



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 2), 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 provides an overview on global development in PIL.

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), 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), Yao-Ming Hsu (National Cheng-Chi University) and Karen Sief (Baker McKenzie Dubai) (listed in the given name alphabetic order).

We thank Professor Caroline Kleiner for contributing a Highlight on two recent French cases on Economic Sanctions and Blocking Statutes, and Tom (Li) Zhang for a Highlight on Serving U.S. Process on Chinese parties.

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 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@cpp.edu and Jie Huang Jeanne.huang@sydney.edu.au.



Expert Perspectives

Economic Sanctions and Blocking Statutes - In Reference with Two Recent French Cases

Caroline Kleiner¹

The adoption of economic sanctions by the US, the EU and other countries, against Russia and Belarus, of an intensity not seen before, is an opportunity to discuss the difficulties encountered by courts and other international tribunals in applying economic sanctions, or, prohibiting compliance with them.

Two recent cases illustrate those difficulties.

The first one is a French decision of the Paris Court of Appeal (the International Chamber of Commerce) of 3 June 2020 RG n°19/07261 (English translation [here](#)), which has been upheld by the French Court of cassation (First Civil Chamber, 9 February 2022, n°20-20.376 (in French only)).

In a nutshell, this case concerned the non-performance of a contract entered into between an Iranian Company and a French company, concerning the storage of gas and governed by the laws of the Islamic Republic of Iran. The contract provided that payment would be made by a letter of credit denominated in US dollars, issued by an Iranian bank. To ensure the performance of the contract, this bank also issued a guarantee of performance, which was counter guaranteed by a French bank. Some issues arose between the parties during the first phase of implementation of the contract and the French company informed its counterpart of the refusal of the banks to extend the bank guarantee for the performance of the second and third phases of the contract.

The Iranian company alleged a breach of contract and notified the French company of the termination of the contract. Thereafter, the guarantees were called. The efforts made by the French company to prohibit the payment of the guarantee and counter guarantee before French courts failed and both banks paid the amount due under the guarantee and counter-guarantee. The French company filed an application for an ICC arbitration, seated in Paris, against the Iranian company, alleging that the termination of the contract by the Iranian company was unjustified and abusive and requested the Iranian company be ordered to pay an overall amount of

approximately 17,500,000 euros for unpaid invoices and additional costs incurred in relation with the performance of the contract.

In the arbitration, the French company argued that the performance of some of its contractual obligations were impossible to perform or could not be performed without violating measures adopted by the United States authorities and the UN Security Council and implemented by the EU. The issue at stake was therefore whether those embargo measures were applicable to the contract in question. The Arbitral Tribunal ruled that the measures (US, UN and EU sanctions) did not apply and ordered the French company to compensate the Iranian company for the damages incurred by the breach of its contractual obligations.

The French company asked the Paris Court of Appeal to set aside the award, for, among other reasons, violating the international public policy (which is a ground for setting aside an award rendered in France according to article 1520 5° of the French Civil Code of procedure). It was argued that the “international sanctions are mandatory laws which are part of the international public policy and that failure by the arbitration court to integrate the provisions regarding international sanctions against Iran in the award, it has given effect to a contract that is subject matter of international sanctions such that this award, which cannot be implemented without breaching these sanctions, is contrary to the French international public policy”.

The Parisian judges refused to annul the award and provided detailed reasoning for refusing to do so.

First, the court of appeal analyzed the sanctions according to their origin. The sanctions resulting from the UN Security Council’s resolutions are assimilated to foreign mandatory laws, or “*really international mandatory laws*”; sanctions against Iran originated from the EU are considered to be *French mandatory laws*, whereas sanctions against Iran originating from American authorities may be characterized as *foreign mandatory laws*, however their application “may be seen as coming under French international public policy only insofar as it carries the values and principles that cannot be disregarded by this international public policy even in an international context”. Accordingly, a distinction regarding their mandatory character is being made depending on the organ which issued the economic sanctions. International and French mandatory laws cannot be disregarded without violating international public policy. However, foreign mandatory rules are not *always* mandatory for a French court.

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This distinction draws parallel with the distinction made in article 9 of the Rome I Regulation (EC Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) which adopts a different approach between the mandatory rules of the *lex fori* and the mandatory rules of another State (knowing that only mandatory laws of the State of performance of the contractual obligation may be applied, in so far as those overriding mandatory provisions render the performance of the contract unlawful), even if this provision was not applicable in this case.

The Paris Court of Appeal then analyzed whether the contract in question was in the material and territorial scope of application of the UN and the EU sanctions. Having found in the negative, the Court then decided that the performance of the award did not violate international public policy and rejected the claim to set aside the award.

Is that distinction based on the sanctioning organ a sound one? In light of the current political situation regarding the annexation of Ukraine by Russia, the answer must be negative. Russia, being a permanent member of the Security Council, will never be the target of measures decided by the Security Council. Therefore, sanctions targeting Russia can only be adopted on a unilateral basis. This suffices to show that the distinction cannot be used as a sole criterion.

The difficulty here lies in the founding of a supplemental criterion. In our view, the only possible answer to that problem – assuming that the dispute fits in the scope of application of the measures – is to allow arbitrators or judges to assess the legitimacy of the restrictive measures. If the disputed economic sanctions have been issued with the objective to protect the interests of one State only, and that State is not the State of the *lex fori*, then this “egoistic” measure should not be enforced (nor promoted) in other states.²

The fight against so called selfish measures – unilateral restrictive measures – can also come from the legislator. China, for instance, adopted the Anti-Foreign Sanction Law to deter foreign countries’ unilateral measures.³ Other countries,

such as France, have taken similar paths. The EU also adopted a blocking statute (Council Regulation (EC) [No 2271/96](#) of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country), aiming at prohibiting persons under EU Member States jurisdiction to comply with foreign sanctions listed in an annex. This Regulation was recently interpreted by the Court of Justice of the European Union (Grand Chamber) in the *Bank Melli Iran v. Telekom Deutschland GmbH* case of 21 December 2021 ([Case C-124/20](#)) by way of a preliminary question asked by a German court.

In this case, the dispute was between Bank Melli Iran (‘BMI’) and Telekom Deutschland (GmbH) over the latter’s termination of contracts for telecommunication services, which Telekom Deutschland provided to the bank’s branch in Germany. The termination was notified, without providing reasons and with immediate effect, shortly after the reintroduction of US secondary sanctions against Iran on November 5, 2018. BMI was relisted on the SDN list (Specially Designated Nationals and Blocked Persons List), which meant that US regulation prohibited any persons, even those outside the US, from doing business with BMI. The Iranian bank brought an action before the German court seeking an order that Telekom Deutschland leave all contractually agreed telephone and internet connections active, alleging that the abrupt termination of contracts was due to Telekom Deutschland’s wish to comply with US secondary sanctions which is prohibited by the EU blocking Regulation. Indeed Article 5(1) prohibits EU persons – citizens of any EU member state and any legal person incorporated within the EU – from complying with the foreign sanctions listed in the Annex to the Blocking Regulation, unless they have obtained prior authorization from the Commission to comply with these sanctions pursuant to article 5(2). However, Telekom Deutschland had not requested such authorization. The German Court of appeal asked the CJEU for a preliminary ruling on four questions.

The first question was easily answered. It concerned the issue of whether article 5(1) applies even in the absence of an order directing compliance issued by the administrative or judicial authorities of a third country which adopted those laws or whether it was sufficient that the contract be in the scope of application of such measures. The CJEU opted for the second option.

Second, the CJEU was asked whether article 5(1) precludes EU persons from terminating a contract with an SDN person without providing a reason for such termination. Before

² See C. Kleiner and P. Le Goff, Deference in international arbitration and economic sanctions, *Portuguese Arbitration Review* 2023, to be published.

³ See Beibei Zhang and Wei Shen, *When International Commercial Arbitration meets China’s sanction laws: living together but remaining apart?* 13 JIDS 665 (2022) <https://doi.org/10.1093/jnlids/idad024>.



addressing the question, the CJEU noted that because Regulation No 2271/96 is a Regulation, i.e., a norm of general application and directly applicable in EU Member States, which full effectiveness lies in the Courts of EU Member States, “it must be possible to ensure compliance with the prohibition laid down in [article 5(1)] by means of civil proceedings”, which means that the CJEU recognizes the right of a person listed on the SDN list to sue its co-contractor for complying with restrictive measures mentioned in the annex of the Regulation. In other words, even though the only sanctions mentioned in the Regulation (art. 9) are sanctions that Member states should adopt in their national legislation, which was understood to be either administrative or criminal sanctions, civil remedies may also be granted (for instance, an action to seek the annulment of the resolution of a contract), sought by the *sanctioned* person (§59-61).

Having clarified this right of action, the CJUE found, as a matter of principle, that an EU person may terminate a contract with an SDN person without providing reason. However, in cases where the evidence available to a national court tends to indicate, *prima facie*, that by terminating the relevant contract, the terminating party wished to comply with the foreign restrictive measures listed in the annex of the EU Blocking Regulation, it is for that person to prove that its conduct did not seek to comply with those measures (§67). By doing so, the CJEU rules on the law of contracts – not necessarily of the Member States – but on the law which is applicable to the contracts to which a person subject to EU Regulation is a party. In other words, it creates, unexpectedly, a new *European mandatory norm*, which any court of an EU Member States shall apply.

The third and fourth questions, which was addressed together by the Court, concerned the issue of whether the annulment of the termination of a contract, ordered by the court of a Member State as a sanction for not complying to the Blocking Statute, would violate the freedom to conduct a business (protected by article 16 of the Charter of Fundamental Rights of the European Union) and the principle of proportionality, enshrined in article 52, when the person who terminated the contract did not seek authorization to do so (according to art. 5(2) of the Blocking Statute) and where that person risks suffering substantial economic loss as a result of that annulment.

The Court did admit that the forced continuation of contracts limits the freedom to conduct a business (§77). However, this freedom is not absolute and may be limited when other interests protected by the EU legal order are at stake. In this

situation, the Court considers that “the limitation on the freedom of contract to conduct a business resulting from the possible annulment of the termination of a contract contrary to the prohibition laid down in art. 5(1) of the EU Blocking State, would appear, in principle, to be necessary to counteract the effects of the laws specified in the annex, thereby protecting the established legal order and the interests of the European Union in general” (§91). Nevertheless, the referring court will have to strike a balance when assessing proportionality between, the annulment of the termination in breach of the EU Blocking statute and the “probability that Telekom would be exposed to economic losses and the extent of those losses if that undertaking were unable to terminate its commercial relationship with a person included in the SDN list” (§92). In this balancing of interests, the German court should take into account the fact that Telekom did not apply to the Commission for derogation from the prohibition laid down in article 5 (1) and so “deprived itself of the possibility of avoiding the limitation on its freedom to conduct a business” (§93).

To say that the decision was received with some skepticism is an understatement. First, by adding an *ex post* control of the application of the EU blocking statute, made by national courts, when the Regulation only foresaw an *ex ante* derogation mechanism issued by the Commission, the decision significantly modifies the objective and functioning of the EU Blocking Statute. In addition, the obligation of national judges to weigh the various interests at stake, when deciding on a civil remedy, introduces a discrepancy of application of the EU blocking Statute, which yet claimed to be a uniform and collective answer to the extraterritorial application of unilateral restrictive measures, mostly adopted by the United States.

Second, this decision illustrates the flaws of the Regulation. No figures may be found on the EU Commission website on the number of requests it receives for the issuance of a derogation. But this case shows that even big companies may not request such derogation, either because they do not know this procedure or because they consider it too burdensome. In 2021, the Commission launched a public consultation on the review of the Blocking Statute. The results of this consultation are enlightening: “From a general perspective, respondents indicated that the extra-territorial application of third-country sanctions has had a negative impact on the EU and its operators” (p. 2); that it has been “unsuccessful in achieving its objective” (p. 3); that the authorization procedure was “not sufficiently clear”, “too lengthy”, and that “it requires a lot of time and workforce (in-house counsels



and external lawyers)” (p. 3). A proposal of a new Regulation was expected by the second half of 2022, but it has not yet been published. Let’s hope that all those concerns will be soon addressed.

Dispute Resolution Highlight

Reflection on Cross-Border Service of Judicial Documents by Emails - Serving U.S. Process on Chinese Parties

Tom (Li) Zhang⁴

Due to the growth of international commercial disputes, it is commonplace for judicial and extrajudicial documents to be served abroad. Ensuring that documents are appropriately transmitted to a foreign jurisdiction is crucial in foreign related legal proceedings. An improper service may cause delay in legal proceedings, and even result in a court’s refusal to recognise and enforce a foreign judgment. Aiming to establish a uniform mechanism for serving judicial documents on parties in other member countries, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (‘Hague Service Convention’)[1] is an international treaty which both China and the US are parties to. The Hague Service Convention provides several methods through which a plaintiff in one Member State may affect service of process upon a defendant in another Member State.

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Primarily, the Hague Service Convention establishes a system in which each nation creates a “Central Authority”.[2] The Central Authority receives, and attempts to satisfy, requests from abroad for service upon persons within the nation’s borders. This procedure is the major method provided by the Hague Service Convention, but other methods of service including service by diplomatic and consular agents, service through consular channels, service on judicial officers in the receiving country, are also authorized. In particular, pursuant to article 10(a) of the Hague Service Convention, if the receiving country does not object, the Convention shall not interfere with the freedom to send judicial documents by postal channels directly to persons abroad.[3]

Although the Hague Service Convention intends to streamline the international service process, its implementation has raised a number of issues. One long-standing issue is whether email is a permissible method of service under the Hague Service Convention if a country has objected to service by postal channels. The US Federal Circuit courts are split on this issue. Some courts have maintained that service via email, regardless of a country’s objections, is precluded under the Hague Convention.[4] Nevertheless, reasoning that an objection to service by postal channels neither represent an objection to other forms of service such as email, nor expressly bar service via email, numerous US courts have taken the opposite position, ruling that service via email is permitted by the Hague Convention.[5]

The recent ruling rendered by the US Southern District Court of New York in *Smart Study Co., Ltd v. Acuteye-US, et al.*[6], addresses this controversy and demonstrates the latest view on this issue.

As a “global entertainment company specializing in developing animated gaming content to deliver high-quality entertainment, Plaintiff owns multiple US federal trademark and copyright registrations associated with the hit song ‘Baby Shark’”. By contrast, the defendants are third-party merchants that operate online shops on e-commerce platforms including Amazon.com. Plaintiff claimed that the defendants, located in China, had marketed and sold counterfeit Baby Shark products via their online shops on Amazon.com.

On July 6, 2021, the plaintiff filed a lawsuit against the defendants in the Federal District Court for the Southern District of New York, claiming that the defendants violated



the Lanham Act, the United States Copyright Law and Unfair competition under the common law of New York, and applied to the court for a temporary restraining order. On July 9, 2021, the court for the Southern District of New York granted the plaintiff's request for relief and authorized the plaintiff to serve the Court's orders, the Summons, and the Complaint on the defendant by email in accordance with Rule 4(f)(3) of the Federal Rules of Civil Procedure. Specifically, the court allowed the plaintiff to send copies of those documents to the email addresses related to the defendant's user accounts and merchant stores on Amazon.

In October 2021, two of the defendants filed motions stating that the Court lacked personal jurisdiction, on the grounds that serving the Chinese defendants by email violated the Hague Service Convention, and did not comply with Article 4(f) of the Federal Rules of Civil Procedure. The plaintiff then dismissed the two defendants from the legal action and filed a motion for default judgment against the other defendants who remained silent by the deadline established in [Federal Rule of Civil Procedure](#), arguing that the remaining defendants were properly served in accordance with rules 4(f)(2) and 4(f)(3) of the Federal Rules of Civil Procedure.

First of all, as the defendants were located in the People's Republic of China, a member state of the Hague Service Convention, the Court held that Hague Service Convention should apply in the present case.

The Court admitted that the US courts are split over whether service by emails is allowed under the Hague Service Convention. Relying on the precedents of the US Supreme Court (*Water Splash, Inc. v. Menon*, [137 S.Ct. 1504, 1505](#) (2017); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, [486 U.S. 694, 699](#) (1988)), and by interpreting the purpose as well as article 11 and 19 of the Hague Service Convention[CS9], the Court reasoned that the only permissible methods of service were those "specified" in the Convention and email is not explicitly referred to.

Interestingly, having obtained legal advice with respect to Chinese law from academic circle and professionals who submitted an amicus brief, the Court elaborated on relevant Chinese Law:

- Article 11 of the Minutes of the National Symposium on Foreign-related Commercial and Maritime Trial Work provides that if the country objects to the service by mail

under the Convention, it shall be presumed that the country does not allow electronic service, and the Chinese people's court shall not adopt electronic service.

- Article 284 (formerly Article 277) of the PRC Civil Procedure Law stipulates that except for certain exceptions (which are not applicable to this case), no foreign organ or individual may serve documents, investigate and collect evidence within the territory of the people's Republic of China without the permission of the competent authority of the people's Republic of China.

Accordingly, taking China's position into account, the Court concluded that through making a reservation to Article 10(a) of the Hague Service Convention, China has made an objection to service by postal channels, which would preclude service by email under the Convention. In any case, only courts have authority to serve documents on litigants themselves pursuant to Chinese laws and practices. The Plaintiff, as a non-Chinese entity, by itself or through its legal counsel, is not permitted to directly serve Chinese individuals or entities by any means (not just email). In fact, according to Chinese law, the service of judicial documents can only be "through the channels specified in international treaties", that is, through the Central Authority provided by the Hague Service Convention.[7]

Notably, Article 4(f)(2)(c) of the Federal Rules of Civil Procedure only allows service by methods that are not "prohibited by foreign laws". As Chinese law prohibits foreign entities and individuals from serving on Chinese litigants without the consent of the Chinese Ministry of justice, the Court held that the plaintiff in this case failed to make proper serve on the defendant under Article 4(f)(2)(c), and hence, the Court lacked personal jurisdiction. Finally, the Court refused the Plaintiff's motion for a default judgment[CS10]. Interestingly, the Court admitted that it was not until the present case that the judge realized that email service might not be permissible on defendants located in China because defendants in the majority of previous cases failed to make such defenses. This vividly demonstrates the importance which Chinese businesses should attach to the protection of their extraterritorial litigation rights. By actively filing defenses rather than remaining silent, Chinese businesses' position can be heard and permitted by the US courts, which may insert significant implications on the results of lawsuits.



Although it remains to be seen whether the policy underlying this ruling could be expected to turn into a trend, this recent ruling provides legal certainty to business entities on cross-border service in legal proceedings. Furthermore, this ruling indicates that some courts are willing and are ready to take a proactive approach to admit foreign laws including Chinese law and attach certain weight when shaping its ruling in connection with application of Hague Service Convention. Such an attitude highlights the Court's professional manner and judicial rationality.

[1] Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, Hague Conference on Private Int'l Law, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=17>.

[2] *Id.* art.2 and art.9

[3] *Id.* art.10(a)

[4] See *Facebook, Inc. v. 9 Xiu Network (Shenzhen) Tech. Co.*, 480 F. Supp. 3d 977, 980 (N.D. Cal. 2020); *Anova Applied Elecs., Inc. v Hong King Grp., Ltd.*, 334 F.R.D. 465, 472 (D. Mass. 2020); *Prem Sales, LLC v. Guangdong Chigo Heating & Ventilation Equip. Co.*, 494 F. Supp. 3d 404, 417 (N.D. Tex. 2020); *CRS Recovery, Inc. v. Laxton*, No. C 06- 7093 CW, 2008 WL 11383537, at *2 (N.D. Cal. Jan. 8, 2008)

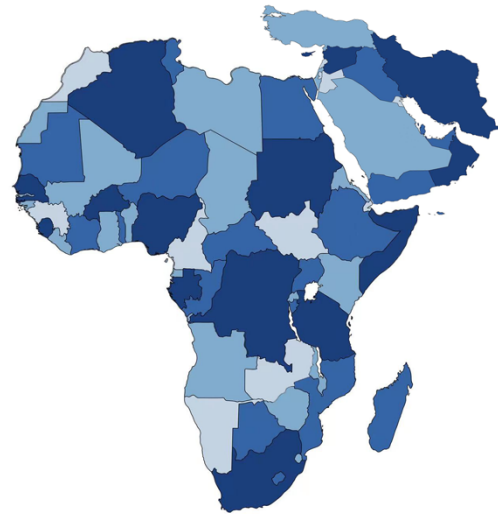
[5] *Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 332 (S.D.N.Y. 2015); *Kaneka Corp. v. Purestart Chem Enter. Co.*, No. 16CV4861MKBSIL, 2017 WL 11509784, at *3 (E.D.N.Y. Oct. 17, 2017); *WeWork Cos. Inc. v. WePlus (Shanghai) Tech. Co.*, No. 5:18-CV-04543-EJD, 2019 WL 8810350, at *2-3 (N.D. Cal. Jan. 10, 2019); *Mattel, Inc. v. Animefun Store, et al.*, No. 18-CV-8824, 2020 WL 2097624, at *5 (S.D.N.Y. May 1, 2022)

[6] 1:21-cv-05860-GHW Document 100 Filed 07/21/22 ([S.D.N.Y. 2022](https://www.ipeconomy.cn/pdf/frankel-babyshark--opinion.pdf)), <https://www.ipeconomy.cn/pdf/frankel-babyshark--opinion.pdf>

[7] It is worth noting that for purposes of the Convention, the Chinese Ministry of Justice has been designated as the "Central Authority". See section 1 of the Approval of Standing Committee of the Chinese National People's Congress in relation to joining the Hague Service Convention (adopted on 2 March 1991).

AFRICA & THE MIDDLE EAST

—Editors: Lamine Balde, Sedat Sirmen,
Naimeh Masumy and Karen Sief



Private international law in Africa and the Middle East has seen little development in the second half of 2022. Some States have entered into bilateral agreements or revised their legislation to promote, facilitate, and increase trade and investment with their economic partners. Bahrain and the United Arab Emirates have signed an investment agreement and a free trade agreement, respectively, while Algeria adopted a new investment law. Moreover, the legal status of dual nationals remains an issue of great importance in some countries, as evidenced by the recent acceptance of dual nationality status in Liberia, with the enactment of a bill amending the country's Aliens and Nationality law. Besides, arbitration is still very much in demand by private economic actors, as recent rulings in South Africa and Jordan demonstrate. Finally, a virtual workshop on the Hague Conference on Private International Law ('HCCH') and its relevance for Africa was held which identified the reasons for the limited impact of the HCCH on the continent and discussed possible measures to overcome the challenge of increased visibility in Africa.



International Conventions

Bahrain: Bahrain signed an investment agreement with Japan

On June 23, 2022, Bahrain and Japan signed the “Agreement between Japan and the Kingdom of Bahrain for the Reciprocal Promotion and Protection of Investment” in Manama, Bahrain. The agreement aims to enhance the protection and promotion of investments by investors of one contracting party in the jurisdiction of the other contracting party. It will enter into force on the thirtieth day after the contracting parties notify each other, through the exchange of diplomatic notes, of the completion of their respective legal procedures.

The full text to the agreement may be found here:

<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6431/download>

United Arab Emirates: the United Arab Emirates signed a free trade agreement with Indonesia after reaching similar agreements with India and Israel

On July 1, 2022, the United Arab Emirates and Indonesia concluded a bilateral free trade agreement known as the Indonesia-United Arab Emirates Comprehensive Economic Partnership Agreement (‘IUAE-CEPA’) to, inter alia, remove barriers to trade, foreign direct investment and other capital movements. The CEPA with Indonesia, reached during a visit by Indonesian President Joko Widodo to Abu Dhabi, is the United Arab Emirates’ third such agreement since the beginning of the year, following agreements signed with India and Israel in February and May, respectively.

For more information, see:
<http://wam.ae/en/details/1395303062771>

Saudi Arabia: accession to the Convention of Abolishing the Requirement of Legalization for Foreign Public Documents

Saudi Arabia acceded on April 8, 2022 to the Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents. This Convention entered into force on December 7, 2022 for Saudi Arabia.

National Legislation

Algeria: adoption of a new investment law

On July 24, 2022, Algeria passed a new investment law, repealing and replacing the previous 2016 Investment Promotion Law. The new law, Number 22-18, was adopted unanimously by the People’s National Assembly on June 27 and the Senate on July 13, 2022 and published in the Official Gazette n°50 on July 28m, 2022. It intends to enhance the investment landscape in Algeria by setting out provisions that, inter alia, are geared towards stimulating investment flows in order to improve the country's economic standing. The Algerian government issued eight decrees in September to implement the new law.

The full text to the Law may be found here:

<https://www.joradp.dz/FTP/jo-francais/2022/F2022050.pdf>

The full text to the decrees may be found here:

<https://www.joradp.dz/FTP/jo-francais/2022/F2022060.pdf>

Liberia: enactment into law of a bill amending the Alien and Nationality Law

On July 22, 2022, the president of Liberia signed into law a bill amending the country’s alien and nationality law. The bill was passed by both the House of Representatives and the Senate and would take effect immediately upon printing into handbills by the Ministry of Foreign Affairs. The new law reverses a 1973 ban on dual citizenship, allowing Liberians to remain citizens after acquiring a second nationality. Another noteworthy development is that individuals can now claim Liberian citizenship through their mothers.

For more information, see:
<https://www.liberianobserver.com/liberia-dual-citizenship-becomes-legal> ;
<https://www.aljazeera.com/features/2022/7/27/all-you-need-to-know-about-liberias-new-dual-citizenship-law>

United Arab Emirates: the Sweeping Reforms to Modernize the Civil Law Framework; the Change in Appeals to the Court of Appeal



In a bid to boost the UAE legal infrastructure, the Government of Dubai enacted sweeping reforms to modernize the framework for civil procedure. The provisions of the new Civil Procedure Law bring about two primary changes. First, the new provisions require the Court of Appeal to hear and decide on the merits of the appeal request referred by the Case management Office. The new provisions designate the Court to hear the appeal in “private chambers” rather than open setting. Under this law, the Court shall decide on the appeal in chambers within 20 business days, by issuing a reasoned judgment or ruling. The new provisions suggest that the Courts might attribute closer scrutiny of the grounds presented for the appeals, which in turn, confirm that there exists less certainty about admitting and reviewing all the appeals.

Second, the new provisions substantially reduced the time limit for filing appeals to the Court of Cassation from 60 days to 30 days. This is a significant change, signaling that the UAE Court system treats appeal challenges with heightened standards of review.

For more information, see:
<https://www.raalc.ae/wp-content/uploads/2020/09/Federal-Law-No.-11-of-1992-On-the-Civil-Procedures-Law.pdf>

United Arab Emirates: the Introduction of English Language as an Official Language in the UAE mainland Courts Following the Federal Decree Law No. 42 of 2022

The new reforms in the Civil Procedure Law confirms that the court shall hear English statements of litigants, witnesses, and other participants through an interpreter upon taking the oath according to the law. The Federal Decree Law No. 42 of 2022 (The New Civil Procedures Law) endorses English as one of the official languages to be heard before certain judicial courts. The new reform confers power to the Chairman of the Federal Judicial Council to determine whether English can be used as the appropriate language of trials, proceedings, judgments, and relevant decisions. The new provisions do not clearly address which courts, disputed matters, or specific cases will be governed in English. Therefore, the circumstances under which English can be endorsed as a primary language for trials and litigants are not clear.

The opacity concerning the scope of application of English as a preferred language for trials gives rise to a few vexing matters. Namely, many UAE nationals have limited knowledge of English and may be forced to use interpreters,

and in turn, be incurred with additional costs. Further, the use of third parties under the guise of interpretation may delay the entire proceedings. Additionally, some of the members of judiciaries may not be well-versed in technical, complex legal jargon. As a result, the judiciaries might be prone to divergent interpretations of the underlying facts and legal issues.

In light of this, the New Civil Procedures Law will benefit from further clarification concerning the scope and the specific use of English as a preferred mode of litigation in the UAE Court system.

The full text to the Decree may be found here:

[https://dlp.dubai.gov.ae/Legislation%20Reference/2022/Decree%20No.%20\(42\)%20of%202022%20Terminating%20the%20Special%20Tribunal.html](https://dlp.dubai.gov.ae/Legislation%20Reference/2022/Decree%20No.%20(42)%20of%202022%20Terminating%20the%20Special%20Tribunal.html)

National Case Law

South Africa: the Supreme Court of Appeal decided whether subsequent agreements can supersede or render clauses inoperative in all previously entered into agreements.

On May 17, 2022, the South African Supreme Court of Appeal, in *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Another (case no 065/2021) [2022] ZASCA 68*, dismissed an appeal against an order granted by the Gauteng Division of the High Court (the ‘High Court’). This appeal addresses whether an arbitration clause and a governing law clause in a license agreement between the appellant, Tee Que Trading Services (Pty) Ltd (TQ), and the first respondent, Oracle Corporation South Africa (Pty) Ltd (Oracle), were rendered inoperative by three subsequent agreements between the same parties. Also at issue is whether similar clauses in a related sublicense agreement between TQ and the South African Post Office (SAPO) were superseded by the dispute resolution clauses in the three agreements between TQ and Oracle. The High Court found that the clauses in the earlier license and sublicense agreements were valid and binding, notwithstanding the three subsequent agreements, and ruled in Oracle’s favor by ordering a stay of the action pending the referral of the dispute to arbitration. TQ was dissatisfied with the High Court’s ruling and appealed the order. On appeal, the South African Supreme Court held that an agreement could not be superseded by another agreement unless the parties provide



otherwise in subsequent agreement(s) and trigger the termination clause or any clause related thereto, thereby emphasizing the applicability of a non-variation clause where there is more than one agreement between the parties. In addition, the applicability of the arbitration clause and governing laws is based on the express provisions of the relevant agreement.

For more information see:
<https://www.supremecourtofappeal.org.za/images/sca2022-68ms.pdf>

For an analysis see:
<https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=31994>

Jordan: the Jordanian Court of Cassation upheld the arbitrability of distribution agreements

The case arose from a distribution agreement containing an arbitration clause between a Jordanian distributor and a German supplier. The distributor brought compensation claims against the supplier before the Amman courts, claiming that the supplier unlawfully terminated their exclusive distribution agreement. Following the proceedings in Jordan and in accordance with the arbitration clause which subjected all disputes arising out of or relating to agreements with buyers outside the European Union to arbitration in Germany under the German Arbitration Institute (DIS), the supplier initiated arbitration proceedings in Germany. Before the Jordanian court of first instance and court of appeal, the supplier successfully argued that the arbitration clause gave exclusive jurisdiction to the arbitral tribunal. On June 14, 2022, the Court of Cassation dismissed the appeal and upheld the substantive validity of an arbitration clause contained in a distribution agreement, thus agreeing with the lower courts' decisions. The Court rejected the distributor's claims but argued that the governing law in Jordan does not render the arbitration agreement invalid with respect to the arbitrability of disputes arising from distribution contracts.

For more information see:
<http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2022/09/Decision-no.-916-2022.pdf>

For an analysis see:
<http://arbitrationblog.kluwerarbitration.com/2022/09/09/the-jo>

[rdanian-court-of-cassation-upholds-the-validity-of-an-arbitration-clause-in-a-distribution-agreement/](#)

Association and Events

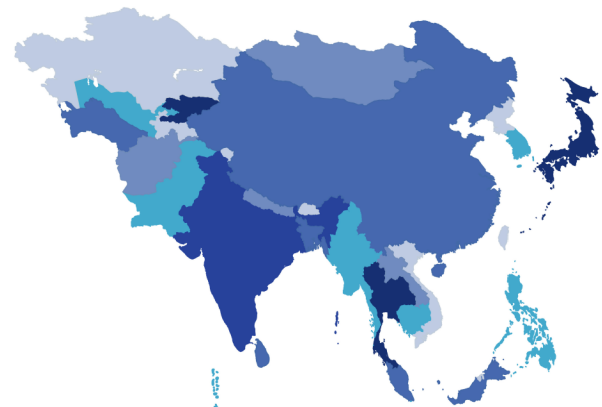
Virtual workshop on the Hague Conference on Private International Law and its relevance for Africa

On November 21, 2022, Dr. Christophe Bernasconi held a video conference via Zoom to discuss the HCCH and its relevance for Africa. The session described the current situation of HCCH in Africa, identified reasons for the limited impact of HCCH in Africa, and discussed possible action points to overcome the challenge of increased visibility in Africa. The workshop is part of a virtual workshop series that intends to discuss new scholarship on private international law in Africa and propose solutions for improving the current framework on the continent.

For more information see:
<https://www.mpipriv.de/events/32636/2376>

ASIA

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





International Conventions

Kyrgyzstan: In April 2022, Kyrgyzstan ratified its membership of the International Centre for Settlement of Investment Disputes (ICSID), the arbitration center of the World Bank.

For more information on Convention, please visit: <https://icsid.worldbank.org/>.

China: Digital Economy Partnership Agreement Joint Committee commenced Accession Working Group for China

On August 18, 2022, the Digital Economy Partnership Agreement ('DEPA') Joint Committee formally commenced the accession process for China, following its application on November 1, 2021. The Joint Committee established an accession working group which is chaired by Chile. The accession working group will examine China's application, conduct discussions on China's ability to comply with the standards and commitments of DEPA, and submit a report to the Joint Committee.

The official news report can be found at <https://www.mci.gov.sg/pressroom/news-and-stories/pressroom/2022/8/digital-economy-partnership-agreement-joint-committee-commences-accession-working-group-for-china>

China: China and Nicaragua signed early harvest arrangement and begins FTA negotiations

On July 12, 2022, China and Nicaragua signed an Early Harvest Agreement, a preliminary step to establishing a Free Trade Agreement. On the same day, the two parties jointly announced that FTA negotiations will formally commence.

The official news report can be found at http://fta.mofcom.gov.cn/enarticle/enrelease/202207/49257_1.html.

China: China-New Zealand FTA upgrade protocol came into effect

On April 7, 2022, the Upgrade to the China-New Zealand Free Trade Agreement came into effect. The China-New Zealand Free Trade Agreement was initially signed on April 7, 2008 and entered into force on October 1, 2008. China and New Zealand began negotiations to upgrade the FTA in November 2016 and concluded negotiations in January 2021. The Upgrade further facilitates trade, services, and investment and adds four new chapters (e-commerce, competition policy, government procurement, environment and trade).

The official news report can be found at http://fta.mofcom.gov.cn/enarticle/enrelease/202204/48117_1.html

Singapore: Singapore and Australia sign a Green Economy Agreement

Singapore and Australia signed the Singapore-Australia Green Economy Agreement (GEA) on 18 October 2022. The GEA is the first agreement of its kind and seeks to foster growth in the green economy. It identifies seven key areas where the two countries will collaborate more closely with respect to the green economy: (i) trade and investment; (ii) standards and conformance; (iii) green and transition finance; (iv) carbon markets; (v) clean energy, decarbonisation and technology; (vi) skills and capabilities; and (vii) business engagements and partnerships.

The full text of the agreement can be found here: <https://www.dfat.gov.au/sites/default/files/singapore-australia-gea-official-text-signed.pdf>

National Legislation

China: a Guideline for Cross-border data transfer

On August 31, 2022, the Cyberspace Administration of China issued the Guideline on the Application of Security Assessment on Cross-border Data Transfer. The Guideline



compliments the Measures for Security Assessment of Cross-border Data Transfer which came into effect on September 1, 2022.

The full text of the Guideline can be found here <http://www.cac.gov.cn/rootimages/uploadimg/1663568170075366/1663568170075366.pdf>.

China: New provisions concerning the jurisdiction of foreign-related civil and commercial cases

On November 15, 2022, the Chinese Supreme People's Court published the Provisions on Several Issues Concerning the Jurisdiction of Foreign-Related Civil and Commercial Cases, which will come into effect on January 1, 2023. The Provisions give all basic and intermediate people's courts jurisdiction to hear first-instance foreign related civil and commercial cases depending on the monetary value of the subject matter in dispute, the complexity of the case, the number of parties, and the case impact.

The full text of the Provisions in Chinese can be found here <http://cicc.court.gov.cn/html/1/218/149/156/2317.html>.

China: Draft of the Civil Procedure Law Amendment

On December 30, 2022, the Standing Committee of the National People's Congress published a draft of the Civil Procedure Law Amendment for public consultation. This draft made important amendment to jurisdiction and judgment recognition and enforcement in foreign-related cases.

The full text of the drafted amendment in Chinese can be found here <http://www.npc.gov.cn/flcaw/userIndex.html?lid=ff808181844230ec0185612c16b27450>.

Hong Kong SAR: Hong Kong SAR passed an ordinance to facilitate reciprocal enforcement of civil and commercial judgments rendered in mainland China

On October 26, 2022, Hong Kong passed the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance to implement the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of Mainland

China and of the Hong Kong Special Administrative Region, which was signed in 2019. The Ordinance will allow a broader range of civil and commercial judgments of Mainland Chinese courts to be enforced in Hong Kong. The Ordinance will likely come into effect in about six to seven months.

The full text of the Ordinance can be found here: <https://www.gld.gov.hk/egazette/pdf/20222644/es1202226441.pdf>

Uzbekistan: In 2019, Uzbekistan launched a modernization of its civil law and procedure. Within the framework of this process, Uzbek private international law norms are under reform. Among the most significant proposed changes there is recognition of party autonomy as a separate provision and expanding of extraterritorial application of foreign law in Uzbekistan.⁵ The proposed changes are under review.

National and Regional Case Law

China: Chinese court dismissed challenge to arbitral award based on alleged breach of confidentiality

On May 30, 2022, the Intermediate People's Court of Wuxi Municipality, Jiangsu Province dismissed a challenge to an arbitral award based on an alleged breach of confidentiality as required under the CIETAC rules due to the disclosure of details relating to the arbitration to a third-party funder. The court held that the confidentiality requirement merely required that the arbitration proceeding not be disclosed to the public and this had not occurred in this case.

The judgment can be found here <https://wenshu.court.gov.cn/> with the following citation (2022) Su 02 Zhi Yi No. 13

Hong Kong SAR: Hong Kong court clarified when a tribunal's omission to deal with an issue would justify setting aside an award

On July 26, 2022, in *LY v. HW* [2022] HKCFI 2267, the Hong Kong Court of First Instance decided that a high threshold would have to be met before an arbitration award would be set aside on the ground of a breach of due process due to the tribunal's failure to deal with an issue raised by the parties. The Court recognised that section 67 of the Arbitration Ordinance which reflects Article 31 of the Model law requires

⁵ Getman-Pavlova I. et al., "Reforma Mezhdunarodnogo Chastnogo Prava v Respublike Uzbekistan" (Private International Law Reform in the Republic of Uzbekistan) Gosudarstvo i Pravo, No. 7, 2022, pp. 132-145.



the award to state the reasons upon which it is based. However, such reasons do not need to be elaborate or lengthy since the object of arbitration is to facilitate the fair and efficient resolution of a dispute.

The judgment can be found here <https://doylesarbitrationlawyers.com/ly-v-hw-2022-hkcfi-2267/>.

The United Arab Emirates: The Discernable Move to Recognize the Principle of Reciprocity by the Ministry of Justice of the United Arab Emirates

Following the decision of the English Court of Appeal in *Lenkor Energy Trading DMCC v Puri* [2021] EWCA Civ 770, in which the Court of Appeal upheld the enforcement of the Dubai court's judgment concerning a dishonored cheque, the Ministry of Justice Issued a letter, urging the Dubai courts to enforce judgments of the English courts under the principle of reciprocity. This announcement marks a shift within the legal framework of the UAE which is predicated upon civil law principles. The principle of reciprocity does not have a strong foothold within the archetype of civil law. The UAE recognizes a number of requirements for the enforcement of foreign judgments, namely, finality, inconsistency of judgments with domestic judgments and the final criteria is the absence of violation of public policy or morality. These criteria are enshrined within the Article 85 (2) of the Cabinet Resolution. In addition to the domestic regulations, the UAE legal framework in relation to the recognition of foreign judgments is shaped by the bilateral treaties that this is a party to. Notably, the UAE is a party to a number of treaties facilitating the reciprocal enforcement of judgments. The most relevant of these are the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications 1996 (GCC Convention). However, the recent decision of the English High Court propelled a shift in the legal approaches adopted by the UAE domestic courts. The decision of the *Lenkor Energy Trading DMCC v Puri* [2021] EWCA Civ 770 reinforced the UAE Ministry of Justice to issue a Directive, confirming that in the absence of a treaty for mutual recognition of judgments, the *Lenkor* decision has established the principle of reciprocity required for enforcement of an English Court judgment in the UAE. In short, this directive can be regarded as a welcome

development in the enforcement of English Court judgments in the UAE. Further, the Directive will potentially enhance the confidence of parties that seek to resolve their disputes in English Court where the counterparty might be located in the UAE or has some tangible asset in the UAE.

The Directive can be found here: <https://www.moj.gov.ae/en/home.aspx>.

Singapore: Injunctive relief granted against NFTs and jurisdiction asserted over dispute involving blockchain

The Singapore High Court granted injunctive relief against NFTs where the domicile, residence and location of the holder of the NFT was unknown, in *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264

The claimant obtained a cryptocurrency loan from the defendant, using a Bored Ape NFT as collateral. The NFT was transferred into an escrow account with the agreement that the defendant would not enforce the collateral without first granting the claimant reasonable opportunities to make full repayment of the loan and to retrieve the NFT from the escrow account. The claimant was unable to make full repayment on time and notified the defendant that he needed a short extension of time to repay the loan. The defendant initially agreed to a further refinancing loan but later changed his mind and foreclosed on the NFT. The NFT was then transferred from the escrow account to the defendant's cryptocurrency wallet. The claimant subsequently discovered that the defendant had listed the NFT on an online NFT marketplace for sale. The claimant brought a suit against the defendant, and also sought an injunction to prevent the defendant from disposing of the NFT pending the suit.

The court granted the injunction, accepting that (1) NFTs are capable of giving rise to proprietary rights, which could be protected by an injunction; and (2) the court had jurisdiction to hear disputes involving blockchain, despite its borderless and decentralized nature and the fact that the domicile, residence and location of the defendant was presently unknown. The primary connecting factor was the fact that the claimant was located in Singapore, and carried on his business there.

The full text of the judgment can be found here: https://www.elitigation.sg/gd/s/2022_SGHC_264



AMERICAS

Central, South America & Mexico

—Editor: Juan Pablo Gómez-Moreno



During the second half of 2022, Latin American countries continue to enter into new international instruments such as free trade agreements and investment treaties. Chile, Ecuador and Uruguay are some of the relevant examples of this trend. Notably, the Trans-Pacific Partnership ('TPP') concluded a free trade agreement ('FTA') with Singapore.

Ecuador's trend of promoting foreign investment and related instruments continues. Additionally, as it has been the case in previous years, courts in the US and Europe keep issuing enforcement decisions concerning awards decided against Latin American parties in multi-billion dollar investment cases involving key states like Ecuador and Venezuela.

International Conventions

Suriname: Suriname acceded to Convention on the Recognition and Enforcement of Foreign Arbitral Awards

On November 10, 2022, Suriname became the 171st State Party to the Convention. The Convention will enter into force for Suriname on February 8, 2023.

For more information on Convention, please visit: <https://uncitral.un.org/en/texts/arbitration>

Uruguay: Uruguay applied to join the Comprehensive and Progressive Trans-Pacific Partnership Agreement

On December 2, 2022, the President of Uruguay, Luis Lacalle Pou, announced the country's plan to join the CPTPP.

A news report can be found at <https://asia.nikkei.com/Economy/Trade/Uruguay-applies-to-join-CPTPP-in-bid-for-Asian-export-boost>.

Chile: commercial treaty with Ecuador entered into force

On May 16, 2022, the commercial treaty between Chile and Ecuador entered into force. The instrument had been negotiated by the parties since 2019 and was approved by Ecuador's National Assembly in May 2021 and Chile's Senate in January 2022.

For further information see:

http://www.sice.oas.org/TPD/CHL_ECU/EiF/CHL_ECU_EiF_s.pdf.

Uruguay: new BIT between Uruguay and Turkey

On April 23, 2022, Uruguay entered into a bilateral investment treaty with Turkey.

For further information see:

<https://www.gub.uy/ministerio-relaciones-exteriores/comunicacion/comunicados/visita-uruguay-del-ministro-relaciones-exteriores-turkiye-sr-mevlut#dropdown>.

TPP concluded an FTA with Singapore

On January 22, 2022, the TPP concluded a free trade agreement with Singapore following its XVI Summit. Presidents from Colombia, Chile, Peru and Mexico were present at the event.



For further information see:

http://www.sice.oas.org/tpd/pacific_alliance/Presidential_Declarations/16th_Pres_Decl_s.pdf.

National Legislation

Ecuador: government presented bill for promoting and protecting foreign investments

On February 22, 2022, Ecuador's Government presented a bill for promoting and protecting foreign investments to the National Assembly. Among the key provisions, there are important proposals for the solution of disputes and the use of international arbitration.

The full text of the bill may be found here:

<https://asobanca.org.ec/wp-content/uploads/2022/02/Proyecto-de-Ley-de-Atraccion-de-Inversiones-presnetado-en-AN-el-22-02-2022.pdf>.

National Case Law

Venezuela: Paris Court of Appeal refused to annul an UNCITRAL award against Venezuela

On September 20, 2022, the Paris Court of Appeal issued a decision refusing to annul an award issued in 2019 by an UNCITRAL tribunal in a \$600 million USD dispute brought by two investors against Venezuela.

The full text of the opinion may be found here:

<https://files.lbr.cloud/public/2022-10/2022.09.20%20-%20Hemsen%20-%20CA%20Paris.pdf?VersionId=tbpU6mcs0DApFmDq5Ku3jxSHw2fpomgm>.

Venezuela: US court granted request to enforce a \$9 billion USD ICSID award against Venezuela

On August 19, 2022, the US District Court for the District of Columbia granted the request of three Dutch subsidiaries of Conoco to enforce a \$9 billion USD ICSID award against Venezuela. The award was issued in 2019 and concerns claims for the expropriation of three large oil projects.

The full text of the opinion may be found here:

<https://files.lbr.cloud/public/2022-08/04519414145.pdf?VersionId=iDWxE6hKPw4DPoWr.ULI7sEOHxzk3SWz>.

Brazil: US court granted a request to attach assets of a Brazilian tycoon

On July 14, 2022, the New York Southern District Court granted an ex parte request by a Brazilian infrastructure group to attach the assets of a Brazilian billionaire. The decision follows an award concerning a sanitation project rendered in 2019 by a tribunal under the auspices of the Brazil-Canada Chamber of Commerce ('CAM-CCBC').

The full text of the decision may be found here:

[https://files.lbr.cloud/public/2022-07/127131602303%20\(1\).pdf?VersionId=zh.OhBUN36PCwSq3qwaIgVm1eMnDOGZO](https://files.lbr.cloud/public/2022-07/127131602303%20(1).pdf?VersionId=zh.OhBUN36PCwSq3qwaIgVm1eMnDOGZO).

Ecuador: Dutch court dismissed Ecuador's request to overturn an UNCITRAL award

On June 28, 2022, a Dutch appeal court dismissed a request from Ecuador to overturn an investment award for \$9.5 billion USD. The underlying dispute was decided in 2018 by a tribunal constituted under the auspices of the PCA and relates to an oil & gas project in the Amazon.

The full text of the decision may be found here:

https://files.lbr.cloud/public/2022-06/20220629132831967.pdf?VersionId=gJ_I9hJzvOet6GbJYPatFn.nJLB_GjOY.

Venezuela: Singapore High Court refused the enforcement of an ICSID award against Venezuela

On May 23, 2022, Singapore's High Court refused to allow one of Venezuela's creditors to enforce a \$500 million USD award against state-owned assets. In an oral ruling, Justice Vinodh Coomaraswamy considered that PDV Marina was not an extension or an organ of the state.

The full text of the decision is not available.



North America

—Editor: Carrie Shu Shang



National Legislation

United States: U.S. State Department recognized head-of-state immunity for Mohammad bin Salman

On November 17, 2022 the Biden administration filed a suggestion of immunity on behalf of Mohammad bin Salman (MBS) in a suit filed by the fiancée of Jamal Khashoggi who was assassinated in 2018 (*Cengiz et al v. Bin Salman et al*). The case was brought in the U.S. District Court for the District of Columbia in 2020, seeking relief under the Torture Victim Protection Act of 1991 and Alien Tort Statute in connection with Khashoggi's killing. Head-of-state immunity is a form of absolute immunity. In the November 17 filing, The U.S. Department of State recognized and allowed MBS's sovereign immunity as a sitting head of the government, making him immune from any remedies the court may order while he remains in office.

For the filing of suggested immunity please see:

https://www.documentcloud.org/documents/23312855-visek_suggofimmunity_11172022?responsive=1&title=1

National Case Law

United States: Supreme Court held hearing in Mallory v. Norfolk Southern Railway Co. (Personal Jurisdiction)

On November 8, 2022, the Supreme Court heard oral arguments in *Mallory v. Norfolk Southern Railway Co.*, a personal jurisdiction case on review from the Pennsylvania Supreme Court. Robert Mallory, a Virginia resident employed in Virginia and Ohio, sued Norfolk Southern, then based and incorporated in Virginia, in the Pennsylvania state court. Under Pennsylvania law, a foreign corporation “may not do business in this Commonwealth until it registers” with the Department of State of the Commonwealth. State law further establishes that registration constitutes a sufficient basis for Pennsylvania courts to exercise general personal jurisdiction over that foreign corporation. Norfolk Southern Railway objected to the exercise of personal jurisdiction, arguing that the exercise violated the Due Process Clause of the Fourteenth Amendment. The trial court agreed and held Pennsylvania's statutory scheme unconstitutional. The Pennsylvania Supreme Court affirmed. The case now asks the Supreme Court to decide whether Norfolk Southern consented to personal jurisdiction in Pennsylvania by registering to do business there. The Court's ruling could affect whether states can assert general personal jurisdiction over foreign corporations by conditioning companies' ability to conduct business within their borders on consenting to personal jurisdiction in their courts.

The U.S. Supreme Court docket information for this case can be found here: <https://www.supremecourt.gov/docket/docketfiles/html/public/21-1168.html>

United States: lower court applied ZF Automotives Rule to decide investor-state arbitration case

In *re Alpene, Ltd.*, a Hong Kong corporation claimed against the Republic of Malta before the International Centre for Settlement of Investment Disputes (‘ICSID’) under a bilateral investment treaty entered into between People's Republic of China and Malta. Alpene brought the action in New York seeking documents and testimony from Elizabeth McCaul, a New York resident, pursuant to 28 U.S.C. § 1782. The statute requires that the discovery be for use in a proceeding before a “foreign or international tribunal”. On October 27, 2022, a magistrate judge sitting in the U.S. District Court for the Eastern District of New York quashed a subpoena issued in



aid of the ICSID proceeding. The decision found insufficient support for the claim that the governments involved intended to imbue the ICSID tribunal with “governmental authority”, after the U.S. Supreme Court drastically narrowed the statute’s applicability to international arbitration this June in the landmark case, *ZF Automotive US, Inc., et al., v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022).

For a full text of the case opinion please see:
<https://docs.justia.com/cases/federal/district-courts/new-york/nyedce/1:2021mc02547/468874/33>

impact corporations’ ability to seek damages for international trademark infringement, and may resolve a circuit split on the applicability of the Lanham Act on foreign defendants’ foreign conduct. The case was appealed from the Tenth Circuit of Court of Appeals. Hetronic brought a Lanham Act trademark infringement claim against one of its foreign distributors alleging that the distributor had blatantly knocked off its products for sale overseas.

The U.S. Supreme Court docket information for this case can be found here:
<https://www.supremecourt.gov/docket/docketfiles/html/public/21-1043.html>

United States: Supreme Court granted cert in *Turkiye Halk Bankasi A.S. v. United States (Foreign State Immunity)*

On October 3, 2022, the United States Supreme Court granted certiorari in *Turkiye Halk Bankasi A.S. v. United States* to determine whether federal courts have subject-matter jurisdiction over criminal prosecutions against foreign sovereign defendants. In 2019, *Turkiye Halk Bankasi A.S.* (“Halkbank”) - a commercial bank majority-owned by the Turkish government - was indicted for its participation in a scheme to launder billions of dollars of Iranian oil and natural gas proceeds in violation of U.S. sanctions against the Iranian government and related entities. In the review, Halkbank asks the Court to decide whether 18 U.S.C. § 3231 (“Section 3231”) and the Foreign Sovereign Immunities Act (‘FSIA’) granted federal courts jurisdiction over criminal actions brought against foreign states or their agencies or instrumentalities. Section 3231 grants federal courts broad jurisdiction over criminal matters.

The U.S. Supreme Court docket information for this case can be found here:
<https://www.supremecourt.gov/docket/docketfiles/html/public/21-1450.html>

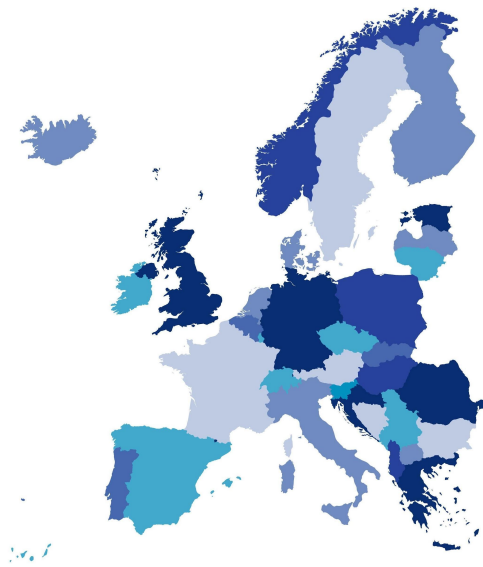
United States: Supreme Court granted review in *Abitron Austria GmbH. Hetronic International, Inc. (Extraterritoriality)*

The U.S. Supreme Court will clarify the extraterritorial reach of the Lanham Act for the first time in reviewing *Abitron Austria GmbH. Hetronic International, Inc.* The decision will



EUROPE

—Editors: Charles Mak & Christos Liakis



International Conventions

The UK: Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand. Step Closer to Ratification

On February 28, 2022, the United Kingdom and New Zealand concluded a free trade agreement. This is the second free trade agreement the United Kingdom has negotiated from scratch since leaving the European Union. The agreement is not yet in force. Both the United Kingdom and New Zealand must complete their own domestic processes for the agreement to come into effect. After approval by both legislatures, businesses will be able to do business under its terms.

The United Kingdom Free Trade Agreement Legislation Act 2022 gained royal assent in New Zealand on November 15, 2022, signifying that domestic ratification has been completed. New Zealand is now awaiting the completion of United Kingdom domestic procedures.

The United Kingdom Free Trade Agreement Legislation Bill can be found at:
https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_125280/united-kingdom-free-trade-agreement-legislation-bill

European Union Regulations

European Union: enhancing the protection of the fundamental rights of individuals

In its Opinion released on October 13, 2022, the European Data Protection Supervisor ('EDPS') supported the commencement of negotiations for a Council of Europe convention on artificial intelligence, human rights, democracy and the rule of law ('Convention'). The EDPS perceived the Convention as an essential opportunity to supplement the European Commission's proposed Artificial Intelligence Act by improving the protection of individuals' basic rights, such as the right to privacy and the protection of personal data.

The EDPS can be found at:
https://edps.europa.eu/press-publications/press-news/press-rel-eases/2022/ai-convention-stronger-protection-fundamental-rights-necessary_en

National Case Law

United Kingdom: Supreme Court addressed the correct remedies for a claim of proprietary estoppel in Guest v Guest [2022] UKSC 387

The appeal raised concerns about the correct procedure for seeking remedy under the law of proprietary estoppel. The Supreme Court was asked to determine: (1) whether a successful claimant's expectation, which in this case was the inheritance of a family farm, was an appropriate starting point when considering a remedy; and (2) whether the remedy granted, namely payment of a lump sum that would effectively result in the sale of the farm, went beyond what was required under the circumstances.

The information of this case can be found here:
<https://www.supremecourt.uk/cases/uksc-2020-0107.html>

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 10, 2023 to August 18, 2023. 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/>

2023 ESIL Annual Conference on “Is International Law Fair?”

The 18th Annual Conference of the European Society of International Law will take place in Aix-en-Provence in France from August 31 to September 2, 2023. The main conference will be preceded by various workshops organized by the Society’s Interest Groups on August 30 - 31, 2023. The general theme of the conference is ‘Is International Law Fair?’.

Further information on the conference is found here:

<https://esil-sedi.eu/2023-esil-annual-conference-on-is-international-law-fair-aix-en-provence-31-august-2-september-2023/>



OCEANIA

—Editor: Jie (Jeanne) Huang



International Conventions

Australia and New Zealand: the two countries joined the Indo-Pacific Economic Framework

In May 2022, the United States launched the Indo-Pacific Economic Framework for Prosperity ('IPEF') with Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, and Vietnam.

The official statement may be found here:

<https://ustr.gov/trade-agreements/agreements-under-negotiation/indo-pacific-economic-framework-prosperity-ipef>.

Oceania: Declaration on U.S.-Pacific Partnership

On September 29, 2022, the first-ever U.S. Pacific Islands Summit was held at the White House in Washington D.C. The governments of Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Nauru, New Caledonia, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, and the United States of America was committed to working together to strengthen the partnership between the countries by pushing forward the 2050 Strategy for the Blue Pacific Continent.

The full text of the Declaration may be found here:

<https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/29/declaration-on-u-s-pacific-partnership/>

On October 4, 2022, Solomon Island joined the U.S Pacific Partnership. The news report may be found here:

<https://apnews.com/article/biden-new-zealand-united-states-china-wellington-bce38fcee1a8e178acdc683949123d98>.

Marshall Islands: partnered with WHO

The Ministry of Health and Human Services and the Ministry of Environment Climate Change Directorate of the Republic of Marshall Islands are partnering with the World Health Organization ('WHO') to tackle the health impacts of climate change and enhance preparedness for future health emergencies, including the next pandemic.

The news report may be found

here: <https://www.who.int/westernpacific/about/how-we-work/pacific-support/news/detail/13-10-2022-marshall-islands-partners-with-who-to-increase-resilience-to-climate-change-and-pandemics>.

Australia: Australia ratified a free trade agreement with India

The Australia-India Economic Cooperation and Trade Agreement ('ECTA') was signed on April 2, 2022, but Australia's parliament ratified the agreement on November 22. The trade deal will now come into effect on a mutually agreed date.

The official text of the Agreement may be found here:

<https://www.dfat.gov.au/trade/agreements/negotiations/aifta/australia-india-comprehensive-economic-cooperation-agreement>.

Tuvalu: recreated itself in Metaverse

Due to the risks of climate change, up to 40 per cent of Tuvalu is underwater at high tide. Simon Kofe, Tuvalu's foreign minister, has now announced its plan to become the first digitized nation in the metaverse.

A news report may be found here:

<https://www.euronews.com/next/2022/11/23/tuvalu-is-recreating-itself-in-metaverse>



[ng-itself-in-the-metaverse-as-climate-change-threatens-to-wipe-it-off-the](#)

National Legislation

Australia: amended the Privacy Act 1988

As a positive step for wider review of the Privacy Act 1988, Australia enacted the Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 on November 28, 2022. It significantly increases the maximum penalties for serious or repeated privacy breaches from the current \$2.22 million penalty to the greater of the following: \$50 million; three times the value of any benefit obtained through the misuse of information; or 30 per cent of a company's adjusted turnover in the relevant period.

The full text of the law may be found here: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6940.

Australia: enacted The Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022

On December 12, 2022, Australia enacted the *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022* providing additional safeguards to parents and children fleeing family and domestic violence in cases brought under the *Hague Convention on the Civil Aspects of International Child Abduction*.

The full text of the Regulations may be found here: <https://www.legislation.gov.au/Details/F2022L01611/Download>.

National Case Law

Australia: BHP Group v Impiombato [2022] HCA 33

On October 22, 2022, the High Court of Australia unanimously ruled that Pt IVA of the Federal Court of Australia Act 1976 (Cth) allowed the inclusion of all persons as group members in a representative proceeding irrespective of their residency as long as they have "claims" of the kind described in s 33C(1) of the Federal Court of Australia Act that are within the jurisdiction of the Federal Court.

The full text of the judgment may be found here: https://www.hcourt.gov.au/cases/case_m12-2022?Itemid=107&print=1&tmpl=component.

Australia: Nyunt v First Property Holdings Pte, [2022] NSWCA 249

Rendered by the NSW Court of Appeal on December 6, 2022, this important judgment addresses the meaning of jurisdiction in the international sense, insufficient notice, public policy exception, etc under the Foreign Judgments Act 1991 (Cth).

The full text of the judgment may be found here: <https://jade.io/article/956626>.

Australia and New Zealand: Thomas, Jake & Xiao, Yue v The a2 Milk Company Ltd [No 2] [2022] VSC 725

On November 28, 2022, the Supreme Court of Victoria decided that it had personal and subject matter jurisdiction to hear claims brought under New Zealand statutes: the Fair Trading Act 1986 and the Financial Markets Conduct Act 2013. The two statutes did not confer exclusive jurisdiction on New Zealand courts.

The full text of the judgment may be found here: <https://www.lawlibrary.vic.gov.au/library-services/digital-library/judgments/thomas-jake-xiao-yue-v-a2-milk-company-ltd-no-2-2022-vsc>.

New Zealand: Almarzooqu v Salih [2022] NZHC 1170

On May 25, 2022, the New Zealand High Court decided that deferred marriage dower (mahr) should be characterized as contract and subject to UAE law, and, whatever its proper law is, the mahar had become payable in this case.

The full text of the judgment may be found here: [http://www.austlii.edu.au/cgi-bin/viewdoc/nz/cases/NZHC/2022/1170.html?context=1;query=\[2022\]%20NZHC%201170;mask_path=](http://www.austlii.edu.au/cgi-bin/viewdoc/nz/cases/NZHC/2022/1170.html?context=1;query=[2022]%20NZHC%201170;mask_path=).



Association and Events

The Australia International Arbitration Conference 2022 was jointly organized by the Australian Centre for International Commercial Arbitration (ACICA) and Chartered Institute of Arbitrators (Australia) in Melbourne on November 7, 2022. The Conference focused on future frontiers in arbitration.

More information can be found here:
<https://aaw.acica.org.au/ia-conference/>.

Recent Scholarly Works

Reid Mortensen, Richard Garnett, and Mary Keyes, Private International Law in Australia (5th Edition), https://store.lexisnexis.com.au/categories/practice-area/jurisdiction-827/private-international-law-in-australia-5th-edition-skuprivate_international_law_in_australia_5th_edition