

COMMENTARIES ON PRIVATE INTERNATIONAL LAW THE PILIG NEWSLETTER

Co-Chairs' Notes

We are pleased to present the newest Commentaries on Private International Law (Vol. 5, Issue 1), the newsletter of the American Society of International Law (ASIL) Private International Law Interest Group (PILIG). The primary purpose of our newsletter is to communicate global news on PIL. Accordingly, the newsletter attempts to transmit information on new developments on PIL rather than provide substantive analysis, in a non-exclusive manner, with a view of providing specific and concise information that our readers can use in their daily work. These updates on 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.

This issue has three sections. Section one contains Highlights on cultural heritage protection and applicable law, and recognition and enforcement of foreign judgments in China. Section two reports on the recent developments on PIL in Africa, Asia, Europe, North America, Oceania, and South America. Section Three overviews the global development.

We express our sincere appreciation to our 2022 editorial team, which consists of Charles Mak (University of Glasgow), Christos Liakis (National & Kapodistrian University of Athens), Cristian Gimenez Corte (Universidad Nacional del Litoral, Santa Fe, Argentina), Hongchuan Zhang-Krogman (Allen & Overy), Juan Pablo Gómez-Moreno (Adell & Merizalde), Lamine Balde (Shanghai Jiao Tong University), Milana Karayanidi (Orrick Herrington & Sutcliffe LLP), Naimeh Masumy (Swiss International Law School), Patricia Snell (Covington & Burling LLP), Yao-Ming Hsu (National Cheng-Chi University) (listed in the given name alphabetic order).

We thank Professor Charles T. Kotuby Jr. to contribute a Highlight on the recent Supreme Court of the U.S. case, *Cassirer v. Thyssen-Bornemisza Collection Foundation* (S. Ct. 2022).

The chief editors are PILIG Co-Chairs Carrie Shu Shang (California State Polytechnic University, Pomona) and Jeanne Huang (University of Sydney Law School, Australia).

We are grateful for the proof-reading and research work conducted by the University of Sydney Law School research assistants: Hao Yang Joshua Mok, Qirui Chi, and Ashna Amit Govil.

PILIG is constantly looking forward to your suggestions to improve our services to our members. If you would like to contribute to the Newsletter, to propose an event idea, or bring our attention to an important private international law development in your region, please contact us at Carrie Shu Shang sshang@cupp.edu and Jie (Jeanne) Huang Jeanne.huang@sydney.edu.au.

We hope you will enjoy reading this issue of Newsletter.



Dispute Resolution Highlight

Litigation against Foreign Sovereign Entities in U.S. Courts: Which Law should be Applied?

Charles T. Kotuby Jr.¹

On April 21, 2022, the Supreme Court decided *Cassirer v. Thyssen-Bornemisza Collection Foundation* (S. Ct. 2022). This case asked a basic question about litigation brought by private parties against foreign sovereign entities in U.S. courts — which law governs the case?

Like many recent cases arising under the Foreign Sovereign Immunities Act, this case concerned the recovery of World War II-era stolen art. Paul Cassirer was a German Jew who owned an art gallery and Picasso's *Rue Saint-Honoré in the Afternoon, Effect of Rain*. Paul's heir, Lilly Cassirer, inherited the painting and hung it in her Berlin home. In 1939, she gave the paintings to the Nazis in return for an exit visa. She later came to the United States with her grandson, Claude, the plaintiff in this case.

The Cassirer family initially brought proceedings in the United States Court of Restitution Appeals under the assumption that the painting had been lost or destroyed — but it wasn't destroyed. The Thyssen-Bornemisza Collection Foundation (TBC) — a public foundation and an agency or instrumentality of the Kingdom of Spain — purchased it in 1993. After TBC refused to return it to the Cassirer's, Claude filed suit against Spain and TBC in 2005. Spain was voluntarily dismissed as a party in 2011, and after his death, Claude's heirs continued the case.

The Courts determined in 2011 that TBC was not immune from suit because the painting had been taken in violation of international law. The case then proceeded to trial on the merits. The plaintiffs argued that California law should govern because the case was being heard in a California federal court but did not arise under federal law. TBC, on the other hand, argued that Spanish law should govern; in its view, federal common law provided the conflict of laws rule that should be used to decide what law substantively governed the claim, and that under those rules, Spanish law governed.

The district court judge sided with TBC and applied Spanish law. TBC ultimately prevailed at trial, and the judgment was

affirmed on appeal. The plaintiffs asked the Supreme Court to review the question whether federal common law should govern the conflicts analysis, as the Ninth Circuit held, or whether the court should instead have applied California's conflict of laws rules, which would have been the result in the Second, Fifth, Sixth and D.C. Circuits.

From the standpoint of the legislative text, the answer was relatively straightforward. The Foreign Sovereign Immunities Act ("FSIA") provides that in any case where the foreign sovereign defendant is not immune from jurisdiction, "*the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.*" 28 U.S.C. § 1606. Put slightly differently by the Supreme Court in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983), "[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances."

So, if TBC had not been an instrumentality of the Spanish state, which the FSIA tells us to assume once the immunity hurdle is cleared, California conflict of laws rules should have governed. This is precisely what Justice Kagan wrote for a unanimous Court. In light of the clear mandate of § 1606, the courts could not apply a special federal conflicts of law rule to a foreign sovereign defendant different from the rule it would have applied to a private defendant. Once immunity is decided against the defendant, TBC became a "*a private individual under like circumstances*" under the FSIA, so California conflicts principles should have governed the case.

So, when can a federal court apply federal common law? To be sure, this body of law has been waning in popularity since *Klaxon Co. v. Stentor Electric Manufacturing Co.* in 1941. As the United States pointed out in its amicus brief supporting the Petitioners in *Cassirer*, "cases in which judicial creation of a special federal rule would be justified" are "few and restricted," *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) and "must be necessary to protect uniquely federal interests." *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

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This narrow standard, of course, begs the question: if not in a case involving the liability of a foreign sovereign entity regarding war-looted art, when is a “uniquely federal interest” present? If the answer to the statutory question presented in *Cassirer* was simple, the answer to this question is a bit more nuanced.

The United States noted in its amicus brief that “there could be instances” where the application of state law would be hostile to federal interests thereby requiring federal law to step-in. U.S. Br. at 22. This could happen, for instance, where a state seeks to restricts public entities from doing business with specific foreign countries, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-388 (2000), or where a state overreaches and seeks to apply its own law to “foreign controversies on slight connections.” *Lauritzen v. Larsen*, 345 U.S. 571, 590-591 (1953). These are all situations where federal courts should “[r]ely on rules that limit the scope and reach of state law in particular instances, rather than adopting a federal choice-of-law rule across the board.” U.S. Br. at 22. Indeed, there remain cases where federal common law may supplant the applicable state law and provide the rule of decision. A defendant state-owned entity’s juridical status separate from its constituent sovereign cannot be determined by that foreign state’s own law; here “principles of equity common to international law and federal common law” determined the question. *National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983). Similarly, federal common law sometimes governs whether a non-signatory to an arbitration agreement can be bound to arbitrate under the New York Convention; “proceeding otherwise would introduce a degree of parochialism and uncertainty into international arbitration that would subvert the goal of simplifying and unifying international arbitration law.” *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 96-98 (2d Cir. 1999),

The *Cassirer* case, for sure, did not require an “across the board” federal solution to protect national interests or ensure a non-parochial outcome. Subjecting a non-immune foreign state entity to state law has been consistent practice outside the Ninth Circuit, “yet the Government says it knows of no case in which that practice has created foreign relations concerns.” Slip Op. at 8. This, along with the clear statutory directive in the FSIA, was enough to decide the case.

So the *Cassirer* family’s case lives on; the judgment in favor of TBC will be vacated and the case remanded for further proceedings. Of course, the lower courts, applying California’s conflict of laws rules, could again conclude that Spanish law should govern, or it could decide that California law should govern in which case a new trial may be necessary. There is unfortunately some litigation remaining, in the end, before the ownership of Pissarro’s *Rue Saint-Honoré in the Afternoon, Effect of Rain* is finally decided.

Latest Developments on the Recognition and Enforcement of Foreign Monetary Judgments in China

Jie (Jeanne) Huang²

The starting point for the recognition and enforcement of foreign judgments in China is the Chinese Civil Procedure Law (hereinafter “CPL”).[1] According to Article 289 of the CPL, judgment recognition and enforcement (hereinafter “JRE”) can take place either under a treaty or according to the principle of reciprocity.

The detailed procedural requirements for the recognition and enforcement of foreign judgments in China are provided in the Supreme People’s Court Judicial Interpretation of the CPL (hereinafter “Judicial Interpretations of CPL”), which was recently amended on March 22, 2022.[2] The Judicial Interpretations of the CPL stipulates that there are two steps for judgment recognition and enforcement: step one is for the foreign judgment creditor to seek recognition of the foreign judgment; step two is enforcement. After a foreign judgment is recognized, it can be enforced as a domestic Chinese judgment pursuant to Part 3 (Execution Procedure) of the CPL.[3]

Despite this overarching statutory framework, various issues awaited further clarification. This included the criteria for determining whether reciprocity exists between China and a foreign country, the meaning of a final and binding foreign decision, the proper characterization of a foreign decision (i.e., whether it should be considered as a judgment or ruling) and the scope of information that should be provided by a judgment

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debtor in its application for the recognition and enforcement of a foreign judgment. All these issues have now been addressed in the Minutes of the National Court's Symposium on Foreign-related Commercial and Maritime Trials (hereinafter "Minutes") [4] issued by the Supreme People's Court on January 24, 2022. These Minutes are not judicial interpretations and cannot be cited in Chinese court judgments; however, they are crucial for judges and legal professionals and would assist them to deal with cross-border commercial matters involving China or Chinese parties. Importantly, the Minutes addresses two highly contentious issues regarding JRE in China.

1. *De Jure* Reciprocity

Since *Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd.* [5] and *Liu Li v. Tao Li and Tong Wu* [6], Chinese courts have started to depart from their historical position and begun to recognize and enforce foreign judgments according to reciprocity. However, the Minutes is the first instance where China's official position on *de jure* reciprocity is articulated. A people's court may determine that *de jure* reciprocity exists between China and a foreign country when one of the following circumstances occurs: [7]

- a) According to the laws of a foreign country, civil and commercial judgments made by people's courts can be recognized and enforced by the courts of that foreign country;
- b) China has reached a mutually beneficial understanding or consensus with the foreign country; or
- c) The foreign country has made a reciprocal commitment to China through diplomatic channels or China has made a reciprocal commitment to the foreign country through diplomatic channels, and there is no evidence to prove that the foreign country has refused to recognize and enforce judgments issued by people's courts on the grounds that there is no reciprocity.

This may be illustrated in the context of Australia and China. Similar to other common law countries, Australia allows for the recognition and enforcement of Chinese judgments at common law. However, in 2006, the Supreme People's Court issued the *Letter of Reply of the Supreme People's Court on*

Request for Instructions Re Application of DNT France Power Engine Co., Ltd. for Recognition and Enforcement of Australian Court Judgment, which held that there was no reciprocity or bilateral treaty relating to the recognition and enforcement of civil and commercial judgments between Australia and China. [8] Thus far, no judgment of an Australian court has ever been recognized and enforced in China. In *Liu v Ma & anor* [2017] VSC 810, the Supreme Court of Victoria (Australia) recognized and enforced a Chinese monetary judgment. In *Bao v Qu Tian (No.2)* [2020] NSWSC 588, the Supreme Court of NSW (Australia) recognized and enforced another Chinese monetary judgment. According to Article 44 of the Minutes, a people's court can hold that reciprocity exists between China and a foreign country if Chinese judgments may be recognized and enforced according to the law of that foreign country. Therefore, in my view, Chinese people's courts should consider that reciprocity for the recognition and enforcement of judgment now exists between China and Australia in both *de jure* and *de facto* sense.

Notably, the existence of reciprocity is determined on a case by case basis. [9] In cases where an Intermediate People's Court decides to recognize and enforce a foreign judgment based on reciprocity, it would submit its opinion to the higher people's court in the same jurisdiction for review before making a ruling of the existence of reciprocity; if the higher people's court agrees with the opinion, it would submit its opinion to the Supreme People's Court for review. [10] The Intermediate People's Court can only make a ruling after the Supreme People's Court provides a response. [11] The reporting system is similar to the one used for refusing the recognition and enforcement of arbitral awards under the 1958 New York Convention. However, the arbitration reporting system is based on reports of instances where recognition and enforcement of arbitral awards have been refused. On the other hand, the JRE reporting system is based on reports of instances where there has been recognition and enforcement of Chinese judgements by foreign courts. This demonstrates a cautious attitude taken by the Supreme People's Court to ensure a consistent approach to *de jure* reciprocity is adopted by lower courts. Notably, even a decade after the arbitration reporting system was established — during which time the system has been constantly improved upon — it is still being criticized for being opaque and time-



consuming. The JRE reporting system will likely face similar criticism because Chinese law does not stipulate a time limit for the Supreme People's Court to make a decision and parties cannot make submissions to support their positions in the reporting system, which will likely cause delay and uncertainty in judgment recognition and enforcement proceedings.

2. Defense against JRE

According to the Minutes, a people's court shall, after reviewing a foreign judgment in accordance with the principle of reciprocity, reject the recognition and enforcement of the judgment if one of the following five circumstances exist:

a) According to the laws of the People's Republic of China, the judgment-rendering court has no jurisdiction over the case.[12]

Notably, jurisdictional grounds under Chinese law may not be the same as the foreign judgment-rendering court. In addition, if a foreign judgment is obtained in a default proceeding and the people's court finds that a valid arbitration agreement exists between the parties and the judgment debtor has not abandon its rights under the arbitration agreement, the people's court will not recognize and enforcement the foreign judgment.[13]

b) The respondent has not been lawfully summoned, or even though it has been lawfully summoned, it has not been given a reasonable opportunity to present its case, or the parties who are with limited litigation capacity have not been properly represented.[14]

This provision addresses natural justice. The Minutes do not clarify whether a Chinese court would apply Chinese law or the law of the judgment-rendering court on this issue. Breaches of natural justice based on procedural irregularity should be determined based on fundamental principles of justice and not according to a formalist interpretation of the law, irrespective of the applicable law.

c) The judgment is obtained by fraud.[15]

The Chinese CPL does not stipulate fraud as an independent ground to reject JRE. Chinese courts used to combine fraud with the natural justice or public policy exception. The Minutes deem fraud as an independent ground for rejecting JRE. In many common law countries, fraud can be divided into two

types: extrinsic fraud, which is based to matters arising out of evidence discovered after the foreign judgment was entered, and intrinsic fraud, which is based on matters raised, considered and determined in the foreign court, but is argued to have been inadequately dealt with by that foreign court. It is unclear which types of fraud may be considered by Chinese courts.

d) The people's court has made a judgment on the same dispute, or has recognized and enforced the judgment or arbitral award made in a third country on the same dispute.[16]

Notably, Article 531 of the Judicial Interpretations of the CPL provides that where both a Chinese court and a foreign court has jurisdiction in a dispute, and one party commences a lawsuit in a foreign country, but the other party also commences a case in China, the people's court can accept the case regardless of whether the foreign court has already accepted it. After the people's court renders a judgment, the foreign judgment on the same dispute will not be recognized and enforced in China.[17] However, the Minutes do not clarify whether a Chinese court should recognize and enforce a foreign judgment if the foreign court renders the judgment earlier than the Chinese court. It is unlikely that a Chinese court would recognize and enforce a foreign judgment even if it is rendered earlier than the Chinese court. This is because Article 531 of the Judicial Interpretations of the CPL may be extended to mean that the foreign court has no jurisdiction to hear the case.

e) Foreign judgments that violate the fundamental principles of the laws of the People's Republic of China or national sovereignty, security, and social and public interests shall not be recognized and enforced. [18]

This provision relates to public policy and should be subject to a high threshold. A critical issue is whether judgment debtors in China may invoke the *Chinese Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures* (hereinafter "Counteracting Rules")[19] to reject JRE. The Counteracting Rules were formulated in accordance with the China National Security Law to address the impact of unjustified extra-territorial



application of foreign legislation and other measures on China. Article 9 of the Counteracting Rules provides that “where a foreign judgment or ruling, made in accordance with the foreign legislation within the scope of the blocking order, causes losses to a citizen, legal person or other organization of China, who may, in accordance with the law, institute legal proceedings in a people’s court, and claim for compensation by the person who benefits from the said judgment or ruling.”

Notably, in 2021 when defending the recognition and enforcement of an arbitration award, a Chinese enterprise invoked the Counteracting Rules, arguing that its business is to provide liquefied gas pipeline service which can directly impact on Chinese society and people’s livelihood.[20] The award was issued by the Singapore International Arbitration Center and the presiding arbitrator was from Essex Court Chambers which had been sanctioned by the Chinese government. Therefore, it was submitted that the recognition and enforcement of the award in China would violate the Counteracting Rules and China’s public policy. This argument was rejected by the Shanghai Financial Court which held that the applicant did not prove that the arbitration award was made according to foreign laws or measures which were blocked according to the Counter Measures.[21] Furthermore, the Court held that China’s sanction was on Essex Court Chambers rather than the presiding arbitrator in this case.[22]

Therefore, the Minutes should be interpreted in accordance with the Counteracting Rules: if a foreign judgment is made according to a foreign law or measure which is within the scope of the blocking order issued under the Counteracting Rules, the relevant foreign judgment will not be recognized and enforced in China.

[1] Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., April 9, 1991, most recently amended on December 24, 2021, effective January 1, 2022) 2022(1) Standing Comm. Nat’l People’s Cong. Gaz. 96 (China).

[2] Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshi Susong Fa De Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Judicial Interpretations

of the Civil Procedure Law] (Promulgated by the Judicial Comm. Sup. People’s Ct., December 18, 2014, most recently amended and adopted March 22, 2022, effective April 10, 2022) Sup. People’s Ct. Gaz., April 2, 2022, <https://www.court.gov.cn/fabu-xiangqing-353651.html> (China); the judicial interpretations formulated and promulgated by the SPC are legally effective and can be cited as the basis of a judgment.

[3] *Id.* article 546.

[4] Quanguo Fayuan Shewai Shangshi Haishi Shenpan Gongzuo zuotanhui Huiyi Jiyao (全国法院涉外商事海事审判工作座谈会会议纪要) [Minutes of the National Court’s Symposium on Foreign-related Commercial and Maritime Trials] (Issued by Supreme People’s Court, 24 January 2022)

<http://cicc.court.gov.cn/html/1/218/62/409/2172.html>.

[5] Kema Jituan Youxian Gongsi Yu Jiangsusheng Fangzhi Gongye Jituan Jinchukou Youxian Gongsi (科玛集团有限公司与江苏省纺织工业(集团)进出口有限公司) [Kolmar Grp. AG v. Jiangsu Textile Industry (Group) Import & Export Co] Su-01 Xie Wai Ren No. 4 (Jiangsu Interm. People’s Ct. 2016) (China).

[6] Liuli Yu Taoli, Tongwu (刘利与陶莉, 童武) [Liu Li v. Tao Li et al.,] Yue Wuhan Zhong Min Shang Wai Chu Zi No. 00026 (Hubei Interm. People’s Ct. 2015) (China).

[7] Minutes, article 44.

[8] Zuigao Renmin Fayuan Guanyu Shenqingren Fulaxi Dongli Fadongji Youxian Gongsi Shenqing Chengren He Zhixing Aodaliya Fayuan Panjue Yian De Qingshi De Fuhuan (最高人民法院关于申请人弗拉西动力发动机有限公司申请承认和执行澳大利亚法院判决一案的请示的复函) [Letter of Reply of the Supreme People’s Court on Request for Instructions Re Application of DNT France Power Engine Co., Ltd. for Recognition and Enforcement of Australian Court Judgment] Min Si Ta Zi No. 45 (2006) (China).

[9] Minutes, article 44.

[10] *Id.* article 49.

[11] *Id.*

[12] *Id.* article 46.

[13] *Id.* article 47.

[14] *Id.* article 46.

[15] *Id.*

[16] *Id.*

[17] Judicial Interpretations of the Civil Procedure Law, article 531.

[18] Minutes, article 46.

[19] Zuduan Waiguo Falv Yu Cuoshi Budang Yuwai Shiyong Banfa (阻断外国法律与措施不当域外适用办法) [Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures] (promulgated by the Ministry of Commerce, January 9, 2021, effective January 9, 2021) <http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml>.



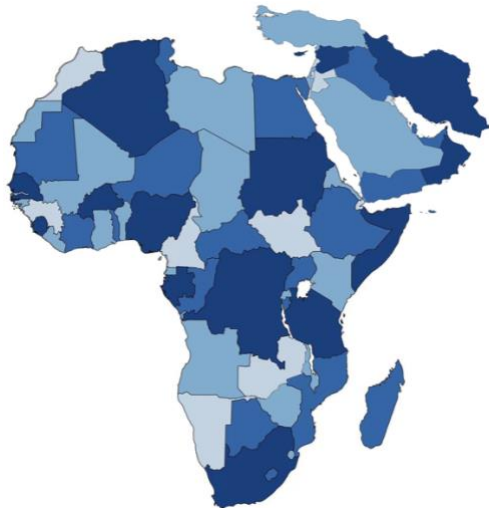
[20] Maigeli Yinhang Youxian Gongsi Yu Wanda Konggu Jituan (麦格理银行有限公司与万达控股集团) [Macquarie Bank Limited v Wanda Holding Group Co., Ltd] Hu 74 Xie Wai Ren No. 1 (Shanghai Financial Court 2021) (China); involving the recognition and enforcement of Singapore International Arbitration Center, Award No. 135 of the year 2020.

[21] *Id.*

[22] *Id.*

AFRICA & THE MIDDLE EAST

—Editors: Lamine Balde and Naimeh Masumy



Private International Law (“PIL”) continues to have relevance in Africa and the Middle East. Cabo Verde, the Democratic Republic of the Congo, and Morocco are all committed to supporting and implementing the African Continental Free Trade Area, heralding an increased need for PIL rules in the future. Likewise, the Democratic Republic of the Congo joined the East African Community to enhance and ease the movement of capital, goods, services and people with its East African neighbors. Furthermore, Saudi Arabia’s accession to The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (the Hague Apostille Convention) is indicative of the treaty’s continued relevance and importance in shortening and simplifying the legalization procedure. On a national level, the enactment of a personal status law for non-Muslim foreigners in Abu Dhabi demonstrates the United Arab Emirates’ efforts to provide a flexible and advanced legal and judicial solution to matters relating to the personal status of non-Muslim foreign nationals

in the emirate. In Qatar, the enactment of both a mediation law and an investment and trade court law illustrate the country’s desire to promote alternative dispute resolution and provide a friendly business environment for foreign investment. Finally, arbitration remains the most effective dispute resolution method for private economic actors, despite the judicial control over arbitration proceedings and arbitration awards.

International Conventions

Cabo Verde, Congo and Morocco: Cabo Verde, the Democratic Republic of the Congo, and Morocco ratify the agreement establishing the African Continental Free Trade Area

Cabo Verde, the Democratic Republic of the Congo, and Morocco formalized their ratification of the agreement establishing the African Continental Free Trade Area by submitting their instruments of ratification to the African Union Commission, the designated depositary for this purpose. As of April 27, 2022, Morocco is the 43rd country to deposit the instruments of ratification.

For further information see: [https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA 1.pdf](https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT%20ESTABLISHING%20THE%20AFRICAN%20CONTINENTAL%20FREE%20TRADE%20AREA%201.pdf)

Congo: The Democratic Republic of the Congo formally joins the East African Community

On April 8, 2022, the Democratic Republic of the Congo (DRC) formally joined the East African Community (EAC) after signing the Treaty of Accession to the regional bloc. The DRC now has up to six months to complete the requisite domestic and constitutional ratification processes and deposit the instruments of ratification with the Secretary General of the EAC.

For further information see: <https://www.eac.int/press-releases/2411-the-democratic-republic-of-the-congo-formally-joins-eac-after-signing-of-the-treaty-of-accession-to-the-community>

Saudi Arabia: Accession to the Hague Apostille Convention



On April 8, 2022, the Kingdom of Saudi Arabia deposited its instrument of accession to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. The Convention will enter into force for Saudi Arabia on December 7, 2022, making it the 122nd Contracting State to the Convention.

The full text of the announcement may be found here: <https://www.hcch.net/en/news-archive/details/?varevent=857>

National Legislation

United Arab Emirates: The Emirate of Abu Dhabi enacts a Personal Status Law for Non-Muslim Foreigners and implements its court

On November 7, 2021, the United Arab Emirates President issued Law No. 14 of 2021 concerning personal status for non-Muslim foreigners in the Emirate of Abu Dhabi (“the Personal Status Law”), which is applicable to non-Muslim foreigners based in Abu Dhabi in matters of civil marriage, divorce, joint custody of children and inheritance and Wills. Under the Personal Status Law, a specialized court has been established to hear and resolve family and inheritance matters concerning non-Muslims with a domicile, place of residence, or workplace in the Emirate of Abu Dhabi.

The full text to the Personal Status Law may be found here: <https://www.adjd.gov.ae/AR/Documents/non-muslims/Abu%20Dhabi%20Law%20No.%20142021%20On%20Personal%20Status%20for%20Non-Muslim%20Foreigners%20in%20the%20Emirate%20of%20Abu%20Dhabi.pdf>

For more information on the court see: <https://www.adjd.gov.ae/AR/Documents/non-muslims/regulation%208%202022%20family%20law.pdf>

Qatar: Enactment of a Mediation Law and an Investment and Trade Court Law

On October 18, 2021, Qatar enacted Law No. 20/2021 on Mediation for the Settlement of Civil and Commercial Disputes and Law No. 21/2021 on the establishment of the Investment and Commerce Court. The Mediation Law provides

comprehensive procedural and substantive rules on the mediation process, including the mediation procedures and methods, the stay of proceedings rules and the settlement agreement procedures. The Investment and Commerce Court Law sets out, inter alia, a new court and its primary and appellate circuits with expedited periods for submissions and short periods for appeal submissions, a “Lawsuit Management Office” with the power to require parties to file all documents in support of their claims or defenses at the time of submission, and an electronic system for the filing of lawsuits, requests for orders on petitions, interim orders, payment orders and other claims.

The full text to the Mediation Law may be found here: <https://www.almeezan.qa/LawView.aspx?opt&LawID=8759&language=ar>

The full text to the Investment and Commerce Court Law be found here: <https://almeezan.qa/LawView.aspx?opt&LawID=8760&language=ar>

National Case Law

South Africa: The Supreme Court of Appeal clarifies the powers of a court and an arbitral tribunal to adjudicate a dispute concerning the validity of an arbitration clause

On December 1, 2021, the South African Supreme Court of Appeal, in *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO*, dismissed an appeal from the full court of the Free State Division of the High Court (the full court). Canton Trading had approached the full court refusing to submit to arbitration on the grounds that the agreement containing the arbitration clause had never been signed by either party and was therefore unenforceable. Its claim was dismissed as the full court did not consider it necessary for the agreement to be signed for it to be valid and binding and ordered Canton to submit to arbitration. On appeal, the South African Supreme Court held that parties may agree to refer a dispute regarding the validity of an arbitration agreement to arbitration, even if the arbitration clause is part of the disputed agreement. The court must interpret the arbitration agreement, based on the doctrines of separability and competence-competence, to determine whether the parties intended to submit such a dispute to arbitration. However, if the dispute



concerned the very existence of an arbitration agreement, this matter cannot be submitted to arbitration but rather to the court.

The full text of the judgment can be found here: <https://www.supremecourtofappeal.org.za/index.php/component/jdownloads/send/35-judgments-2021/3703-canton-trading-17-pty-ltd-t-a-cube-architects-v-fanti-bekker-hattingh-n-o-479-2020-2021-zasca-163-1-december-2021?Itemid=0>

Zimbabwe: The High Court set aside an arbitral award terminating arbitration proceedings for failure to communicate a statement of claim

The case arose from a commercial agreement containing an arbitration clause between the applicant and the respondent. Following a dispute, the parties approached an arbitrator, who convened pre-arbitration proceedings at which the parties agreed on the arbitration process. The applicant agreed, inter alia, to file its statement of claim by July 13, 2018, but failed to abide by the agreed timeline of the arbitration process, leading the respondent to request and obtain from the arbitrator the termination of the proceedings. On January 12, 2022, the High Court of Zimbabwe, following referral by the applicant for breach of the audi alteram partem rule (among other things), set aside the arbitral award on the basis that the failure of an applicant to file a statement of claim placed an onus on the arbitral tribunal to issue an order requiring the applicant to demonstrate its reasons for its failure to timely file its statement of claim.

The full text of the judgment can be found here: <https://media.zimlil.org/files/judgments/zwhhc/2022/28/2022-zwhhc-28.pdf>

Namibia: The High Court ruled that same-sex marriages conducted outside the country could not be legally recognised

On January 20, 2022, the Namibian High Court, in *Matsobane Daniel Digashu and Others v Government of the Republic of Namibia and Others*, ruled that it could not require marriage between two same-sex couples conducted outside of the country to be granted legal recognition. The couples, married in South Africa and Germany, could not obtain work and residence permits for their non-Namibian partners and therefore filed a lawsuit against Namibia's non-recognition of same-sex marriages. The High Court held that it was bound by a 2001 Supreme Court ruling that domestic law does not recognize same-sex relationships.

The full text of the judgment can be found here: <https://namiblii.org/na/judgment/high-court-main-division/2022/11>

Nigeria: The Court of Appeal declines to uphold an exclusive foreign choice of court agreement

On November 12, 2021, the Nigerian Court of Appeal, in *BUPA Insurance v Chakraverti & Anor*, dismissed an appeal from the High Court of Cross River State (High Court). The respondents had instituted an action against the appellant as defendant in the lower court, claiming, among other things, declaratory reliefs and damages for negligence and breach of contract. In response, the Appellant requested an order to stay the proceeding on the ground that the trial arose from a contract containing a clause stating that English law and English courts have exclusive jurisdiction to hear disputes, but the High Court dismissed the application. On appeal, the Court of Appeal dismissed the Appellant's claim and upheld the first instance judgment.

For more information see: <https://lawpavilion.com/blog/application-of-a-foreign-jurisdiction-clause-in-the-grant-of-an-application-for-stay-of-proceedings/>

For an analysis see: <https://conflictoflaws.net/2021/the-nigerian-court-of-appeal-declines-to-enforce-an-exclusive-english-choice-of-court-agreement/>

Egypt: The Court of Cassation held that Egyptian courts have exclusive jurisdiction over disputes arising from technology transfer agreements

On November 17, 2021, the Egyptian Court of Cassation, in *The Swifthold Foundation v. Fast International Trading Group and Sheikh Fahad Ahmed Bin Mohammed Al-Thani*, ruled that disputes arising from technology transfer agreements cannot be resolved in foreign-seated arbitration proceedings and that any clause purporting to refer such disputes to foreign arbitration is null and void. The Court was to determine the governing law and dispute resolution provisions of a technology transfer contract relating to the import of medical device know-how into Egypt. The contract contained an agreement to resolve disputes by arbitration in Stockholm under the Stockholm Chamber of Commerce rules. But the court held that Article 87 of the Egyptian Commercial Code was a mandatory rule for disputes arising from a technology transfer agreement, that the parties' agreement to arbitrate outside Egypt was invalid, and that Egyptian courts had jurisdiction.



For more information see: <https://www.klgates.com/Recent-Judgment-Highlights-Potential-Pitfalls-in-Technology-Transfer-Agreements-in-Egypt-3-18-2022>

Association and Events

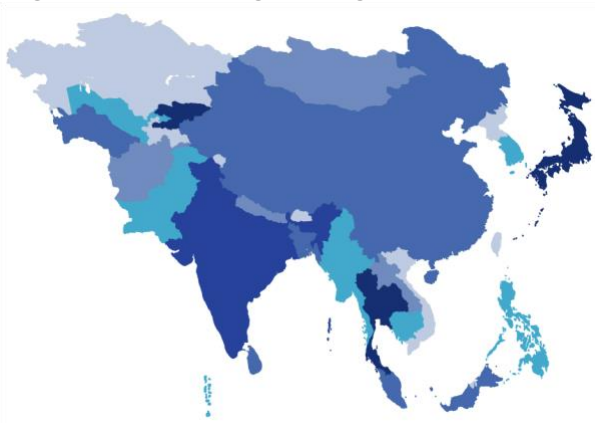
The International Chamber of Commerce hosts the 6th African Conference on International Arbitration

The International Court of Arbitration (ICC) hosted its 6th ICC Africa Conference on International Arbitration from 1st to 3rd June. The conference is a key forum for keeping abreast of the latest global and regional developments relating to international commercial arbitration.

For more information see: <https://2go.iccwbo.org/icc-africa-conference-on-international-arbitration.html>

ASIA

—Editors: Jeanne Huang, Milana Karayanidi, Yao-Ming Hsu, and Hongchuan Zhang-Krogman



Private International Law continues to develop vibrantly in Asia. In the first half of 2022, China and its Macao Special Administrative Region, Vietnam, Singapore, and Malaysia have all promoted recognition and enforcement of foreign judgments or arbitration awards. Singapore, a major center of international arbitration in the Asia-Pacific region, amended its laws to permit the use of conditional fee agreements in certain types of disputes, including in international arbitration. States have also made significant efforts to develop digital trade and protect personal data. For example, Thailand joined several other South-east Asian states in enacting a personal data

protection law. Both the Republic of Korea and China applied to join the Digital Economic Partnership Agreement.

International Conventions

Kyrgyzstan: Kyrgyzstan acceded to the Cape Town Convention and Aircraft Protocol

In May 2021, Kyrgyzstan acceded to the Cape Town Convention and Aircraft Protocol with UNIDROIT, which entered into force for Kyrgyzstan on September 1, 2021.

The official news report can be found at <https://www.unidroit.org/cape-town-convention-and-aircraft-protocol-accession-by-the-kyrgyz-republic/>.

The Republic of Korea: government applied for the Digital Economic Partnership Agreement (DEPA)

On September 13, 2021, the Korean Office of the Minister for Trade at the Ministry of Trade, Industry and Energy officially notified New Zealand, the Depositary of the Digital Economic Partnership Agreement (DEPA), of Korea's intent to join the Agreement.

DEPA was concluded by Singapore, Chile, and New Zealand in June 2020 and became effective in January 2021. It covers topics such as trade facilitation, digital trade, new technology, innovation and digital economy, and cooperation of small and mid-size enterprises.

On January 27, 2022, the Korean chief delegate, met with his counterparts from Singapore, New Zealand and Chile at their first Accession Working Group meeting to discuss Seoul's membership.

The official news report can be found at http://english.motie.go.kr/en/pc/pressreleases/bbs/bbsView.do?bbs_cd_n=2&bbs_seq_n=870 and <http://www.koreaherald.com/view.php?ud=20220127000191>.

China: government applied for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership membership

On September 16, 2021, China formally submitted a request to accede to the Comprehensive and Progressive Agreement for



Trans-Pacific Partnership (CPTPP). The CPTPP is a free trade agreement signed in 2018 between Australia, Canada, Japan, Mexico, New Zealand, Singapore, Brunei Darussalam, Chile, Malaysia, Peru and Vietnam.

The official news report can be found at http://www.gov.cn/xinwen/2021-09/16/content_5637879.htm.

China: government applied for the Digital Economy Partnership Agreement

On November 1, 2021, China formally submitted a request to accede to the Digital Economy Partnership Agreement (DEPA).

The official news report can be found at http://www.gov.cn/xinwen/2021-11/06/content_5649528.htm.

Kazakhstan: government ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation

With the deposit of the instrument of ratification at the UN Headquarters in New York, Kazakhstan becomes the tenth State Party to the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the "Singapore Convention on Mediation". The ratification by Kazakhstan was effected on May 23, 2022 and the Convention will enter into force for Kazakhstan on November 23, 2022.

For more information, see https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

National Legislation

China: amended the China Civil Procedure Law and related Judicial Interpretation

The Chinese Civil Procedure Law was amended on December 24, 2021, and the revised law came into force on January 1, 2022. 7 new articles have been added and 26 articles have been amended focusing on five key areas: judicial mediation, small claims procedure, sole-judge trial, online litigation rules, and

the starting time to calculate the statute of limitation for executing a judgment.

The full text of the amendment can be found here <https://www.court.gov.cn/zixun-xiangqing-353721.html>.

The China Supreme People's Court's Judicial Interpretation to the Chinese Civil Procedure Law was also amended on March 22, 2022, and the revised Judicial Interpretation became effective on April 10, 2022.

The full text of the amendment can be found here <https://www.court.gov.cn/fabu-xiangqing-353651.html>.

China: Minutes of the National Court's Symposium on Foreign-related Commercial and Maritime Trials

The China Supreme People's Court published the *Minutes of the National Court's Symposium on Foreign-related Commercial and Maritime Trials* (the *Minutes*) on December 31, 2021. The *Minutes* are not judicial interpretations and cannot be cited as the basis of a judgment; instead, they serve as guidelines for judges to address contentious issues in foreign-related commercial and maritime disputes. It has 111 articles, divided into three parts: (1) Foreign-related commercial affairs; (2) Foreign-related maritime affairs; (3) Arbitration judicial review.

The full text of the *Minutes* can be found here: <https://cicc.court.gov.cn/html/1/218/62/409/2172.html>.

Mainland China and Macao Special Administrative Region: Arrangement on Mutual Assistance in Preservation in Arbitral Proceedings by the Courts of the Mainland and of the Macao Special Administrative Region

On February 25, 2022, the Supreme People's Court of the People's Republic of China and the Macao Special Administrative Region signed the *Arrangement on Mutual Assistance in Preservation in Arbitral Proceedings by the Courts of the Mainland and of the Macao Special Administrative Region* (the *Preservation Arrangement*) (Fa Shi [2022] No.7). The *Preservation Arrangement* provided clarifications on (1) the applicable types of preservation; (2) the applicable arbitral proceedings; and (3) stages of the application for preservation. Together with the *Arrangement on Mutual Recognition and Enforcement of Arbitration Awards Between the Mainland and Macau Special*



Administrative Region adopted in 2007 (Fa Shi [2007] No.17), which does not cover the period before the delivery of arbitration awards, the two arrangements establish a comprehensive support mechanism for arbitral proceedings between Mainland China and Macau.

The full text of the *Preservation Arrangement* can be found here: <https://www.court.gov.cn/fabu-xiangqing-347101.html>;

The transcript of the press release held by the Supreme People's Court can be found here: <https://www.court.gov.cn/zixun-xiangqing-347021.html>.

Singapore: Reforms to permit conditional fee agreements in international disputes

Historically, Singaporean law prohibited outcome-related fee structures such as "no win, no fee", "no win, less fee", or "win, more fee" agreements. With effect from 4 May 4, 2022, under Singapore's new conditional fee agreement framework, Singapore-based lawyers may enter into such arrangements in the case of (a) international and domestic arbitration proceedings; (b) some proceedings in the Singapore International Commercial Court; and (c) related court and mediation proceedings. Such proceedings typically involve high-value cross-border commercial disputes. Unlike the similar regime in England, the uplift fees in Singapore are not subject to any maximum limit. A point to note is that conditional fee agreements are different from full contingency or damages-based arrangements, in which the lawyer is paid a percentage of the damages awarded. The latter arrangements remain prohibited in Singapore. The reforms to permit conditional fee agreements are expected to boost Singapore's competitiveness as a leading hub for international dispute resolution.

The full text of the framework can be found at: <https://sso.agc.gov.sg/Acts-Supp/8-2022/Published/20220222?DocDate=20220222>.

Thailand: Personal Data Protection Act to Come into Force

Thailand's first-ever law on personal data protection, Personal Data Protection Act B.E. 2561 (PDPA), will come into force on June 1, 2022. The law outlines the obligations for businesses regarding the collection and processing of personal information and has been considered to be comparable to the European General Data Protection Regulation (GDPR).

The data protection obligations under the PDPA generally apply to all organizations that collect, use, or disclose personal data in Thailand or of Thai residents, regardless of whether they are formed or recognized under Thai law, and whether they are residents or have a business presence in Thailand. The extraterritorial scope of the PDPA represents a significant expansion of Thailand's data protection obligations to cover all processing activities relating to Thailand-based data subjects. The PDPA also supports the requirements under several Free Trade Agreements (FTAs) regarding data privacy requirements and the establishment of a safe and secure environment for digital commerce and online banking in Thailand. Thailand now joins its ASEAN peers, Singapore, Malaysia and the Philippines, in enacting data protection laws.

An unofficial translation of the legislation can be found here: <https://thainetizen.org/wp-content/uploads/2019/11/thailand-personal-data-protection-act-2019-en.pdf>.

Vietnam: Amendments to the 2008 Law on Civil Judgment Enforcement

On January 11, 2022, the Vietnam National Assembly passed a new Law 03/2022/QH15, which among other effects, amended the 2008 Law on Civil Judgment Enforcement. The amendments took effect on March 1, 2022. The 2008 Law on Civil Judgment Enforcement sets out the procedures for the enforcement of civil judgments.

The new amendments deal with the situation where a judgment or decision has to be enforced against assets in various localities. Prior to the amendments, a civil judgment enforcement authority in a particular locality had to realize the relevant assets in their locality before the enforcement could continue in another locality. This prolonged the enforcement process and caused difficulties with enforcement in corruption cases where assets were situated in various localities. The new amendments provide for the possibility of simultaneous realization of assets in various localities.

Full English text of the amended law cannot be located but the Vietnamese version of Law 03/2022/QH15 can be located at <https://english.luatvietnam.vn/law-no-03-2022-qh15-dated-january-11-2022-of-the-national-assembly-amending-and-supplementing-a-number-of-articles-of-the-law-on-public-investment-216275-Doc1.html>.



National and Regional Case Law

China: Enforcement and recognition of British judgment in China

On March 17, 2022, the Shanghai Maritime Court, obtaining approval from the Supreme People's Court, published a judgment that confirms the recognition and enforcement in Mainland China of a judgment from the UK. The case concerned a dispute relating to payments of installment of hire arose between Spar Shipping AS, the owner of three bulk carriers, and Grand China Logistics Holding (Group) Co, Ltd, the entity which chartered the carriers under a contract of hire. The England and Wales Court of Appeal handed down a decision in 2016. Spar Shipping AS applied to the Shanghai Maritime Court in 2018 for the recognition and enforcement of the judgment to recover money from Grand China Logistics, which is governed by the jurisdiction of Mainland China. The Shanghai Maritime Court recognized judicial reciprocity between Chinese and British courts, hence ruling that British judgments in the civil division are legally binding in China. This is the first time Chinese Courts have recognized and enforced a British ruling. This will likely facilitate the growing trend of recognition of foreign judgments in China.

A report of this development can be found here:
https://www.sohu.com/a/543454156_175033.

The Chinese judgment can be found here:
<https://s.alphalawyer.cn/1r1HXR>.

Taiwan: First provisional measure ruling by Taiwanese Constitutional Court relating to transnational custody for a Child and the Constitutional Court ruled that the provisional measure was unconstitutional

On March 18, 2022, the Taiwanese Constitutional Court made its first provisional measure ruling. In response to a case of transnational custody for a child who has an Italian and Taiwanese parent, it ruled that the implementation of a temporary measure order which required the child to be handed over to her biological father should be temporarily suspended until the judgment of the constitutional review case requested by the child's mother is announced. For a period of time, the biological father could not immediately take the child out of Taiwan.

The reasoning of the Constitutional Court's ruling pointed out that in the case of transnational custody for a child involving the request for a temporary measure for the exercise of parentage of a minor, the minor's constitutional rights to physical and mental health development will suffer serious and irreversible damage if the decision is inappropriate. The ruling subject to review in this case is a district court's decision, in which a temporary measure was declared that the girl's mother should deliver the child to her biological father. However, since its enforcement has a great impact on the child's constitutional rights, it is subject to constitutional review. Because of the urgency of the case, and there are no other means to prevent and avoid possible irreversible damages, it is necessary to grant a temporary measure. The Constitutional Court ruled that enforcement should be temporarily suspended before the constitutional review judgment is announced.

On May 27, 2022, the Constitutional Court ruled that the temporary measure order of the Taipei District Court was unconstitutional because the best interest of the child had not been properly considered. The case has been remitted to the Supreme Court.

The judgment can be found here:
<https://cons.judicial.gov.tw/docdata.aspx?fid=39&id=340360>.

Malaysia: Scrutiny of defenses raised in challenge to enforcement of foreign judgment - PT Sandipala Arthaputra v Muehlbauer Technologies Sdn Bhd [2021] 9 CLJ 484

The plaintiff sought to enforce a judgment issued by the South Jakarta District Court in the Malaysian High Court. As the judgment did not fall within the scope of the Reciprocal Enforcement of Judgments Act 1958, the plaintiff commenced a common law action in the Malaysian High Court to enforce the judgment against the defendant. The defendant raised a number of defenses when opposing the application, including the lack of jurisdiction of the South Jakarta Court, that the judgment was obtained through a breach of natural justice and that the judgment contravened Malaysian public policy.

The Malaysia High Court examined each of the defenses in detail and found that the defenses were not meritorious. In considering whether there was a breach of natural justice, the court noted that this ground did not give the court the right to encroach into the merits of the case or to re-evaluate the admissibility of evidence before the foreign court. Similarly, in



relation to the public policy ground, the court reiterated that it would not rehear disputes decided by a foreign court or scrutinize a foreign judgment for errors.

An unofficial summary of the judgment can be found here: <https://www.skrine.com/insights/alerts/february-2022/beyond-statutory-enforcement-the-high-court-examin#:~:text=It%20reiterates%20that%20where%20foreign,n,be%20enforced%20under%20common%20law.&text=A%20foreign%20judgment%20for%20a,constitutes%20the%20a,use%20of%20action>

Singapore: Contravention of foreign law unlikely to be valid ground to set aside arbitral award - CHY and another v CIA [2022] SGHC(I) 3

This case involved an application to set aside an ICC award for being contrary to public policy in Singapore, because the relief granted was allegedly illegal under the applicable foreign law (i.e. Indian law).

The Singapore International Commercial Court interpreted a leading Singapore Court of Appeal judgment as standing for the proposition that when considering applications for an award to be set aside, the court may reopen the tribunal's findings of law, but not findings of fact in the absence of vitiating factors. The SICC acknowledged that there was another possible interpretation of the Court of Appeal judgment, i.e. that the court should not, save in limited circumstances, reopen findings of fact or law so long as the decision was within the tribunal's jurisdiction. However, the SICC considered that this should be left to the Court of Appeal to clarify in an appropriate case.

The court found that the tribunal's findings of law and fact and relief granted under the applicable foreign law were findings of fact under Singapore law that accordingly could not be reopened. This case shows that parties who seek to argue that an award contravenes foreign law will face an uphill battle with their setting aside applications in Singapore, if the dispute is governed by foreign law.

The full text of the judgment can be found here: https://www.elitigation.sg/gd/sic/2022_SGHCI_3.

Singapore: More time for States to challenge enforcement of arbitral awards - CNX v CNY

This case is the first time Singapore courts considered the interaction between the provisions of the State Immunity Act and the International Arbitration Act that are relevant to the enforcement of an arbitral award against a foreign State.

Germany's Deutsche Telekom obtained an *ex parte* enforcement order from the Singapore courts to enforce a US\$137 million investment treaty award against India. The order stated that India had the usual 21 days under the International Arbitration Act to set aside the order after service. India argued that under s 14(2) of the State Immunity Act, which provides that any "*time for entering an appearance ... shall begin to run 2 months after the date on which the writ or document is so received*", it had two months, in addition to the usual 21 days, to apply to set aside the enforcement order. The Singapore High Court ruled in favor of India, holding that foreign states served with an order granting leave to enforce an arbitral award had two months and 21 days from the date of receipt to apply to set aside the enforcement order.

The full text of the judgment can be found here: https://www.elitigation.sg/gd/gd/2022_SGHC_53/pdf.

Recent Scholarly Works

Darius Chan, Paul Tan, Nicholas Poon: Law and Theory of International Commercial Arbitration in Singapore (April 2022) <https://store.lawnet.com/the-law-and-theory-of-international-commercial-arbitration-in-singapore-1st-ed-print-digital.html>

N Jansen Calamita, Ayelet Berman: Investment Treaties and the Rule of Law Promise: The Internalisation of International Commitments in Asia (forthcoming in September 2022) <https://www.barnesandnoble.com/w/investment-treaties-and-the-rule-of-law-promise-n-jansen-calamita/1141210773>



AMERICAS

Central, South America & Mexico

—Editor: Juan Pablo Gómez-Moreno



During the end of 2021 and the first part of 2022, many South American countries have entered into new international instruments such as free trade agreements and investment treaties. This is exemplified by recent actions by governments of Ecuador and Uruguay which pursued those initiatives to re-activate the economy after the pandemic.

At the same time, countries like Paraguay have amended their arbitration rules to reflect international arbitration's best practices. Additionally, as several parties sought to make effective their international awards in disputes with Latin American parties, recent decisions by US courts illustrate a trend that favors recognition and enforcement.

International Conventions

Ecuador: government applied for the CPTPP membership

On December 19, 2021, Ecuador applied for membership to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). With this, Ecuador seeks to boost its

economy through the free trade agreement by increasing exports to the Asia-Pacific region.

For further information see:
<https://twitter.com/CancilleriaEc/status/1471959269884968960?s=20&t=JptHdQwzPUnG0tnrrO5fFA>.

Uruguay: Congress approves new BIT with Australia

On December 22, 2021, Uruguay's Congress approved the text of the BIT subscribed with Australia on December 5, 2019. Ratification is needed from both states for the BIT to enter into force, which is still pending.

The full text of the decision may be found here:

<https://medios.presidencia.gub.uy/legal/2021/leyes/12/mrree371.pdf>

National Legislation

Paraguay: new Rules on National and International Arbitration enter into force

On November 12, 2021, the new Rules on National and International Arbitration of the Paraguay Center of Arbitration and Mediation (CAMP) entered into force. Major changes include rules on matters such as attorney fees, timelines, emergency arbitrators, expedited arbitration, as well as multi-party and multi-contract proceedings.

The full text of the statute may be found here:

<https://www.camparaguay.com/es/descargas/reglamentos-vigentes>.

National Case Law

Venezuela: US court gives the go-ahead to the sale process of shares related to the payment of an ICSID award

On January 2, 2022, the US District Court for the District of Delaware issued an opinion allowing the sale of a US-based company CITGO to proceed. The sale is related to Venezuela's payment to Canadian mining company Crystallex of a US \$1,2 billion award which had been made in 2016 by an ICSID Tribunal.



The full text of the opinion may be found here: https://www.govinfo.gov/content/pkg/USCOURTS-ded-1_17-mc-00151/pdf/USCOURTS-ded-1_17-mc-00151-13.pdf.

Dominican Republic: US court confirms an ICC award ordering the state to pay minimal damages

On March 1, 2022, the US District Court for the Southern District of Florida confirmed an ICC award ordering the state to pay US \$23 million of the nearly US \$288 million in lost profits claimed by a Spanish company. Judge Beth Bloom rejected the respondent's argument that the denial of said claim was insufficiently reasoned by the arbitral tribunal.

The full text of the decision may be found here: <https://pacer-documents.s3.amazonaws.com/42/592655/051124399848.pdf>.

Haiti: US court confirms a partial award ordering a Haitian agency to provide pre-award security

On January 26, 2022, the US District Court for the Southern District of New York enforced an award ordering a Haitian agency to deposit US \$23 million in pre-award security. Judge Kevin Castel dismissed arguments of the Haitian agency that it had been unable to present its case, the tribunal lacked jurisdiction and the arbitration agreement was illegal.

The full text of the decision may be found here: <https://pacer-documents.s3.amazonaws.com/119/564717/127130575006.pdf>.

Venezuela: US court refuses to intervene in an enforcement procedure of the Crystallex ICSID award

On January 18, 2022, the US Court of Appeals for the Third Circuit said in an opinion that it lacks jurisdiction to hear Venezuela's appeal to an order issued by the Delaware District Court. The order upheld the attachment of the shares owned by PDVSA, Venezuela's national oil company, on CITGO, a US-based petroleum company.

The full text of the opinion may be found here: <https://files.lbr.cloud/public/2022-01/003014039755.pdf?VersionId=BQdfttDiL1.qAviYLBcuL8QPbZLvrbpi>.

North America

—Editor: Carrie Shu Shang



Among North American countries, the United States has recently become the sixth signatory state to the *Hague Judgments Convention*, demonstrating the U.S.'s favoritism towards mutual judgment recognition as part of its championship of private international law harmonization.

On the case law side, the current term of the Supreme Court of the United States is very exciting for private international law enthusiasts. The SCOTUS has recently rendered an important decision in *Cassirer v. Thyssen-Bornemisza Collection Foundation* to end Circuit splits in interpreting one conflict of law issue related to the Foreign Sovereign Immunities Act. This will also become a landmark case in the international Art Repatriation Movement. The SCOTUS has also held hearings in cases concerning international judicial assistance via Section 1782, as well as the "grave risk" exception in the *Hague Child Abduction Convention*. Both decisions could be available to the public by the summer of 2022, providing clearer roadmaps for international litigants. The Supreme Court of Canada has also rendered a decision in an interesting case reinterpreting the "carrying on business" standards.

On the other hand, the Uniform Law Commission ("ULC") and American Bar Association are taking additional steps in facilitating uniform state laws in multiple areas that are consistent with U.S. international obligations. Stronger liaison has also been built between the ULC and the American Society of International Law.



International Conventions

United States: Joining the HCCH Judgments Convention 2019

On March 2, 2022, the United States signed the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (the “Hague Judgments Convention”). The Hague Judgments Convention seeks to enhance access to justice by encouraging the free flow of judgments across national borders. It does so by providing a set of clear, predictable rules under which civil and commercial judgments rendered by the courts of one Contracting State can be recognized and enforced in other Contracting States. The United States became the sixth signatory state to the Hague Judgments Convention, which is not yet in force.

For a full version of the Hague Judgments Convention please see: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>

National Legislation

Canada: Revised Statute on Jurisdiction is Released

The Uniform Law Conference of Canada (ULCC) has drafted model legislation placing the obtaining of jurisdiction and staying of proceedings on a statutory footing. This statute, known as the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA), has been adopted and brought into force in four of Canada’s thirteen provinces and territories (British Columbia, Saskatchewan, Nova Scotia, Yukon) as of December 1, 2021.

The full text of the statute may be found here: [https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Court-Jurisdiction-and-Proceedings-Transfer-Act-\(2021\).pdf](https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Court-Jurisdiction-and-Proceedings-Transfer-Act-(2021).pdf)

National Case Law

United States: Supreme Court Decides *Cassirer v. Thyssen-Bornemisza Collection Foundation* Concerning the Foreign Sovereign Immunities Act

On April 21, 2022, the U.S. Supreme Court decided *Cassirer et al. v. Thyssen-Bornemisza Collection Foundation*, holding that federal courts hearing state-law claims under the Foreign Sovereign Immunities Act (FSIA) should apply the forum state’s choice-of-law rules.

In the underlying dispute, Cassirer and others filed a lawsuit to recover a painting by French Impressionist painter Camille Pissarro, which was stolen from their ancestors by the Nazi regime in 1939. The district court originally granted summary judgment in favor of Thyssen-Bornemisza Collection Foundation (TBC), but the U.S. Court of Appeals for the Ninth Circuit reversed and remanded, holding that the court needed to determine whether TBC had actual knowledge the painting was stolen. If it had such knowledge, then it could be an accessory after the fact under Spanish Civil Code Article 1956. In its opinion, the Ninth Circuit affirmed the application of federal common law to the choice-of-law analysis under the FSIA. Cassirer appealed, based on the theory that the district court should have applied California law, not Spanish law. Under California law, a thief cannot pass title to anyone, including a good faith purchaser.

The decision of *Cassirer v. Thyssen-Bornemisza Collection Foundation* may be found here: https://www.supremecourt.gov/opinions/21pdf/20-1566_15gm.pdf

United States: Supreme Court Decided to End Circuit Splits on Section 1782 For Judicial Aid of Overseas Arbitration Proceedings

On March 23, 2022, the U.S. Supreme Court heard oral argument in two consolidated cases — *ZF Auto. US v. Luxshare, Ltd.* and *AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States* — on whether 28 U.S.C. § 1782 (Section 1782) can be used to obtain information and documents in aid of private international arbitrations conducted overseas. In the decision rendered on June 13, 2022, the Supreme Court held that American law does not allow federal courts to order discovery for private commercial arbitration abroad, significantly narrowing the scope of foreign litigant’s uses of U.S. discovery procedures. The decision has the potential to resolve the circuit split concerning the interpretation of Section 1782.

The U.S. Supreme Court docket information for *ZF Auto. US v. Luxshare, Ltd.* may be found here:



<https://www.supremecourt.gov/docket/docketfiles/html/public/21-401.html>; The U.S. Supreme Court docket information for *AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States* may be found here: <https://www.supremecourt.gov/docket/docketfiles/html/public/21-518.html>

United States: Supreme Court Interprets “Grave Risk” Exception in the Hague Child Abduction Convention

On March 22, 2022, the U.S. Supreme Court heard oral argument in *Golan v. Saada*. Under the Hague Child Abduction Convention, children who are wrongfully taken from the country where they live must be returned to that country, so that custody disputes can be resolved there. The convention makes an exception for cases in which there is a “grave risk” that the return of the child would expose him or her to physical or psychological harm. In *Golan v. Saada*, a U.S. citizen married an Italian citizen in 2015; they had a child who was born in Milan in 2016. The husband was allegedly abusive toward the wife throughout the marriage. In 2018, the wife took the child to the United States (New York) and did not return. The husband tried to compel the child’s return to Italy. The district court ordered the child’s return to Italy with a variety of protective measures.

The Supreme Court delivered its final decision on June 15, 2022. Although as a general rule the Hague Convention requires the district court to order a child’s return to his home country, Justice Sotomayor explained, the Convention also gives the district court discretion to grant or deny return when the court concludes that the child would face a grave risk of harm if returned. The case was remanded to the district court.

The U.S. Supreme Court docket information for this case may be found here:

<https://www.supremecourt.gov/docket/docketfiles/html/public/20-1034.htm>

Canada: Supreme Court Reinterprets Foreign Judgment Status in HMB Holdings Ltd v Antigua and Barbuda

On November 4, 2021, the Supreme Court of Canada released the decision of *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, clarifying the definition of “carrying on business” in an increasingly virtual world.

Antigua’s relevant business activity in British Columbia was its Citizenship by Investment Program. The government agency responsible for the program did not have any physical presence in British Columbia in relation to the Program. In interpreting the definition of “carrying on business,” the majority decision written by Chief Justice Wagner held that determining whether a corporation is “carrying on business” is a question of fact and requires inquiring whether a corporation holds “some direct or indirect presence in the jurisdiction, accompanied by a degree of business activity that is sustained for a period of time”. Chief Justice Wagner dismissed the appeal and held that since Antigua did not have a physical presence in British Columbia, they were not “carrying on business” in the province of British Columbia for the purposes of the Canadian *Reciprocal Enforcement of Judgments Act*.

The decision of *H.M.B. Holdings Ltd. v. Antigua and Barbuda* may be found here: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19047/index.do>.

Associations and Events

United States: Uniform Law Commission (ULC) & American Bar Association’s Joint Editorial Board for International Law facilitates the Promulgation of Uniform State Laws and International Obligations

ASIL appointed its first liaison officer to the Uniform Law Commission (ULC) & American Bar Association’s (ABA) Joint Editorial Board for International Law (IJEb) - Ms. Kathleen Hook. The IJEb, among other activities, facilitates the promulgation of uniform state laws which deal with international and transnational legal matters and ensures those laws are consistent with the United States’ domestic laws and its international obligations, and advises the ULC with respect to international and transnational legal matters that have the potential to impact areas of law in which the ULC has been, or might become, active.

The Joint Editorial Board for International Law

In January 2022, ASIL President Catherine Amirfar appointed Kathleen Hooke as the Society’s liaison to the Joint Editorial Board for International Law (IJEb). The IJEb includes representatives from the Uniform Law Commission (ULC) and the American Bar Association’s Section of International Law,

as well as a liaison from the Office of Private International Law at the U.S. Department of State.

Among other activities, the IJEB facilitates the promulgation of uniform state laws which deal with international and transnational legal matters and ensures those laws are consistent with the United States' domestic laws and its international obligations; the IJEB also advises ULC with respect to international and transnational legal matters that have the potential to impact areas of the law in which ULC has been, or might become, active; finally, the IJEB also promotes the rule of law and harmonization of law. Two current ULC projects that may be of interest to IG members include a study on Supply Chain Transparency, which will investigate the need for and feasibility of state legislation dealing with transparency in the context of international supply chains and a project on the UN Convention on International Settlement Agreements Resulting from Mediation.

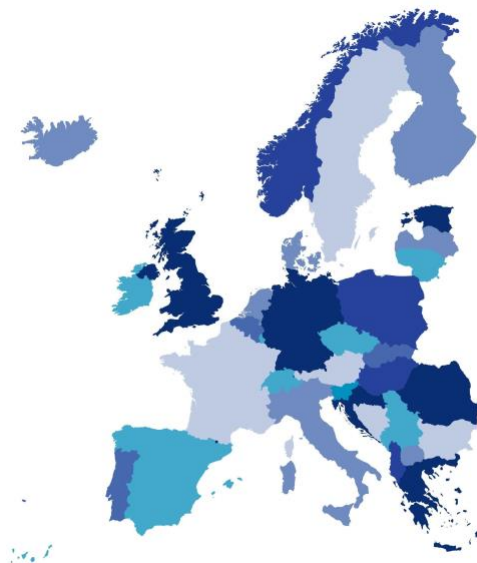
A full list of the current ULC study committees can be found here:
<https://www.uniformlaws.org/projects/committees/study>.

The role of the Society's liaison is to participate in meetings of the board, to solicit ideas from ASIL members on areas related to international and transnational legal matters in which uniform state laws would be useful, and to invite feedback and engagement of ASIL members on ongoing ULC projects related to international law.

The next meeting of the IJEB will be in the Fall of 2022. IG members are encouraged to share ideas for topics or areas of potential study that the board may wish to consider or discuss, by emailing Kathleen at liaison@asil.org. Please share any ideas you have by September 6, 2022.

EUROPE

—Editors: Patricia Snell, Charles Mak & Christos Liakis



The last weeks of 2021 and the first half of 2022 saw developments in family, inheritance and insolvency case law as well as international commercial and investment arbitration. The French courts rendered several decisions in respect of the court's power to investigate corruption and money laundering issues at the stage of enforcement of an arbitral award. Furthermore, in late 2021 and early 2022, there have been further inroads into the enforcement of intra-EU arbitral awards, as European Union institutions and domestic courts of EU member states have weighed in on the applicability of intra-EU bilateral investment treaties (BITs) in light of the *Achmea* decision. In the field of EU legislation, an additional level of protection against abusive proceedings has emerged through new instruments concerning SLAPPs. There have also been developments in family law in France, where the Supreme Court opened a door for the recognition of foreign bigamous marriages as well as in the Environmental, Social and Governance (ESG) space, with Norway introducing corporate due diligence obligations. Further legislative changes are anticipated across Europe over the coming year – with the UK government announcing in the Queen's May 10, 2022 speech that it will introduce a Modern Slavery Bill during the parliamentary session, and the Swiss government considering introducing a human rights sanctions bill.



International Conventions

The UK: government applied to accede to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

On February 1, 2021, the UK formally requested accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and on June 2, 2021, the CPTPP Commission agreed to formally commence accession negotiations with the United Kingdom.

On January 20, 2022, the UK Minister for Trade Policy, Penny Mordaunt, said that the UK Government hoped to have negotiations concluded by the end of 2022.

The UK government's announcement may be found at: <https://lordslibrary.parliament.uk/uk-membership-of-the-trans-pacific-trade-agreement/>.

European Union Regulations

European Union: Increasing Protection Against Abusive Court Proceedings

On April 27, 2022, the European Commission adopted a proposal based on Article 81(2)(f) TFEU for a Directive covering SLAPPs – that is, Strategic Lawsuits Against Public Participation which are generally aimed at journalists and human rights defenders – in civil matters with cross-border implications. On the same day, the Commission approved a complementary Recommendation to encourage Member States to align their rules with the Directive for all domestic proceedings, (i.e., not only in civil matters); it also calls on Member States to take a range of other measures, such as training and raising awareness, to curb the use of SLAPPs.

The texts and explanation of the aforementioned instruments may be found here: https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_22_2652

National Legislation

Norway: Norway introduces corporate due diligence law

Coming into force on July 1, 2022, the Norwegian Supply Chain Transparency Act will impose due diligence obligations

on large Norwegian enterprises. The act aims to promote human rights and ensure decent working conditions in a company's supply chain in accordance with the OECD Guidelines.

EU Case law

Court of Justice of the European Union: Same-Sex Parenthood Effectively Recognized in Conjunction with Citizen Mobility

On December 14, 2021, in Case C-490/20, *V.M.A.v Stolichna obshtina, rayon 'Pancharevo'*, the Court of Justice of the European Union ('CJEU') was confronted with the issue of a Bulgarian national born to same-sex parents in Spain being denied a Bulgarian birth certificate that was also inter alia necessary for the issuance of an identity card. The CJEU relied on Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 4(3) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States to find that in the case of a child, it being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of a host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged (a) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (b) to recognize, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

The full text of the judgment may be found here: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=251201&pageIndex=0&doclang=en&mode=lst&dir=&c=first&part=1&cid=4984224>

Court of Justice of the European Union: The Micula saga before the European Commission and the Court of Justice of the European Union

In its judgment dated January 25, 2022, the CJEU quashed the 2019 decision of the General Court and upheld the appeal brought by the European Commission. The Court of Justice concluded that the European Commission was competent to



determine that compensation paid to give effect to the 2013 ICSID award of *Micula v. Romania* (ICSID Case No. ARB/05/20) constituted state aid. Significantly, the Court of Justice found that the General Court had erred in law when it found that the *Achmea* C-284/16 judgment was irrelevant “on the ground that the arbitral tribunal was not required to apply EU law to the facts before it which arose before Romania’s accession to the European Union”. The Court of Justice also stated that “with effect from Romania’s accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure, the consent given to that effect by Romania, from that time onwards, lacked any force.” The case has been referred back to the General Court to adjudicate on whether the Commission was correct to consider that payment by Romania of the compensation under the award constituted state aid.

The decision of the Court of Justice in *Micula* may be found here:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=252641&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=601727>

The decision of the Court of Justice in *Achmea* may be found here:

<https://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130dec886afb24fda4bcca680d669753953c7.e34KaxiLc3eQc40LaxqMbN4Pb30Re0?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=366892>

On February 6, 2022, the European Commission referred the United Kingdom to the Court of Justice of the European Union in relation to a judgment of the UK Supreme Court allowing enforcement of the ICSID award against Romania, despite a Commission decision having found that the compensation infringed EU state aid rules. On February 19, 2020, the UK Supreme Court lifted a stay of enforcement of the arbitral award despite an ongoing state aid investigation by the Commission, finding that the duty of sincere cooperation under EU law did not preclude enforcement of the ICSID arbitral award in accordance with the UK’s obligations under the ICSID Convention. The Commission considered that the UK Supreme Court decision had implications for the application of EU law to investment disputes, particularly for intra-EU application of the Energy Charter Treaty (ECT).

The Commission’s announcement may be found here:

https://ec.europa.eu/commission/presscorner/detail/es/ip_22_802

Court of Justice of the European Union: On Main Insolvency Proceedings and the Debtor’s Main Center of Interests

On March 24, 2022, in Case C-723/20, *Galapagos BidCo*, the CJEU interpreted Article 3(1) of Regulation (EU) No 2015/848 on insolvency proceedings (European Insolvency Regulation) as meaning that the court of a Member State with which a request to open main insolvency proceedings has been lodged retains exclusive jurisdiction to open such proceedings, including in the event where the center of the debtor’s main interests is moved to another Member State after that request has been lodged but before that court has delivered a decision on it. Thus, the court of another Member State with which another request is lodged subsequently and for the same purpose may not, in principle, declare it has jurisdiction to open proceedings until the first court has delivered a decision and declined jurisdiction.

The full text of the judgment may be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0723&from=EN>

Court of Justice of the European Union: Clarifications on Ex Officio Verification of Jurisdiction in Matters of Succession

On April 7, 2022, in Case C-645/20 *V A and Z A v TP*, the CJEU confirmed that Article 10(1)(a) of Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession etc. (European Succession Regulation) must be interpreted as meaning that a court of a Member State must raise on its own motion its jurisdiction under the rule of subsidiary jurisdiction referred to in that provision if it has been seized on the basis of the rule of general jurisdiction established in article 4 of the Regulation and finds that it has no jurisdiction under that latter provision. The court regarded the fora of articles 4 and 10(1) as not being in a hierarchical relationship and thus considered the rule of jurisdiction in the latter provision entailed an “equivalent and supplementary” relationship to the former provision.

The full text of the judgment may be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0645&from=EN>.

Court of Justice of the European Union: Circumvention of Double Exequatur



On April 7, 2022, in Case C-568/20, *J v. H Limited*, the CJEU examined the issue of double exequatur by considering whether an English summary order to pay a debt recognized in a judgment of a third party is enforceable in Austria. The CJEU ruled that according to Article 2(a) and Article 39 of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Bis Regulation), an order for payment made by a court of a Member State – as was the United Kingdom at the time of issuance of the order – on the basis of final judgments delivered in a third State constitutes a judgment and is enforceable in other Member States if it was made at the end of adversarial proceedings in the Member State of origin and was declared to be enforceable in that Member State. It also established that the fact that it is recognized as a judgment does not deprive the party against whom enforcement is sought of the right to apply, pursuant to Article 46 of that regulation, for a refusal of enforcement on one of the grounds referred to in Article 45.

The full text of the judgment may be found here: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=257492&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1103886>.

National Case Law

France: The French Supreme Court paves the way for the recognition of foreign bigamous marriage

On November 17, 2021, the French Supreme Court for private and criminal matters (Cour de Cassation), considered the question of when a bigamous marriage of Libyan nationals of which one party had filed a petition for divorce before the French courts may be not deemed void. The court found that in the field of marriage, conflict-of-law rules are mandatory and that, according to article 202-1 of the French Civil Code, the French choice of law rule on the validity of marriage provides for the application of the law of the spouses' common nationality.

The full text of the judgment (in French) may be found here: <https://www.legifrance.gouv.fr/juri/id/JURITEXT000044352185?isSuggest=true>

France: The French courts set aside an arbitral award on the grounds of international public policy

In a March 23, 2022 decision, the Cour de Cassation upheld the decision of the Paris Court of Appeal to set aside a US\$15 billion UNCITRAL award against Kyrgyzstan (*Belokon v. Kyrgyzstan* (Cass. Civ. 1ère, 23 March 2022, No. 17-17.981)). The Paris Court of Appeal had set aside an arbitral award in 2017 against Kyrgyzstan on grounds of international public policy, whereby enforcement of the award would allow Belokon to benefit from the proceeds of money laundering. Although the arbitral tribunal had determined that fraud and money laundering were not sufficiently established, the Court of Appeal decided that it could rely on additional documents and evidence that had not been produced before the tribunal. The Cour de Cassation held that the Paris Court of Appeal had not exceeded its powers by conducting its own investigation and adopting broad fact-finding powers not limited to the evidence presented before the arbitral tribunal.

The decision of the Cour de Cassation may be found here: https://jusmundi.com/en/document/decision/fr-valeri-belokon-v-kyrgyz-republic-arret-de-la-cour-de-cassation-wednesday-23rd-march-2022#decision_21697

For another recent decision concerning corruption and international public policy, see the Paris Court of Appeal's April 5, 2022 decision in *Republic of Gabon v. Groupement Santullo-Sericom Gabon* (no. RG 20/03242), setting aside a US\$180 million award against Gabon, and in which the Paris Court of Appeal conducted a de novo review of the evidence and considered fresh evidence.

The decision of the Paris Court of Appeal may be found here: <https://jusmundi.com/en/document/decision/fr-le-groupement-santullo-sericom-gabon-c-la-republique-gabonaise-sentence-finale-tuesday-19th-november-2019>

This is consistent with the fact-finding approach of the Paris Court of Appeal in its May 28, 2019 decision (no. 16/11182) of *Alexander Brothers Ltd. v. Alstom Transport*. Although on September 29, 2021, the Cour de Cassation (no. 19-19769) overturned the Paris Court of Appeal's refusal to enforce the arbitral award on grounds of international public policy, the Cour de Cassation did not challenge the Court of Appeal's power to review evidence. Notably, the English High Court – when faced with the question of enforcement of that same arbitral award – reached the opposite conclusion and upheld enforcement of the award (*Alexander Brothers Limited (Hong Kong S.A.R) v (1) Alstom Transport SA (2) Alstom Network UK Limited* [2020] EWHC 1584 (Comm)).



The decision of the Cour de Cassation may be found here: https://jusmundi.com/fr/document/decision/fr-alexander-brothers-ltd-c-alstom-transport-s-a-et-alstom-network-uk-ltd-arret-de-la-cour-dappel-de-paris-wednesday-29th-september-2021#decision_18047

The decision of the English High Court may be found here: <https://www.bailii.org/ew/cases/EWHC/Comm/2020/1584.html>

France: The Paris Court of Appeal set aside arbitral awards in accordance with the Achmea decision

In April 2022, the Paris Court of Appeal set aside two partial arbitral awards rendered against the Republic of Poland, on the grounds that the tribunal lacked jurisdiction over disputes arising out of intra-EU BITs (*Poland v. Strabag et al*, no. RG 20/13085 and *Poland v Slot et al*, no. RG 20/14581 (*Paris Court of Appeal*)). The Court of Appeal applied the *Achmea* judgment of the Court of Justice of the European Union, which held that investor-state arbitration clauses in intra-EU BITs were incompatible with EU law.

The judgments of the Court of Appeal may be found here: https://jusmundi.com/fr/document/decision/fr-strabag-se-raiffeisen-centrobank-ag-syrena-immobilien-holding-ag-v-the-republic-of-poland-arret-de-la-cour-dappel-de-paris-tuesday-19th-april-2022#decision_22357
<https://jusmundi.com/en/document/decision/en-slot-group-a-s-v-republic-of-poland-judgment-of-the-paris-court-of-appeal-tuesday-19th-april-2022>

The Court of Appeal referred to the October 26, 2021 judgment of the Court of Justice of the European Union in *PL Holdings v. Poland*, which held that states cannot circumvent *Achmea* by executing an *ad hoc* arbitration agreement similar to the BIT's arbitration provision. The judgment in *PL Holdings* may be found here: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=248141&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=303711>

The Court of Appeal also referred to the September 2, 2021 judgment of the Court of Justice of the European Union in *Republic of Moldova v. Komstroy* (Case C-741/19), which held that intra-EU arbitrations under the ECT were contrary to EU law.

The judgment in *Komstroy* may be found here: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=245528&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5091477>

Association and Events

The Hague Academy of International Law – Summer Courses

The Hague Academy of International Law's Summer Courses will be held on-site from July 11, 2022 to August 19, 2022. The Summer Courses consist of two three-week courses, one on Public International Law and another on Private International Law.

Further information on The Hague Academy is found here: <https://www.hagueacademy.nl/programmes/the-summer-courses/>

2022 ESIL Annual Conference, Utrecht

The 17th Annual Conference of the European Society of International Law will assemble in Utrecht in the Netherlands from September 1, 2022 to September 3, 2022. The main conference will be preceded by several workshops hosted by the Society's Interest Groups on August 31, 2022 and September 1, 2022. The general theme of the conference is 'In/Ex-clusiveness of International Law'.

Further information on the conference is found here: <https://esil-sedi.eu/2022-esil-annual-conference-utrecht-1-3-september-2022/>

Launch of Young EFILA

The European Foundation for Investment Law and Arbitration will be launching a young members' group – Young EFILA – on June 8, 2022 on the eve of the EFILA Annual Conference 2022 taking place on June 9, 2022.

Further details about joining Young EFILA may be found here: <https://efila.org/young-efila/>

Launch of Young ITF



The Investment Treaty Forum of the British Institute of International and Comparative Law has launched Young ITF, a young members group for investment arbitration practitioners in London. Young ITF's core activities include hosting debates with junior and senior practitioners on issues of international economic law and offering publication opportunities on the BIICL Blog.

Further information about Young ITF may be found here:
<https://www.biicl.org/youngitf>



OCEANIA

—Editor: Jie (Jeanne) Huang



From late 2021 to the first half of 2022, important judgments were issued by Australian courts on whether jurisdiction can be exercised over foreign internet giants such as Facebook and Apple.

Both Australia and New Zealand actively signed new or updated existing free trade agreements.

International Conventions

Australia and New Zealand: The Regional Comprehensive Economic Partnership Agreement (RCEP) entered into force

The RCEP entered into force for Australia, NZ, Brunei Darussalam, Cambodia, China, Japan, Laos, Singapore, Thailand and Vietnam on January 1, 2022, for the Republic of Korea on February 1, 2022, and for Malaysia on March 18, 2022. It creates the world's largest free trade agreement.

A full text can be found here: <https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text>.

The most recent press release from the Minister for Trade, Tourism and Investment of Australia can be found here: <https://www.trademinister.gov.au/minister/dan-tehan/media-release/worlds-largest-free-trade-agreement-enters-force>.

New Zealand: Upgrade to the Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China

New Zealand and the People's Republic of China updated their Free Trade Agreement which will come into force on April 8, 2022. The updated Agreement includes new topics such as the environment and e-commerce. It complements the RCEP and aims to facilitate bilateral trade and investment and promote the strategic partnership between the two countries.

The full text of the updated Free Trade Agreement can be found here: <https://www.mfat.govt.nz/assets/Trade-agreements/China-NZ-FTA-Upgrade/China-FTA-Upgrade-NIA.pdf>.

Solomon Islands: Framework Agreement Between the Government of the People's Republic of China And the Government of Solomon Islands on Security Cooperation

On March 31, 2022, the Government of Solomon Islands and the People's Republic of China signed a bilateral Security Cooperation Framework. The main contents of this Framework are still confidential. According to news report, the Framework will promote social stability and long-term peace and security with the Solomon Islands by allowing China to operate varied military and intelligence operations on the Islands. The Framework has caused significant concerns in Australia.

The most recent press release from the Solomon Islands Government can be found here: <https://solomons.gov.sb/solomon-islands-and-china-initial-framework-agreement-on-security-cooperation/>

Australia: Australia-India Economic Cooperation and Trade Agreement

On April 2, 2022, Australia and India signed the Economic Cooperation and Trade agreement aiming to strengthen economic relations by immediately eliminating tariffs on more than 85% of Australia goods exported to India. Upon its entry, 96% of Indian goods imported to Australia will be duty-free which will benefit domestic households and businesses by introducing new goods and reducing costs.

An official link of the text can be found here: <https://www.dfat.gov.au/trade/agreements/negotiations/aifta/australia-india-ecta-official-text>.



National Case Law

Australia: Facebook Inc v Australian Information Commissioner [2022] FCAFC 9

This is a case concerning the Cambridge Analytical Scandal. The Full Court of Federal Court in Australia upheld the primary judge's decision to refuse Facebook Inc's application to set aside service upon it. This is because there is a prima facie case that (1) Facebook was carrying on business in Australia under the Privacy Act 1988 (Cth), (2) installation, operation and removal of cookies on Australian users' devices and management of the Facebook login through Graph API occurred in Australia and (3) Facebook collected or held personal information in Australia.

The full text of the judgment may be found here: <https://jade.io/article/904558>.

Australia: Epic Games, Inc v Apple Inc [2021] FCAFC 122

This is a case concerning the exclusive jurisdiction clause favoring the state and federal courts of the Northern District of California in the Apple Developer Program License Agreement concluded between Apple and Epic. Epic alleged that the Apple APP Store on iOS devices reduced competition and contravened the Competition and Consumer Act 2010 (Cth); moreover, Epic alleges that Apple had engaged in unconscionable conduct under the Australian Consumer Law. The Full Court of the Federal Court of Australia held that there were public policy considerations which (cumulatively) indicated strong reasons for this proceeding to remain in this Court.

The full text of the judgment may be found here: <https://jade.io/article/823050>.

New Zealand: Hebei Huaneng Industrial Development Co Limited v Deming Shi, [2021] NZHC 2687

When considering whether to recognize and enforce a Chinese money judgment, the New Zealand High Court considered the impartiality and independence of Chinese courts.

The full text of the judgment may be found here:

<http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2021/2687.html?query=Hebei%20Huaneng%20Industrial%20Development%20Co%20Limited>

Association and Events

The International Law Association (Australia Branch) announced their annual thesis competition for Peter Nygh Private International Law Essay Prize in 2022 and invites applications for the Peter Nygh Hague Conference Internship.

More information can be found here: <https://ila.org.au/prizes-internships/>.

GLOBAL CONFLICT OF LAWS

—Editor: Cristián Giménez Corte



Transnational Principles & Soft Law

OAS Principles on Privacy and the Protection of Personal Data

During its 51st Session, held from November 10 – 12, 2021, the Organization of American States (OAS) General Assembly approved the Updated Principles on Privacy and the Protection of Personal Data prepared by the Inter-American Juridical Committee (CJI).



These Principles reflect the different approaches shared by the OAS Member States on basic issues related to the protection of personal data, including consent, the purposes and means for the collection and processing personal data, cross-border flow and security of personal data, special protection for sensitive data, and the exercise of the rights of access, rectification, cancellation, opposition and portability.

For additional information please see

http://www.oas.org/en/sla/dil/newsletter_CJI_OAS_General_Assembly_Approves_Updated_Principles_Privacy_Protection_Personal_Data_November-2021.html

This book is divided into four sections, including: (i) Theory; (ii) Institutional and Conceptual Framework Issues; (iii) Civil and Commercial Law (apart from Family Law); and (iv) Family Law.

For more details see:
<https://www.bloomsbury.com/uk/guide-to-global-private-international-law-9781509932078/>

International Courts and Arbitral Tribunals

Arbitration and Cryptocurrencies

A Greek Court of Appeal found that a foreign arbitral award granting damages in bitcoin is non-compatible with the substantive public policy of the forum. Under the framework of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Court established that the recognition of a US arbitral decision is contrary to Greek public order. The Court argued that cryptocurrencies may favor tax evasion and financial crimes, and thus breach the founding basis of the national economic system

For more information see
<https://conflictoflaws.net/2022/bitcoin-and-public-policy-in-the-field-of-international-commercial-arbitration/>.

Global PIL Scholarship

A Guide to Global Private International Law

Edited by Professors Paul Beaumont and Jayne Holliday this new book, “A Guide to Global Private International Law”, provides a comprehensive review of the discipline of private international law from a global point of view.