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.

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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.

'Giustizia consensuale': A New Law Journal on Consensual Justice in Its Many Nuances and Forms

In recent years, the debate surrounding consensual justice and party autonomy has received increasing attention in the national and international arenas and has raised a broad array of questions. In the pressing need to observe this phenomenon from different perspectives lies the rationale behind a newly founded biannual journal, *Giustizia consensuale*. The journal, founded and directed by Prof. Silvana Dalla Bontà and Prof. Paola Lucarelli, features

contributions in both Italian and English.

By adopting an interdisciplinary and holistic approach, the journal aims to investigate the meaning of consensual justice, its relation with judicial justice, and the potential for integrating – rather than contrasting – these two forms of justice. This investigation is premised on the relationship between justice and private autonomy as well as forms of integrative, participatory, and restorative justice. By being particularly suited for meeting the needs of an increasingly complicated and multi-faceted society, these forms of justice ultimately promote social cohesion and reconciliation. Against this backdrop, *Giustizia consensuale* strives to make a valid contribution to the discourse on conflict and the meaning of justice by fostering an interdisciplinary dialogue which encompasses both theory and practice.

The first issue of *Giustizia Consensuale* has just been released and it features:

Silvana Dalla Bontà (University of Trento), *Giustizia consensuale* ('Consensual Justice – A Foreword'; in Italian)

Paola Lucarelli (University of Firenze), *Mediazione dei conflitti: una spinta generosa verso il cambiamento* (*Conflict Mediation: A Push for Cultural Change*; in Italian)

From the Italian Recovery and Resilience Plan to the guidelines of the Italian Ministry of Justice, the urgency of a reform to strengthen out-of-court dispute resolution procedures clearly emerges. Recovery and resilience become fundamental objectives. Conflict mediation is the path chosen to achieve social cohesion and reconciliation. Promoting and strengthening this dispute resolution mechanism is important not only to reduce the judicial backlog, but also to empower the parties to self-tailor the solution of their conflict with the assistance of their attorneys. By fostering responsibility, self-determination, awareness and trust, mediation makes citizens and professionals protagonists in the process of change that combines judicial and consensual justice.

Francesco P. Luiso (University of Pisa), *La «proposta» del mediatore* (*The Mediator's 'Dispute Settlement Offer'*; in Italian)

The Italian Legislative Decree No. 28 of 4 March 2010 – implementing the Directive 2008/52/EC – enables, in certain conditions, the mediator to submit a

settlement offer to the conflicting parties. In the case that the mediation fails, the judge, in the subsequent court proceedings, might sanction the non-accepting party when allocating procedural costs. Nonetheless, the aforementioned Legislative Decree does not compel the mediator to submit such a settlement offer. However, the mediation rules of some institutions oblige the mediator to make a settlement offer to the parties. Against this background, when ordering the parties to attempt mediation, some courts require them to file their mediation application with a mediation institution allowing the mediator to submit a settlement offer to the parties. In this article, the author argues that these court orders are against the above-mentioned Legislative Decree. In fact, this does not permit the judge to make any particular determination regarding the mediation procedure, the parties, or the mediator themselves. Furthermore, the author underlines how the judge could never take the mediator's settlement offer into consideration in the pending proceedings. While the judge grounds their decision on what is right and what is wrong, the mediator's settlement offer revolves around the needs and interests of the conflicting parties, thus impeding any comparison between their contents.

Antonio Briguglio (University of Rome 'Tor Vergata'), *Conciliazione e arbitrato. Conciliazione nell'arbitrato. Appunti sparsi fra diritto, psicologia e prassi* (*Conciliation and Arbitration. Conciliation in Arbitration. Notes on Law, Psychology, and Practice*; in Italian)

The article deals with the relationship between conciliation and arbitration within the overall ADR system. It first analyses the conceptual, legal and systematic differences between conciliation and arbitration, with references to some areas of partial overlap (such as, for example, the one now opened by the Singapore Convention of 2019). The author then takes into consideration the parties' and adjudicators' different approaches to conciliation both in in-court proceedings and arbitration. Subsequently, the attention is focused on the attempt of conciliation in the course of the arbitral proceedings; on the so-called multi-step clauses that provide for a mandatory attempt of conciliation before the commencement of arbitration; and on the 'award by consent' in the practice of international arbitration.

Neil Andrews (University of Cambridge), *Procedure, Party Agreement, and Contract* (in English)

In this piece the author considers three points of interaction between agreement and procedure. (1) The parties might consensually choose the applicable procedure, notably the choice between (a) judicial proceedings and (b) arbitration. If they have chosen (a), the parties might stipulate which court and in which jurisdiction the matter will be litigated. Having chosen instead (b) arbitration, the parties will normally make explicit the 'seat' (London, Milan, New York, etc) and the size of the arbitral tribunal (one, three, five, etc). Also falling within (1), there is possibility that the parties will agree to impose on themselves preliminary 'negotiation agreements' and/or mediation agreements. (2) The parties can take a further step and specify or modify the elements of the relevant formal process (whether that process is court proceedings or arbitration). This modification of the default elements of the procedure will involve a 'bespoke' or *ad hoc* agreement, rather than simply adopting national or institutional procedural rules. However, this is less common. Most parties adopt without modification the relevant procedure 'off the peg'. (3) Settlement is the consensual disposal or narrowing of the dispute. In practice, this is the most important way in which agreement and procedure interact. Settlement can occur before or after court or arbitration proceedings have commenced. It is also possible that settlement might occur even after the first-instance judgment has been obtained, for example, when appeal or enforcement proceedings are pending.

Margherita Ramajoli (University of Milan), *Per una giustizia amministrativa alternativa con particolare (anche se non esclusivo) riguardo alle transazioni pubblicistiche* (*For an Alternative Administrative Justice: Focusing on Public Dispute Settlements*; in Italian)

The use of alternative dispute resolution mechanisms in public interest litigation brings both substantial and procedural advantages. They may improve the quality of public decision-making, foster the adoption of shared solutions, re-establish dialogue between parties whose relations are bound to last over time, contribute to moralisation by making clear agreements otherwise not intended to emerge, and finally, make the administrative judicial review more efficient by directing the demand for justice elsewhere. In addition, alternative dispute resolution mechanisms are in tune with the current changes in administrative law; there is a deep link between *droit souple* and *justice douce*, between soft law and ADR, between non-traditional substantive law and alternative administrative judicial review. However, alternative justice is a phenomenon not yet sufficiently

developed in public litigation, because of some debated issues in its use. Specifically, it is not easy to harmonise the very purpose of ADR to definitively settle a dispute with the perpetual protection of public interest institutionally entrusted to administrative authorities, as demonstrated by how the latter use the settlement. The introduction of a framework law on ADR in public interest litigation could solve some of the most dramatic issues, naturally maintaining the indispensable flexibility.

Teresa Arruda Alvim (Pontifícia Universidade Católica de São Paulo) and **Márcio Bellocchi** (Universidade de São Paulo), *Mediazione. Il frutto di un buon esercizio del diritto* (*Mediation. The Result of a Mindful Exercise of Rights*; in Italian)

In the last few decades, even civil law jurisdictions have witnessed an increase in the promotion of alternative dispute resolution. Among various reasons for its adoption, ADR affords the parties the possibility to self-tailor a solution to their conflict while significantly diminishing the case overload of the judiciary. Nevertheless, just as varied are the obstacles to the diffusion of ADR, ranging from the lack of preparation of mediators to the traditional adversarial approach of attorneys. The authors examine each of these profiles in the perspective of the Brazilian legal system, analysing the reasons behind the promotion of ADR, its practical implications, and the future outlook on a multi-door justice.

Colin Rule (University of Stanford), *Reinventing Justice with Online Dispute Resolution* (in English)

Online Dispute Resolution (ODR) is the study of how to use technology to help parties resolve their disputes. Originally created to help e-Commerce companies build trust with their users, ODR is now being integrated into the courts to expand access to justice and reduce costs. With the expansion of artificial intelligence and machine learning, ODR has the potential to play a major role in the justice systems of the future, but there are many questions that still need to be answered. This article outlines the need for ODR, provides a short history of its development, and describes some of the challenges that could accompany its expansion.

Silvana Dalla Bontà (University of Trento), *Una giustizia «co-esistenziale»* online *nello spazio giuridico europeo? Spunti critici sul pacchetto ADR-ODR per i*

consumatori (‘Co-Existential’ Online Justice within the EU Judicial Area? Some Constructive Criticism on the Consumer ADR/ODR Package; in Italian)

Since the 1990s, the European Community, now the European Union, has shown particular regard to the matter of extra-judicial settlement of civil and commercial disputes. The European Union recognized the added value brought by alternative dispute resolution mechanisms in answering the problems posed by cross-border litigation and thus facilitating the creation of the Single Market. The Community’s attention first focused on consumer disputes (Recommendations 98/257/EC and 2001/310/EC); it subsequently extended its reach to all civil and commercial disputes (Directive 2008/52/EC); ultimately, it reverted its focus back to consumer disputes with the Directive on consumer Alternative Dispute Resolution (ADR) and the Regulation on consumer Online Dispute Resolution (ODR), both adopted in 2013. This article proposes an in-depth analysis of the objectives, the scope, and the application of the two above-mentioned legal acts composing the so-called ADR/ODR package for consumers, highlighting its strengths and weaknesses. In particular, the discussion focuses on the ODR Platform for the resolution of consumer-to-business disputes launched by the European Union in 2016. In reviewing its functioning through the statistical data collected by the European Union, the author inquires whether the ODR Platform provides for the creation of a ‘co-existential justice’ in the European legal area or whether other complementary instruments should be implemented to grant a high standard of protection for consumers as the European Treaties impose.

The Latest Development on Anti-suit Injunction Wielded by Chinese Courts to Restrain Foreign Parallel

Proceedings

(This post is provided by Zeyu Huang, who is an associate attorney of Hui Zhong Law Firm based in Shenzhen. Mr. Huang obtained his LLB degree from the Remin University of China Law School. He is also a PhD candidate & LLM at the Faculty of Law in University of Macau. The author may be contacted at the e-mail address: huangzeyu@huizhonglaw.com)

When confronted with international parallel proceedings due to the existence of a competent foreign court having adjudicative jurisdiction, the seized foreign court located in common law jurisdictions seems to see it as no offence to Chinese courts by granting anti-suit injunctions to restrain Chinese proceedings. This is because the common law court believes that "An order of this kind [anti-suit injunction] is made in personam against a party subject to the court's jurisdiction by way of requiring compliance with agreed terms. It does not purport to have direct effect on the proceedings in the PRC. This court respects such proceedings as a matter of judicial comity". [1] However, the fact that the anti-suit injunction is not directly targeted at people's courts in the PRC does not prevent Chinese judges from believing that it is inappropriate for foreign courts to issue an anti-suit injunction restraining Chinese proceedings. Instead, they would likely view such interim order as something that purports to indirectly deprive the party of the right of having access to Chinese court and would unavoidably impact Chinese proceedings.

The attitude of Chinese courts towards the anti-suit injunction – a fine-tuning tool to curb parallel proceedings – has changed in recent years. In fact, they have progressively become open-minded to resorting to anti-suit injunctions or other similar orders that are issued to prevent parties from continuing foreign proceedings in parallel. Following that, the real question is whether and how anti-suit injunction is compatible with Chinese law. Some argued that Article 100 of the PRC CPL provides a legal basis for granting injunctions having similar effects with anti-suit injunction at common law. [2] It provides that:

"The people's court may upon the request of one party to issue a ruling to preserve the other party's assets or compel the other party to perform certain act or refrain from doing certain act, in cases where the execution of the judgment would face difficulties, or the party would suffer other damages due to the acts of the other party or for other reasons. If necessary, the people's court also could

make a ruling of such preservative measures without one party's application." [3] Accordingly, Chinese people's court may make a ruling to limit one party from pursuing parallel foreign proceedings if such action may render the enforcement of Chinese judgment difficult or cause other possible damages to the other party.

In maritime disputes, Chinese maritime courts are also empowered by special legislation to issue maritime injunctions having anti-suit or anti-anti-suit effects. Article 51 of the PRC Maritime Special Procedure Law provides that the maritime court may upon the application of a maritime claimant issue a maritime injunction to compel the respondent to do or not to do certain acts in order to protect the claimant's lawful rights and interests from being infringed. [4] The maritime injunction is not constrained by the jurisdiction agreement or arbitration agreement as agreed upon between the parties in relation to the maritime claim. [5] In order to obtain a maritime injunction, three requirements shall be satisfied – firstly, the applicant has a specific maritime claim; secondly, there is a need to rectify the respondent's act which violates the law or breaches the contract; thirdly, a situation of emergency exists in which the damages would be caused or increased if the maritime injunction is not issued immediately. [6] Like the provision of the PRC CPL, the maritime injunction issued by the Chinese maritime court is mainly directed to mitigate the damages caused by the party's behaviour to the other parties' relevant rights and interests.

In Huatai P&C Insurance Corp Ltd Shenzhen Branch v Clipper Chartering SA, the Maritime Court of Wuhan City granted the maritime injunction upon the claimant's application to oblige the respondent to immediately withdraw the anti-suit injunction granted by the High Court of the Hong Kong SAR to restrain the Mainland proceedings. [7] The Hong Kong anti-suit injunction was successfully sought by the respondent on the grounds of the existence of a valid arbitration agreement. [8] However, the respondent did not challenge the jurisdiction of the Mainland maritime court over the dispute arising from the contract of carriage of goods by sea. Therefore, the Maritime Court of Wuhan City held that the respondent had submitted to its jurisdiction. As a result, the application launched by the respondent to the High Court of the Hong Kong SAR for the anti-suit injunction to restrain the Mainland Chinese proceedings had infringed the legitimate rights and interests of the claimant. In accordance with Article 51 of the PRC Maritime Special Procedure Law, a Chinese maritime injunction was granted to order the respondent domiciled in Greece to withdraw the Hong Kong anti-suit injunction (HCCT28/2017). [9] As the maritime injunction in the Huatai Property case was a Mainland Chinese ruling issued directly against the anti-suit

injunction granted by a Hong Kong court, it is fair to say that if necessary Chinese people's court does not hesitate to issue a compulsory injunction "which orders a party not to seek injunction relief in another forum in relation to proceedings in the issuing forum". [10] This kind of compulsory injunction is also called 'anti-anti-suit injunction' or 'defensive anti-suit injunction'. [11]

When it comes to civil and commercial matters, including preserving intellectual property rights, the people's court in Mainland China is also prepared to issue procedural orders or rulings to prevent the parties from pursuing foreign proceedings, similar to anti-suit injunctions or anti-anti-suit injunction in common law world. In Guangdong OPPO Mobile Telecommunications Corp Ltd and its Shenzhen Branch v Sharp Corporation and ScienBiziP Japan Corporation, the plaintiff OPPO made an application to the seized Chinese court for a ruling to preserve actions or inactions.[12] Before and after the application, the defendant Sharp had brought tort claims arising from SEP (standard essential patent) licensing against OPPO by commencing several parallel proceedings before German courts, a Japanese court and a Taiwanese court. [13] In the face of foreign parallel proceedings, the Intermediate People's Court of Shenzhen City of Guangdong Province rendered a ruling to restrain the defendant Sharp from pursing any new action or applying for any judicial injunction before a Chinese final judgment was made for the patent dispute. [14] The breach of the ruling would entail a fine of RMB 1 million per day. [15] Almost 7 hours after the Chinese 'anti-suit injunction' was issued, a German 'anti-anti-suit injunction' was issued against the OPPO. [16] Then, the Shenzhen court conducted a court investigation to the Sharp's breach of its ruling and clarified the severe legal consequences of the breach. [17] Eventually, Sharp choose to defer to the Chinese 'anti-suit injunction' through voluntarily and unconditionally withdrawing the anti-anti-suit injunction granted by the German court. [18] Interestingly enough, Germany, a typical civil law country, and other EU countries have also seemingly taken a U-turn by starting to issue anti-anti-suit injunctions in international litigation in response to anti-suit injunctions made by other foreign courts, especially the US court. [19]

In some other IP cases involving Chinese tech giants, Chinese courts appear to feel more and more comfortable with granting compulsory rulings having the same legal effects of anti-suit injunction and anti-anti-suit injunction. For example, in another seminal case publicized by the SPC in 2020, Huawei Technologies Corp Ltd ("Huawei") applied to the Court for a ruling to prevent the respondent Conversant Wireless Licensing S.A.R.L. ("Conversant") from further

seeking enforcement of the judgment rendered by the Dusseldorf Regional Court in Germany. [20] Before the application, a pair of parallel proceedings existed, concurrently pending before the SPC as the second-instance court and the Dusseldorf Regional Court. On the same date of application, the German regional court delivered a judgement in favour of Conversant. Within 48 hours after receiving the Huawei's application for an anti-suit injunction, the SPC granted the injunction to prohibit Conversant from applying for enforcement of the German judgment; if Conversant failed to comply with the injunction, a fine (RMB 1 million per day) would be imposed, accumulating day by day since the date of breach. [21] Conversant applied for a reconsideration of the anti-suit injunction, and it was however rejected by the SPC eventually. [22] The SPC's anti-suit injunction against the German regional court's decision compelled both parties to go back to the negotiating table, and the dispute between the two parties striving for global parallel proceedings was finally resolved by reaching a settlement agreement. [23]

The SPC's injunction in Huawei v. Conversant is commended as the very first action preservation ruling having the "anti-suit injunction" nature in the field of intellectual property rights litigation in China, which has prematurely established the Chinese approach to anti-suit injunction in judicial practice. [24] It is believed by the Court to be an effective tool to curb parallel proceedings concurrent in various jurisdictions across the globe. [25] We still wait to see Chinese court's future approach in other civil and commercial matters to anti-suit injunction or anti-anti-suit injunction issued by itself as well as those granted by foreign courts.

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1. See Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd [2015] EWHC 811, para.144.
2. See Liang Zhao, 'Party Autonomy in Choice of Court and Jurisdiction Over Foreign-Related Commercial and Maritime Disputes in China' (2019) 15 Journal of Private International Law 541, at 565.
3. See Article 100, para.1 of the PRC CPL (2017).
4. See Article 51 of the PRC Special Maritime Procedure Law (1999).
5. See Article 53 of the PRC Special Maritime Procedure Law (1999).
6. See Article 56 of the PRC Special Maritime Procedure Law (1999).
7. See Huatai Property & Casualty Insurance Co Ltd Shenzhen Branch v Clipper Chartering SA (2017) E 72 Xing Bao No.3 of the Maritime Court of Wuhan City.

8. See HCCT 28/2017 of the High Court of the Hong Kong SAR.
9. See (2017) E 72 Xing Bao No.3.
10. See Andrew S. Bell, Forum Shopping and Venue in Transnational Litigation (Oxford University Press 2003), at 196.
11. See ibid.
12. See (2020) Yue 03 Min Chu No.689-1.
13. See ibid.
14. See ibid.
15. See ibid.
16. See ibid.
17. See ibid.
18. See ibid.
19. See Greta Niehaus, 'First Anti-Anti-Suit Injunction in Germany: The Costs for International Arbitration' Kluwer Arbitration Blog, 28 February 2021.
20. See Huawei Technologies Corp Ltd and Others v Conversant Wireless Licensing S.A.R.L. (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-I.
21. See ibid.
22. See Conversant Wireless Licensing S.A.R.L. v Huawei Technologies Corp Ltd and Others, (2019) Zui Gao Fa Zhi Min Zhong No.732, No.733, No.734-II.
23. See Case No.2 of the "10 Seminal Intellectual Property Right Cases before Chinese Courts", Fa Ban [2021] No.146, the General Office of the Supreme People's Court.
24. See ibid.
25. See ibid.

Third-party Funding and E-Justice in International Dispute Resolution – Jean Monnet Module

Annual Conference – 20 July 2021, Università degli Studi, Milan [live streaming]

On July 20, 2021 (14.00 – 19.00), Università degli Studi, Milan will host (in streaming) the Annual Conference of the EU-funded project Jean Monnet Module on "Multilevel, Multiparty and Multisector Cross-Border Litigation in Europe".

The topic of this year – "Incentives and Challenges to Transnational Access to Justice" – will be addressed by distinguished panelists in two Round-Tables on, respectively, Third-party Funding in International Dispute Resolution and E-Justice in International Dispute Resolution.

The event is organized with the support of the Eramus+Programme of the European Union, the Centre of Research on European and Transnational Dispute Settlement (EUTraDiS), the European Court of Arbitration (CEA) and the Jean Monnet Chair on EU Health Legal Framework and Competition Law (EHCL).

Please find here the complete programme.

Registration is due by 15 July 2021, by completing and submitting this registration form (also referred to in the flyer).

For any information, please contact Prof. Albert Henke (albert.henke@unimi.it)

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)

4/2021: Abstracts

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

O. Remien: **The European Succession Regulation and the many questions of the European court practice – five years after entry into force**

After five years of application of the European Succession Regulation it is time to have a look at European court practice: The general connecting factor of habitual residence has somehow been addressed by the European Court of Justice (ECJ) in *E.E.*, but especially national court practice shows many interesting cases of the necessary overall assessment. Choice of law by the testator is particularly important and a notary should point not only at the present situation, but also at possible developments in the future. Estate planning has become more interesting. The legacy *per vindicationem* (*Vindikationslegat*, i.e. with *in rem* effect) recognized in *Kubicka* poses specific problems. The position of the surviving spouse under § 1371 BGB in German law has become a highly debated subject and here the aspect of free movement of persons is highlighted. The European Succession Certificate also raises many questions, among them the applicability of the competence rules in case of national notarial succession certificates or court certificates, cases *Oberle*, *WB* and *E.E.*. The article pleads for an equilibrated multilateral approach. Donation *mortis causa* will have to be dealt with by the ECJ soon. Five years of application of the Succession Regulation – and many questions are open.

P. Hay: **Product Liability: Specific Jurisdiction over Out-of-State Defendants in the United States**

“Stream of commerce” jurisdiction in American law describes the exercise of jurisdiction in product liability cases over an out-of-state enterprise when a product produced and first sold by it in another American state or a foreign country reached the forum state and caused injury there. The enterprise cannot be reached under modern American rules applicable to “general” (claim unrelated) jurisdiction. Can it be reached by exercise of “specific” (claim related) jurisdiction even though it did not itself introduce the product into the forum

state? This is an important question for interstate American as well as for foreign companies engaged in international commerce. The applicable federal constitutional limits on the exercise of such "stream of commerce" jurisdiction have long been nuanced and uncertain. It was often assumed that the claim must have "arisen out of" the defendant's forum contacts: what did that mean? The long-awaited U.S. Supreme Court decision in March 2021 in Ford vs. Montana now permits the exercise of specific jurisdiction when the claim arises out of or is (sufficiently) "related" to the defendant's in-state contacts and activities. This comment raises the question whether the decision reduces or in effect continues the previous uncertainty.

W. Wurmnest: **International Jurisdiction in Abuse of Dominance Cases**

The CJEU (Grand Chamber) has issued a landmark ruling on the borderline between contract and tort disputes under Article 7(1) and (2) of the Brussels I-bis Regulation. *Wikingerhof* concerned a claim against a dominant firm for violation of Art. 102 TFEU and/or national competition law rules. This article analyses the scope of the ruling and its impact on actions brought against dominant firms for violation of European and/or national competition law and also touches upon the salient question as to what extent such disputes are covered by choice of court agreements.

C.F. Nordmeier: **The waiver of succession according to Art. 13 Regulation (EU) 650/2012 and § 31 IntErbRVG in cases with reference to third countries**

According to Art. 13 Regulation (EU) 650/2012, a waiver of succession can be declared before the courts of the state in which the declarant has his habitual residence. The present article discusses a decision of the Cologne Higher Regional Court on the acceptance of such a declaration. The decision also deals with questions of German procedural law. The article shows that – mainly due to the wording and history of origin – Art. 13 Regulation (EU) 650/2012 presupposes the jurisdiction of a member state bound to the Regulation (EU) 650/2012 to rule on the succession as a whole. Details for establishing such a jurisdiction are examined. According to German procedural law, the reception of a waiver of

succession is an estate matter. If Section 31 of the IntErbRVG is applicable, a rejection of the acceptance demands a judicial decree which is subject to appeal.

P. Mankowski: **The location of global certificates – New world greets old world**

New kinds of assets and modern developments in contracting and technology pose new challenges concerning the methods how to locate assets. In many instances, the rules challenged are old or rooted in traditional thinking. Section 23 of the German Code of Civil Procedure (ZPO) is a good example for such confrontation. For instance, locating global certificates requires quite some reconsideration. Could arguments derived from modern legislation like the Hague Intermediated Securities Convention, Art. 2 pt. (9) EIR 2015 or § 17a DepotG offer a helping hand in interpreting such older rules?

S. Zwirlein-Forschner: **All in One Star Limited – Registration of a UK Company in Germany after the End of the Brexit Transition Period**

Since 1 January 2021, Brexit has been fully effective as the transition period for the UK has ended. In a recent decision, the Federal Court of Justice (BGH) has taken this into account in a referral procedure to the Court of Justice of the European Union (CJEU). The decision raises interesting questions on the demarcation between register law and company law, on conflict of laws and on the interpretation of norms implementing EU law. This article comments on these questions.

K. Sendlmeier: **Informal Binding of Third Parties – Relativising the Voluntary Nature of International Commercial Arbitration?**

The two decisions from the US and Switzerland deal with the formless binding of third parties to arbitration agreements that have been formally concluded between other parties. They thus address one of the most controversial issues in international commercial arbitration. Both courts interpret what is arguably the most important international agreement on commercial arbitration, the New York

Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The Supreme Court has ruled that the Convention does not preclude non-signatories from being bound by arbitration based on equitable estoppel in US arbitration law. In the Swiss decision, the binding nature of a non-signatory is based on its interference in the performance of the main contract of other parties. According to the established case law of the Swiss Federal Tribunal, this binding approach does not conflict with the New York Convention either.

K. Bälz: **Can a State Company be held liable for State Debt? Piercing of the Corporate Veil vs. attribution pursuant to Public International Law – Cour d'appel de Paris of 5 September 2019, No. 18/17592**

The question of whether the creditor of a foreign state can enforce against the assets of public authorities and state enterprises of that state is of significant practical importance, particularly in view of the increasing number of investment arbitrations. In a decision of 5 September 2019, the Paris Court of Appeal has confirmed that a creditor of the Libyan State can enforce an arbitral award against the assets of the Libyan Investment Authority (LIA), arguing that – although the LIA enjoys separate legal personality under Libyan law – it was in fact an organ *(émanation)* of the Libyan State, that was functionally integrated into the state apparatus without clearly separated assets of its own. This approach is based on public international law concepts of state liability and diverges from corporate law principles, according to which a shareholder cannot generally be held liable for the corporation's debts.

O.L. Knöfel: **Liability of Officials for Sovereign Acts (acta iure imperii) as a Challenge for EU and Austrian Private International Law**

The article reviews a decision of the Supreme Court of the Republic of Austria (Case 1 Ob 33/19p). The Court held that a civil action for compensation brought in Austria, by the victim of a downhill skiing accident, against a German school teacher on account of alleged negligence during a reconnaissance ride down an Austrian ski slope, does not constitute a "civil and commercial matter" under the Rome II Regulation, as it involves an *actum iure imperii* (Art. 1 cl. 1 Rome II Regulation). As a consequence, the Court applied German Law, relying on an

alleged customary conflicts rule (*lex officii* principle), according to which indemnity claims against officials who act on behalf of the State are inevitably and invariably governed by the law of the liable State. Finally, the Court held that an action brought directly against a foreign official in Austria is not barred by sec. 9 cl. 5 of the Austrian Act of State Liability *(Amtshaftungsgesetz)*. The Court's decision is clearly wrong as being at variance with many well-established principles of the conflict of laws in general and of cross-border State liability in particular.

E. Piovesani: **Italian Ex Lege Qualified Overriding Mandatory Provisions as a Response to the "COVID-19 Epidemiological Emergency"**

Art. 88-bis Decree-Law 18/2020 (converted, with modifications, by Law 27/2020) is headed "Reimbursement of Travel and Accommodation Contracts and Package Travel". This provision is only one of the several provisions adopted by the Italian legislator as a response to the so-called "COVID- 19 epidemiological emergency". What makes Art. 88-bis Decree-Law 18/2020 "special" is that its para. 13 qualifies the provisions contained in the same article as overriding mandatory provisions.

Chinese Private International Law

Chinese Private International Law

Edited by Xiaohong Liu and Zhengyi Zhang

Written with the assistance of a team of lecturers at the Shanghai University of Political Science and Law, this book is the leading reference on Chinese private international law in English. The chapters systematically cover the whole of Chinese private international law, not just questions likely to arise in commercial matters, but also in family, succession, cross-border insolvency, intellectual property, competition (antitrust), and environmental disputes. The chapters do

not merely cover the traditional conflict of law areas of jurisdiction, applicable law (choice of law), and enforcement. They also look into conflict of law questions arising in arbitration and assess China's involvement in the harmonisation of private international law globally and regionally within the Belt and Road Initiative. Similarly to the Japanese and Indonesian volumes in the Series, this book presents Chinese conflict of laws through a combination of common and civil law analytical techniques and perspectives, providing readers worldwide with a more profound and comprehensive understanding of Chinese private international law.

Xiaohong Liu *is Professor and President and* ***Zhengyi Zhang*** *is Associate Professor and Deputy Director of the International Affairs Office, both at Shanghai University of Political Science and Law, China.*

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Hague Academy of International Law: Last chance to register for the online Summer Courses 2021!

The Hague Academy of International Law is holding its Summer Courses on Private International Law for the first (and perhaps last) time online from **26 July to 13 August 2021**. Registration is open until Sunday 27 June 2021 at 23:59 The Hague time. More information is available here.

As you may remember, we announced in a previous post that the 2020 Summer Courses were postponed and that the only prior time that the courses were cancelled was World War II.

This year's general course will be delivered by NYU Professor **Linda Silberman** and is entitled ***The Counter-Revolution in Private International Law in the United States: From Standards to Rules***. The special courses will be given by José Antonio Moreno Rodríguez, Mary Keyes, Pietro Franzina (former editor of Conflictoflaws.net), Sylvain Bollée, Salim Moollan, Jean-Baptiste Racine and Robert Wai. The inaugural lecture will be delivered by Alexis Mourre, President of the International Court of Arbitration of the ICC. The poster is available here.

The holding of the Summer Courses in times of the Covid-19 pandemic attests to the perseverance of the Hague Academy, which has organised two live broadcasts per day to cater to people living in different time zones.

Please note that "no certificate of attendance will be delivered upon completion of the courses. Instead, each attendee will receive an electronic certificate of enrolment at the end of the session."

If you are interested in a more full-fledged experience, you may consider registering for the Winter Course, which appears to be an in-person course. Registration for the Winter Courses 2022 is open since 1 June 2021 and will end 31 July (scholarships) and 29 September 2021 (full fee). For more information,

click here.

Dickinson on European Private International Law after Brexit

Just as the Commission formally announced its refusal to give consent to the UK's accession to the Lugano Convention, Andrew Dickinson has provided a comprehensive overview on the state of Private International Law for civil and commercial matters in the UK and EU, which has just been published in the latest issue of *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* (IPRax 2021, p. 218).

The article sketches out this 'realignment of the planets' from three angles, starting with the legal framework in the UK, which will now be based on the Withdrawal Act 2018, several other statutes and multiple pieces of secondary legislation. The latter include the *Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations*, which entail a return to the rules previously applied only to non-EU defendants, and the *Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations*, which (by contrast) essentially carries over the Rome I and II Regulation. With regard to jurisdiction, the situation is of course complicated by some residual remains of the Brussels regime, some new provisions aiming to preserve certain jurisdictional advantages for consumers and employees, and the interplay with the Hague Choice of Court Convention, all of which the article also covers in detail. Interestingly, especially in the context of last week's news, Dickinson concludes the section on jurisdiction (on p. 218) as follows:

> *One might take comfort in the fact that there is nothing in the mechanisms and rules described above that is truly novel. In large part, the effect of the UK's withdrawal from the EU will be to extend to the province formerly occupied by the Brussels-Lugano regime the conflict of law rules for situations lacking an*

> *EU connection, with which many cross-border practitioners will be familiar. Some will welcome, for example, the increased role for the doctrine of forum non conveniens or the removal of fetters on the UK courts' ability to grant anti-suit injunctions. Others will see the transition to what is unquestionably a complex and piecemeal set of rules as a backward step, which nonetheless creates an opportunity to review, simplify and up- date the UK's private international law infrastructure.* ***The case for reform will grow if the UK's application to rejoin the 2007 Lugano Convention does not bear fruit.***

The text then goes on to describe the consequent changes in EU Private International Law and the effects of these changes on third states with whom the EU has concluded international agreements.

The article links up nicely with Paul Beaumont's article on The Way Ahead for UK Private International Law After Brexit, which has just been published in this year's first issue of the Journal of Private International Law and which considers the steps the UK should take to remain an effective member of international institutions such as the Hague Conference on Private International Law. Both articles can also be read in conjunction with Reid Mortensen's contribution on Brexit and Private International Law in the Commonwealth and Trevor Hartley's article on Arbitration and the Brussels I Regulation – Before and After Brexit, which appear in the same issue.