1) *Macquarie Law Journal* 79, 87-8

[11] Historically, the essence of unconscionability is the exploitation of a weaker party. *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 36 [81] (Gageler J) ('*ASIC v Kobelt*').

[12] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10], 492 [19.48].

[13] *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[14] *Epic Games Inc v Apple Inc* [2021] FCA 338, [19] (Perram J). On appeal, the Full Court of the Federal Court of Australia exercised its discretion afresh and refused the stay: *Epic Games Inc v Apple Inc* (2021) 392 ALR 66. That said, Perram J's conclusion that s 21 was a mandatory law was not challenged on appeal.

[15] Analogical support for a 'conduct' analysis can be found from cases on s 18 like *Australian Competition and Consumer Commission v Valve Corporation [No 3]* (2016) 337 ALR 647 (Edelman J, at first instance). In *Valve* it was reiterated that the test for s 18 was objective. See 689 [212]–[213]. A contractual term might neutralise the misleading or deceptive conduct, but it cannot be contracted out of. See *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 17 [37] (Stone J, Moore J agreeing at 4 [1], Mansfield J agreeing at 11 [17]); *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, 29–30 [83] (Keane JA, Williams JA agreeing at [1], Atkinson J agreeing at [145]).

[16] *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) [No 2]* [2017] FCA 709, [60]–[62] (Beach J).

[17] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 463 [19.1], 492 [19.48].

[18] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10]. While a consumer might be able to challenge a proper law of contract clause on the grounds of unconscionability, it would be harder for a commercial party to do so.

Excess of authority as a ground of refusal for an AAA award in Greece

Introduction

The case arises from a a long-running family dispute of the parties over the distribution of assets left by their late brother in the USA. Z. is the sister, and M. the brother of the deceased. Over the course of several years, the parties entered into a series of agreements with an eye towards efficiently dividing the assets and providing for the effective management of the properties and businesses included in the estate. All attempts to settle the dispute amicably failed. Eventually, the

case was decided in favour of Z. by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules. The efforts of M. to vacate the award failed. As a next step, Z. sought recognition and enforcement of the US award in Greece. First and second instance courts decided in favour of Z. Upon second appeal (cassation) of M., the Supreme Court ruled that the Athens Court of Appeal failed to examine two grounds of appeal raised by M. The case was sent back to the appellate court [Supreme Court nr. 635/20.5.2021]

Stage 1: USA

The parties entered into an agreement known as the "U.S. Agreement," which set out a process for: (1) an accounting of the affairs of the . . . [U.S. Companies] during the relevant time period leading to a report detailing [an] auditor's findings; (2) . . . [setting] a period in which the Parties would 'confer amicably and in good faith to agree on the amount of any distributions or payments that should be made in order to' realize the objective of equal distribution of the assets or their proceeds and of the earnings of the assets in the relevant period; (3) [and making] a determination as a result of this process as to 'the extent to which [either Party] has received a disproportionate share of prior income or other distributions in respect of [the U.S. Companies] and the amount of such excess benefit.

The U.S. Agreement further provided that, if the parties failed to agree on the amount of the Party Distribution by way of the auditor's report, "the amount of the D. Distribution, the P. Distribution, the T. D. and/or the Party Distribution as applicable shall be determined by an arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules," subject to confirmation by any court having appropriate jurisdiction.

The audit contemplated in the U.S. Agreement was never completed, and the parties were unable to come to reach an agreement on the amount of the Party Distribution. After several years of litigation in both federal and state courts, Z. instituted the subject arbitration in 2009. The arbitration panel issued its Final Award on March 20, 2014, finding in favor of Z. in the amount of approximately $10.8 million, inclusive of approximately $4.8 million of prejudgment interest.

1. filed a petition to vacate the Final Award on June 16, 2014, and on August

29, 2014, he filed the instant motion in support of that petition. The Petitioner's Arguments for Vacatur were the following:

2. a) Failure to Determine the U.S. Company Distributions.
3. b) Manifest Disregard of the Law and Agreement – "Redefining" the Term "Received".
4. c) Award of Prejudgment Interest as Exceeding Authority.

The Southern District Of New York decided that the Petitioner's motion to vacate the arbitration panel's Final Award is denied and Respondent's cross-motion to confirm the award is granted.

Stage 2: Greece

The application to recognize and enforce the US award was granted by the Athens Court of 1st Instance [nr. 443/2018, published in: Epitheorissi Politikis Dikonomias (*Civil Procedure Law Review*) 2017, 643 et seq, note *Kastanidis*]. The appeal against the first instance court was dismissed [Athens Court of Appeal 5625/2018, unreported]. The final appeal was successful. The Supreme Court ruled that the appellate court did not examine two cassation grounds:

1. No reference is made in the judgment of the Athens CoA in regards to the lack of an arbitration agreement, as evidenced by points 1-9 of the US Agreement, which refer to an arbitral *determination*, not an award.
2. No reference is made in the judgment of the Athens CoA in regards to the excess of authority by the arbitrators.

As a result, the Supreme Court reversed the judgment of the Athens CoA, and ordered Z. to pay the costs of the proceedings.

Comments

An issue that was not examined by the Supreme Court was the conduct of M. during the arbitral proceedings, and the grounds invoked for vacating the AAA award. There is no evidence that M. challenged the authority of the arbitration panel to issue an award. In addition, the arguments for vacatur do not challenge the panel's authority, save the award of Prejudgment Interest under (c), which was dismissed by the Greek instance courts as contrary to the principle of non-revision on the merits.

The question has been addresses by legal scholarship as follows:

One issue that is not dealt with in the Convention is what happens if a party to an arbitration is aware of a defect in the arbitration procedure but does not object in the course of the arbitration. The same issue arises in connection with jurisdictional objections that are raised at the enforcement stage for the first time. The general principle of good faith (also sometimes referred to as waiver or estoppel), that applies to procedural as well as to substantive matters, should prevent parties from keeping points up their sleeves [ICCA Guide to the NYC, 2011, p. 81].

The Federal Arbitrazh (Commercial) Court for the Northwestern District in the Russian Federation considered that an objection of lack of arbitral jurisdiction that had not been raised in the arbitration could not be raised for the first time in the enforcement proceedings; The Spanish Supreme Court said that it could not understand that the respondent "now rejects the arbitration agreement on grounds it could have raised in the arbitration" [ICCA Guide to the NYC, 2011, p. 82]

It is generally accepted that the party resisting enforcement of the award may, under certain circumstances, be barred from raising a defense under Article V(1)(c) in the exequatur proceedings. Preclusion may, in particular, occur if the party resisting enforcement has taken part in the arbitral proceedings without objecting to the jurisdiction or competence of the arbitral tribunal when it had the opportunity to do so [*Wolff/(Borris/Hennecke*), New York Convention, Second Edition, 2019, p. 340 nr. 257].

Conclusion

It is not entirely clear whether the judgment of the Athens Court of Appeal did in fact fail to take into account the grounds aforementioned. As mentioned above, the judgment has not been published in the legal press. However, the extracts reproduced in the ruling of the Supreme Court allow the reader to have some doubts. In any event, the case will be re-examined by the Court of Appeal, and most probably, will end up again before the Supreme Court…

New Journal: “The Italian Review of International and Comparative Law”

Brill launched a new Journal, The Italian Review of International and Comparative Law, which is managed by a group of professors from the University of Naples and the Scuola Superiore Sant’Anna in Pisa.
The aim of the Journal is to publish contributions on International law, private International law, EU law and comparative law. In this regard, see the recently launched a call for papers on “The European Union and International Arbitration”.