



COMMENTARIES ON PRIVATE INTERNATIONAL LAW THE PILIG NEWSLETTER

Co-Chairs' Notes

We are pleased to revive the overdue issue of *Commentaries on Private International Law* (Vol. 4, Issue 1), the newsletter of the American Society of International Law (ASIL) Private International Law Interest Group (PILIG). The primary *purpose* of our newsletter is to communicate *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 to providing specific and concise raw information that our readers can then use in their daily work. These new developments on PIL may include information on new laws, rules and regulations; new judicial and arbitral decisions; new treaties and conventions; new scholarly work; new conferences; proposed new pieces of legislation; and the like.

We express our sincere appreciation to our 2021 editorial team, which consists of Cristian Gimenez Corte (Universidad Nacional del Litoral, Santa Fe, Argentina), Jeanne Huang (University of Sydney Law School), Sedat Sirmen (Ankara University Faculty of Law), Yao-Ming Hsu (National Cheng-Chi University), Patricia Snell (Covington & Burling LLP), Charles Mak (University of Glasgow), Juan Pablo Gómez-Moreno (Cartagena Refinery), Lamine Balde (Shanghai Jiao Tong University), Christos Liakis (National & Kapodistrian University of Athens), and is coordinated by PILIG Co-Chairs Rekha Rangachari (New York International Arbitration Center) and Carrie Shu Shang (California State Polytechnic University, Pomona). In addition, PILIG is constantly looking forward to your suggestions to improve our services to our members.

International Treaty Highlight

ILA GUIDELINES ON INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW: Contributions and Practical Challenges

Jie (Jeanne) Huang and Qirui Chi

In 2020, the 79th Conference of the International Law Association passed the Resolution 6/2020 and adopted the *Guidelines on Intellectual Property and Private International Law* ('*Kyoto Guidelines*').¹ The Guidelines are part of international efforts to establish a cooperative global system for jurisdiction, choice of law, and judgment recognition and enforcement in transnational intellectual property ('IP') disputes. It draws useful insights from predecessor projects, such as American

Law Institute Principles on Transnational Intellectual Property Disputes, CLIP Principles, Transparency Proposal, and Joint Korean-Japanese Principles.

Contribution

The Guidelines apply to civil and commercial matters involving IP rights that are connected to more than one State.² They address jurisdiction, applicable law, and recognition and enforcement of judgments.

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¹ Committee on Intellectual Property and Private International Law, 'Guidelines on Intellectual Property and Private International Law' (Annex to Resolution 6/2020, the 79th Conference of International

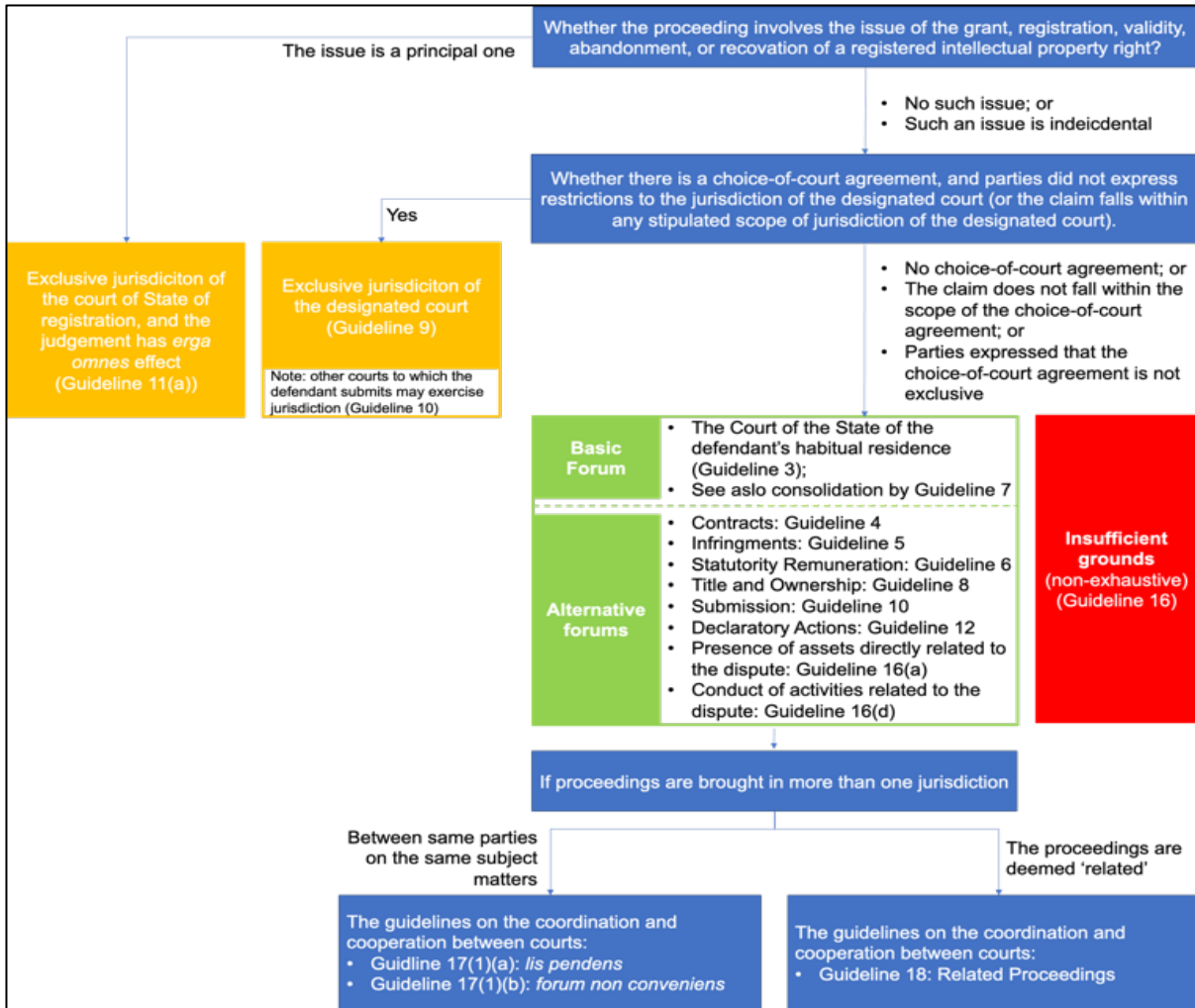
Law Association, 13 December 2020) ('Guidelines').

² Guideline 1(1).



Jurisdiction

intellectual property rights.³ Secondly, a exclusiveness of the jurisdiction of the



court of the State of registration for relevant disputes.⁵

When no courts have exclusive jurisdiction, the Guidelines on the basic forum and alternative fora would apply. The default position is that the court of the State of the defendant's habitual residence has the jurisdiction,⁶ and such a court might consolidate proceedings against defendants habitually residing in other States if conditions set out in Guideline 7 are all satisfied.

Additionally, Guideline 4 (Contracts), Guideline 5 (Infringements),

The Guidelines recognize two grounds of exclusive jurisdiction. The first is the court of the State of registration in dealing principally with the issue of 'the grant, registration, validity, abandonment, or revocation of registered

choice-of-court agreement is deemed to be an exclusive one, unless parties indicate otherwise.⁴ It should be noted that the court, other than the one designed by parties, to which the defendant submits may exercise jurisdiction, while the defendant's submission cannot vary the

Guideline 6 (Statutory Remuneration), and Guideline 8 (Title and Ownership) provides alternative grounds to ascertain jurisdiction to hear a particular case.

Guideline 16 provides a non-exhaustive list on grounds insufficient for exercising jurisdiction.⁷ Guidelines

³ Ibid, Guideline 11(1); Courts other than those in the State of registration may hear proceedings incidentally involving with such an issue, but judgments rendered are of *inter partes* effects only, whereas the judgment rendered by the court of State of registration has *erga omnes* effects: see,

Joost Blom et al, 'International Law Association's Guidelines on Intellectual Property and Private International Law ("Kyoto Guidelines"): Jurisdiction' (2021) 12(1) *Journal of Intellectual Property, Information Technology, and Electronic Commerce Law* 13, 27.

⁴ Guideline 9.

⁵ Guideline 10.

⁶ Guideline 3.

⁷ By operating as exceptions to insufficient grounds for jurisdiction, Guideline 16(a) and (e) can be seen as providing additional

17 applies the doctrines of *lis pendens* and *forum non conveniens* to parallel proceedings brought by the same persons on the same cause of action. Guideline 18 regulates related proceedings.

Applicable Law

Guidelines 25(2) to 27 (except Guideline 27(2)) provide different choice-of-law rules for special infringement cases. In terms of proprietary claims, the applicable laws to claims regarding the initial ownership or allocation of rights

while the applicable law for the latter is the law of the State with the closest connection to the creation.¹⁰

Regarding contractual claims, subjective applicable laws designated by parties enjoy the priority, which is subject to the mandatory protective rules provided by the objective applicable law of the contract if these protective rules are deprived by the laws designated by parties. To ascertain the objective applicable law, the approach is to ascertain the State which is most closely connected to the contract. Such a closest connection, subject to rebuttal, is presumed in certain scenarios.¹¹

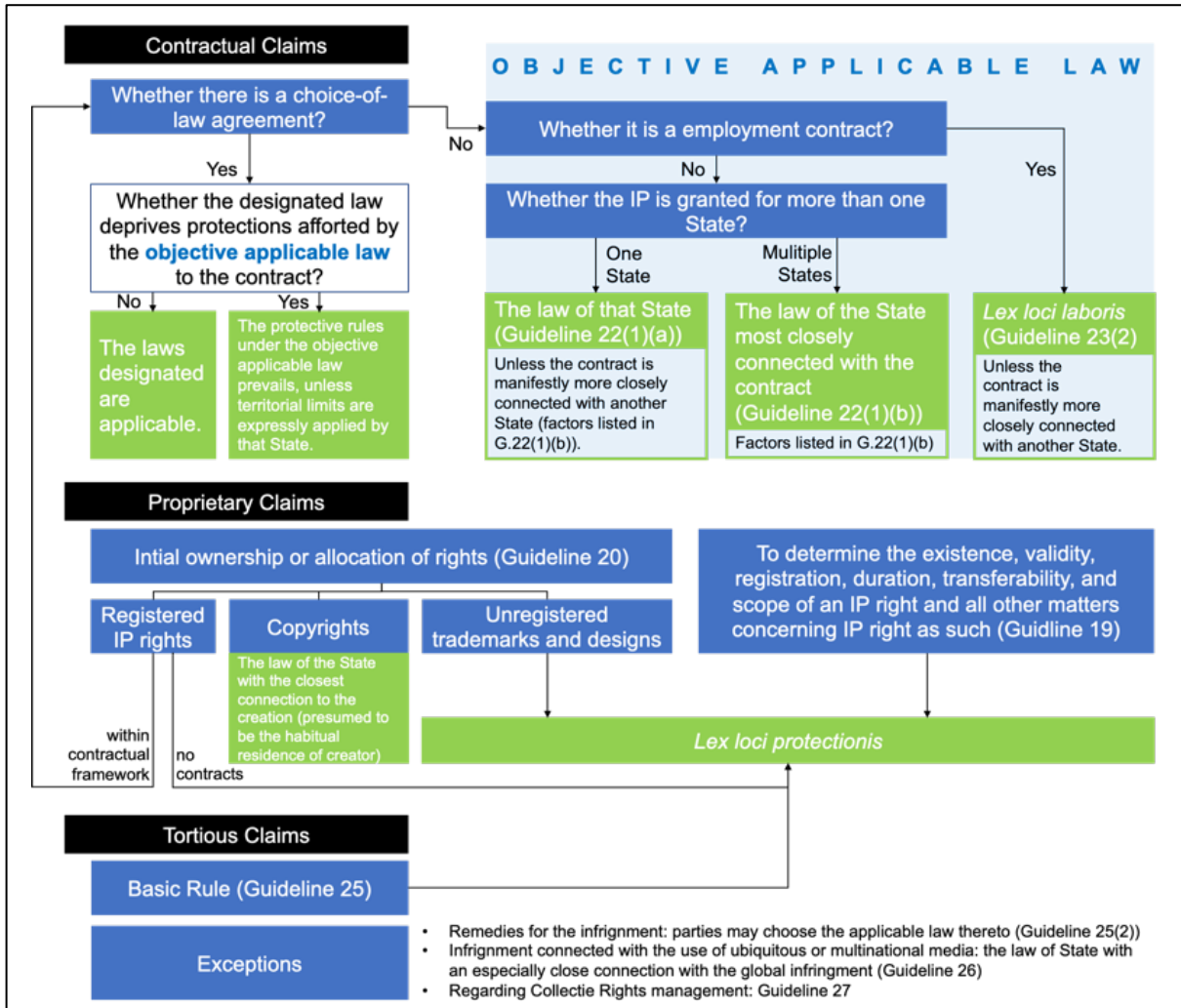
Guidelines 28 and 29 recognize the public policy and overriding mandatory provisions of the forum. Guideline 30 clearly rejects the application of *renvoi*. Guideline 31 addresses the arbitrability of a case.

Recognition and Enforcement

Guidelines 32 to 35 set out rules regarding insufficient grounds for non-recognition and non-enforcement,¹² judgments that cannot be prima facie recognized and enforced,¹³

The general choice-of-law rule for proprietary and tortious claims regarding IP rights is that *lex loci protectionis* applies.⁸ For infringement cases,

concerning registered intellectual property rights within a contractual framework and copyrights are not *lex loci protectionis*. For the former, the claim is treated as a contractual claim,⁹



sufficient grounds for exercising jurisdiction.

⁸ Guidelines 19, 20(1)(a) and 25.

⁹ Guideline 20(1)(b).

¹⁰ Guideline 20(2)(a).

¹¹ Guidelines 22(1)(a), 23(2).

¹² Guideline 34.

¹³ Guideline 32(2)(3).



and empowering the court to partially or limitedly recognize a foreign judgment.¹⁴

Practical Challenges: The Xiaomi-InterDigital Case Study

The worldwide IP litigations between Chinese multinational company Xiaomi and the US tech giant InterDigital vividly demonstrates the competition between domestic court jurisdiction, the challenging relationship between national interest and international comity, and the need for and difficulties in international cooperation.

Since 2015, Xiaomi has started negotiations with InterDigital regarding standard essential patent (SEP) license rates. However, the negotiations fell into a deadlock. On June 9, 2020, Xiaomi filed a lawsuit with the Wuhan Intermediate People's Court in China, requesting the court to follow the fair, reasonable, and non-discriminatory (FRAND) rule to set a global license of InterDigital's 3G and 4G SEPs.

On July 29, 2020, InterDigital sued Xiaomi in India, alleging that a series of its SEPs registered in India were infringed by Xiaomi.

Considering InterDigital's Indian proceedings may interfere with and hinder the Wuhan proceeding, on August 4, 2020, Xiaomi applied for the Wuhan Intermediate Court to issue an anti-suit injunction against InterDigital. Consequently, the Wuhan Intermediate People's Court issued an injunction

against InterDigital and restrained it from continuing the Indian proceeding. InterDigital was also ordered to refrain from filing infringement actions in any country of the world during the pendency of the Wuhan proceedings. The Wuhan Court also ordered a daily 1 million RMB fine in case of a breach.¹⁵

InterDigital applied to courts in Germany and India for an injunction against Xiaomi from enforcing the Wuhan court's injunction. Xiaomi argued in both courts that InterDigital's suit relating to FRAND rates was already under consideration at the Wuhan Court; therefore, this is an overlap of the subject matter being taken up in different jurisdictions and if the parallel litigations are allowed to proceed, courts may issue contradictory judgments. The Munich Regional Court in Germany in February 2021¹⁶ and the Delhi High Court in May 2021 both issued an anti-enforcement injunction (or anti-anti-suit injunction) against Xiaomi.¹⁷

In August 2021, Xiaomi and InterDigital reached a global licensing agreement and ended their worldwide SEPs litigations. However, challenges surrounding complicated private-international-law issues in global SEPs transactions remain. Applying Guidelines, two pending issues deserve further consideration.

First, Guidelines divide fora into the basic forum (the defendant's habitual residence) and alternative fora (contracts and infringements). The Wuhan Court exercised personal jurisdiction on

InterDigital and issued the global anti-suit injunction based on neither contract nor infringements. The court exercised jurisdiction because the registration, research and development, manufacture, and sale of Xiaomi's products are in China. Since the purpose of Xiaomi to initiate the Wuhan proceeding is to seek a global SEP license, Guideline 4 may be the most closely related provision because it applies to matters relating to contracts. Guideline 4 uses the place where the license is granted or the right is transferred as a connecting factor, which is not necessarily the place to implement the licence (e.g. manufacturing products using SEPs).¹⁸ If assuming that the place of manufacturing is the place where the license is granted or the right is transferred, the Wuhan court can decide all disputes arising out of a SEP global license contract; but Guideline 4 limits the Wuhan court's jurisdiction to China. Therefore, the Wuhan Court cannot issue a global injunction against InterDigital. This is agreed by both Munich Court and Delhi Court. As the Munich Court indicated, the Wuhan injunction created a coercive effect to limit the freedom of the companies that hold German SEPs to protect their rights.¹⁹ The Delhi High Court held that the Wuhan Court failed to consider the fact that the cause of action arose in India and the perceived infringement took place on six specific Indian patents and the Wuhan injunction was oppressive and did not respect the jurisdiction of the Indian courts.

¹⁴ Guideline 35.

¹⁵ Wuhan Intermediate People's Court Civil Decision, (2020) E 01 Zhi Min Chu 169.

¹⁶ *InterDigital v Xiaomi*, District Court (Landgericht) Munich I, judgment dated 25 February 2021, Case-No. 7 O 14276/20.

¹⁷ *Interdigital Technology Corporation v Xiaomi Corporation & Ors*, A. 8772/2020 in CS(COMM) 295/2020.

¹⁸ See Joost Blom, Rochelle C. Dreyfuss, Paulius Jurcys et al., *Kyoto Guidelines: Jurisdiction*, 12 (2021) JIPITEC 13, 15.

¹⁹ *InterDigital v Xiaomi*, supra n 15, para 121.



However, when parties litigate their SEPs disputes in different countries, they may receive conflicting judgments. One solution that the Guideline provides is to litigate the case in the defendant's habitual residence (e.g. the US for InterDigital). Nevertheless, the case reveals the practical difficulties in SEPs litigations where the party who seeks a global SEP license often prefers to bring a lawsuit in its home country. Moreover, the court in the licensee's habitual residence may consider it is their national interest to exercise global jurisdiction. This is especially true, where due to the Huawei Ban, the mainstream view in China is that the US is using its power to interrupt the global technology supply chain and the Chinese telecommunication enterprises may not be fairly treated in the US. Therefore, it waits to be seen how the Guidelines can handle the national interest implications in SEPs disputes.

Second, Guidelines 14 allows a court to issue injunctions and provides that the scope of the injunction is limited by the extent of the jurisdiction of the court. Notably, the injunctions under Guidelines 14 should be 'directly aimed at the protection of intellectual property rights' so procedural injunctions are excluded.²⁰ However, in practice, a SEP dispute may involve both injunctions to cease an infringement of an IP right (which is covered by Guidelines 14) and anti-suit injunction/anti-anti-suit injunction (which goes beyond the scope of the Guidelines). On one hand, the

Indian Court issued an injunction against Xiaomi ordering it to cease infringement of InterDigital's Indian SEPs in India, which is permitted by Guideline 14. On the other hand, the key issue in the IP saga between Xiaomi and InterDigital is the procedural injunctions, which is not covered by Guidelines 14. The drafter of the Guidelines may consider Guidelines 17 and 18 may help resolve jurisdiction competition between national courts in the IP disputes. However, this may not be realistic in practice. Guideline 17 applies to proceedings between the same parties on the same cause of action. However, as the Delhi Court indicated that the overlap between the Wuhan proceedings and those in India was minor, Guideline 17 is not applicable. Guideline 18 addresses related proceedings but it allows courts in different states to 'take any step permitted by its own procedures that will promote the fair and efficient resolution of the related proceedings considered as a whole.' Guideline 18 may have limited implications on SEPs parallel litigations because it gives considerable discretion to courts in related proceedings. The discretion provided to national courts in related proceedings may be deliberate because it can promote the acceptance of the Guidelines. However, courts in China, India, and Germany all considered they were taking steps to promote the fair and efficient resolution of the case as a whole. Consequently, the Wuhan Court's anti-suit injunction does not achieve the intended result. As the Munich Court indicated, the Wuhan anti-suit injunction

reduced the prospects for Xiaomi to successfully defend itself against infringement suits in Germany. Therefore, how to establish international jurisdiction cooperation in related proceedings remains unanswered.

In Conclusion, Guidelines are an important step to achieve coordination in transnational IP disputes. It is a laudable beginning, but more research is necessary to develop private-international-law rules in transnational IP disputes.

New Convention Highlight

International Tax Reform: A Paradigm Shift From Neoliberal Ideology

Lamine Balde

After talks and stalls, tensions and concessions, reform of the international tax regime is inching forward with leaders of the world's 20 major economies endorsing at the recently concluded summit in Rome the Organisation for Economic Co-operation and Development/Group of Twenty (OECD/G20) Inclusive Framework on Base Erosion and Profit Shifting (BEPS) agreement.²¹ Built on two pillars,²² one

²⁰ Official Comments to Guidelines 14.

²¹ G20, 'G20 ROME LEADERS' DECLARATION' <<https://www.g20.org/wp-content/uploads/2021/10/G20-ROME-LEADERS-DECLARATION.pdf>> accessed

05 November 2021; OECD, 'OECD/G20 Base Erosion and Profit Shifting Project: Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' 1 <[<https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>> accessed 5 November 2021.](https://www.oecd.org/tax/beps/statement-</p>
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²² Reuven S Avi-Yonah, 'The New International Tax Framework: Evolution or



on profit allocation and nexus and the other on a global minimum corporate tax, the agreement will ultimately renew international tax rules, which currently rely on aging source and residence taxation principles, increasingly at odds with the globalized economy and modern business realities. The reform aims to adapt corporate taxation to the digital age and ensure that 21st-century multinationals pay a fair share of taxes wherever they operate. It marks the failure of neoliberal policies, ensnared in the pitfalls of tax evasion, avoidance, and competition that they have fostered.

The neoliberal claim that less government - lower taxes and less regulation - would spur economic growth to the benefit of the majority seems to be failing, driven in part by the twin shocks of the subprime mortgages and the Covid-19 pandemic. Governments are proposing a two-pillar plan to regulate the market, safeguard common interests and ensure the smooth and healthy functioning of the economy, which entails, *inter alia*, addressing tax evasion and avoidance. The latter costs states substantial revenue losses, locked for decades in ever-increasing tax competition,²³ resulting in a race to the bottom in tax rates. Some companies benefit from this competition by setting their headquarters and profits in tax-friendly countries to lighten their taxes. These practices are conducive to a distorted competitive environment with adverse effects for both states and

companies. Indeed, as governments tend to offset their revenue shortfalls, the tax load not borne by large companies falls on small ones and by ricochet on households. States had to intervene to close the loopholes in the international tax system, improve their tax collection power, and finance public spending.

Pillar One aims to ensure a fairer distribution of corporate taxes based on profits earned in each country, regardless of their tax domicile. It contains “Amount A” which would apply to multinational enterprises (“MNEs”), excluding financial and extractive ones, with a global turnover above €20 billion and a pre-tax profit margin above 10%. The turnover threshold would fall to €10 billion after seven to eight years, contingent on successful implementation. Market countries would tax 25% of profits above a 10 % margin. Pillar One also contains “Amount B” to simplify and streamline the application of the arm’s length principle to in-country baseline marketing and distribution operations.

Pillar Two seeks to regulate corporate income tax competition through two interlocking rules, the Income Inclusion Rule (“IIR”) and the Undertaxed Payment Rule (“UTPR”), the so-called Global anti-Base Erosion Rules (“GloBE rules”), and a treaty-based rule, the Subject to Tax Rule (“STTR”). The GloBE rules propose an effective global minimum tax rate of 15% that countries

can charge on companies whose revenues exceed €750 million to shield their tax base. The IIR would allow a country to capture a share of a company's foreign income in its tax base, provided that the income is taxed below the minimum rate. The UTPR would operate as a secondary rule to complement the IIR when a company is not already subject to an IIR by denying a deduction or applying a withholding tax on base eroding payments. The minimum rate for the STTR would be 9%. Pillar Two will therefore not end tax competition but limit it by steering a share of the taxes large multinationals pay to countries where their goods or services are sold, rather than having those taxes flow back to their headquarters.

Tax havens would then be of little interest to MNEs, taxed at similar rates irrespective of their tax base. Tax competition between states would also be of little effect, prompting states to harmonize their tax policy and rely on attributes such as physical infrastructures, labor costs, and tax incentives to draw corporations. For years, this competition deprived states of some financial resources needed to shore up their budgets and finance their public services. The OECD expects Pillar One to yield more than \$125 billion of taxing rights to be reallocated to market jurisdictions each year and Pillar Two to generate around \$150 billion in additional global tax revenues each year.²⁴ The reform will thus greatly assist states whose cash flow

Revolution?’ (2021) 25 ASIL
<<https://www.asil.org/insights/volume/25/issue/11>> accessed 31 August 2021.

²³ Reuven S Avi-Yonah, ‘Globalization, Tax Competition, and the Fiscal Crisis of the

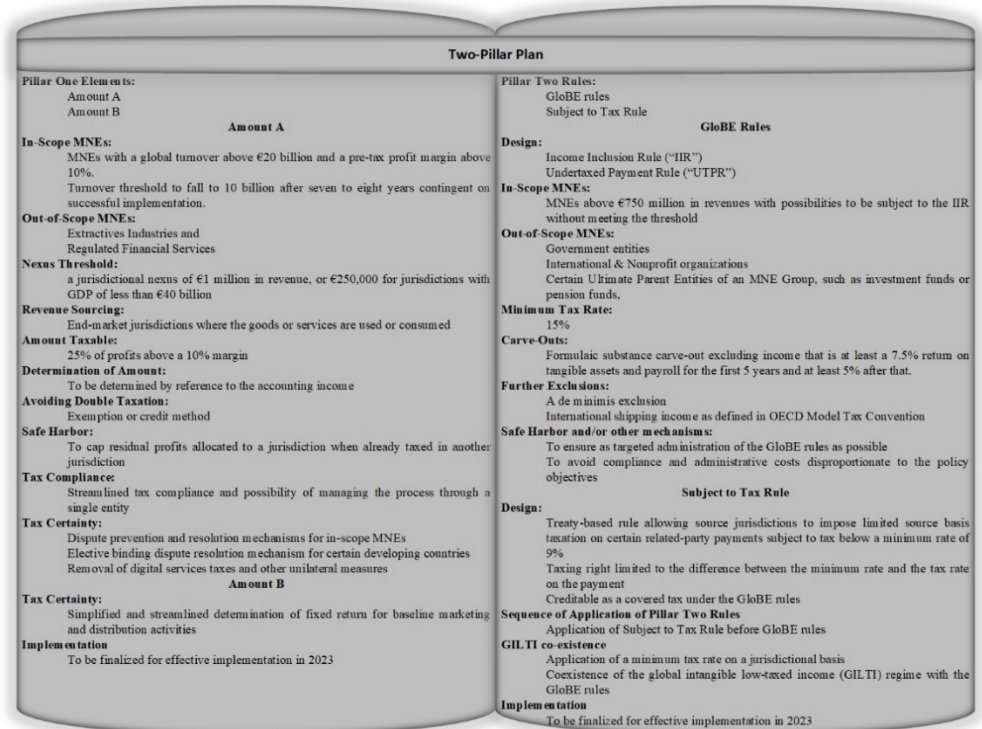
Welfare State’ (2000) 113 Harvard Law Review 1573.

²⁴ OECD, ‘International Community Strikes a Ground-Breaking Tax Deal for the Digital Age’

<<https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm>> accessed 5 November 2021.

has been drained by the pandemic, while large companies, especially digital ones, have significantly benefited from the crisis. It will also stabilize the international tax system and provide greater legal certainty for both taxpayers and tax authorities.

The political, social, and economic crises of recent years, albeit not all imputable to the neoliberal ideology, seem to indicate that perhaps what we need is not less state, but a regulating and redistributing state, an entrepreneurial and investing state. Governments have realized the urgency of rethinking their approach and taking far-reaching reforms to stop the tax hemorrhage and meet the economic and social challenges of the 21st century. The formal endorsement by G20 leaders is the culmination of a years-long process of negotiation and consensus-building, although some critical details still need to be worked out.²⁵ Multinational corporations will have to brace themselves for a profound and rapid change in the ground rules since the OECD hopes to have the reform wrapped in 2022 for practical implementation in 2023.



(Illustration of the Two-Pillar Plan)

²⁵ For a detailed implementation plan, see: OECD, ‘OECD/G20 Base Erosion and Profit Shifting Project: Statement on a Two-Pillar Solution to Address the Tax

Challenges Arising from the Digitalisation of the Economy’ 1
<<https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax->

challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> accessed 5 November 2021.



Dispute Resolution Highlight

Holding Multinationals Accountable for Business and Human Rights Violations – What’s Next?

Juan Pablo Gomez, Yao-Ming Hsu & Carrie Shu Shang

A transnational litigation market has been established for business human rights/transnational tort violations. The United States has long been considered the ideal forum to holding multinationals accountable due to the once liberal interpretation for the Alien Tort Statute (ATS), while the US Supreme Court has just rendered an 8:1 decision in *Nestle v. Doe* that limits its forum availability for transnational tort cases regarding extraterritoriality issues and at the same time leaves the door open for such claims in other critical aspects. At the same time, in two related cases litigated in the UK Supreme Court and Dutch Court recently, courts in Europe seem to be more lenient in allowing lawsuits to be filed in their forums, and at the same time expanding the individual liability under violation of climate rules. These key decisions in the first half of 2021 seem to have further reshaped the landscape of transnational tort litigation.

Nestle v. Doe (United States)

*Nestle v. Doe*²⁶ is an emblematic case for the purposes of this human rights/transnational tort litigation market. The class action lawsuit was initiated by a group of six former child slaves from Mali who sued Nestlé and Cargill, two companies dedicated to purchase, process and sell cocoa, for aiding and abetting forced labor and other human rights violations through practices such as physical abuse, torture and starvation in Ivorian cocoa fields. According to the plaintiffs, the companies had to be held liable because they provided technical and financial support to the cocoa farms that enslaved the plaintiffs in the form of training, fertilizer, tools, and cash despite they knew or should have known of these abuses and tried to prevent them.

The extensive prolongment of this case, which took over 15 years, is largely due to complications over US court jurisdiction: while the forced labor practices and human rights violations were allegedly corroborated by Nestlé USA, the forced labor itself did not take place on US soil. The plaintiffs

presented a claim before the Central District of California in 2005, and the case was dismissed in 2010 on the basis that the ATS does not allow for allegations regarding corporate liability.²⁷ The Ninth Circuit reversed and remanded the case.²⁸ However, the district court again dismissed it on the grounds that the claim constituted an “impermissible extraterritorial application of the ATS”. Again, in 2018 the Ninth Circuit reversed the dismissal as it considered that despite the fact that the forced labor had occurred overseas, such actions were perpetuated from corporate headquarters in the US.²⁹

On July 2, 2020 the US Supreme Court granted a *certiorari* to hear the case. It addressed in this decision, issued recently on July 17, 2021 the question on whether US corporations can be held liable under the ATS for aiding and abetting human rights abuses that took place in a foreign country when such actions were allegedly coordinated from US soil. To tackle this question, the Supreme Court referred to at least three issues of importance for the purpose of this comment: (i) the extraterritorial application of the ATS, (ii) the cause of action for ATS claims, and (iii) whether US corporations are immune to liability under the ATS. While the case was decided on the grounds of extraterritoriality of the ATS, Justices offered very interesting views about the other two issues.

Firstly, extraterritoriality is a major factor in transnational torts litigation under the ATS because it provides US courts with jurisdiction to review “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. Thus, to successfully claim the application of the ATS, plaintiffs must demonstrate “sufficient conduct” within the US. In this sense, the plaintiffs in this case argued that, despite the events related to forced labor and human rights violations took place abroad, major operational decisions were made from within the US. This argument had been confirmed by the Ninth Circuit as it found that there was sufficient conduct in the US as “every major operational decision by both companies is made in or approved in the US”.

The Supreme Court then applied the two-tier test in *RJR Nabisco Inc. v. European Community*,³⁰ which refers to extraterritoriality issues in general. In the first part, this test requires considering whether the relevant statute is subject to the presumption against extraterritoriality, according to which

²⁶ Nestlé U.S.A. v. Doe, 593 U.S. ___ (2021).

²⁷ Doe v. Nestle, S.A., No. CV 05-5133 SVW (JTLx) (C.D. Cal. Sep. 8, 2010).

²⁸ Doe v. Nestle USA, Inc., 738 F.3d 1048 (9th Cir. 2013).

²⁹ Doe v. Nestle, S.A., 929 F.3d 623 (9th Cir. 2018)

³⁰ RJR Nabisco, Inc. v. European Community, 579 U.S. (2016).



a statute is deemed to apply domestically unless indicated otherwise. In the second part, it requires an analysis of the focus of the relevant provision and whether “the conduct relevant to the statutes focus occurred in the US”. Regarding the first part, the Supreme Court relied on the case of *Kiobel v. Royal Dutch Petroleum Co.*³¹ to remind the parties that the ATS is subject to a presumption against extraterritoriality as the ATS had no “clear, affirmative indication” that rebuts the presumption.

As to the second part of the test, an alternative approach to that of *RJR Nabisco* was the famous “touch and concern” test established in *Kiobel*. In that case, the Court only established that the “mere corporate presence” and “general corporate activity” of the defendant were not enough to allow ATS jurisdictions. As pointed out by scholars, it did not clarify how an ATS claim might fulfill this test and instead created a “complex and confusing” criteria to assess the extraterritoriality issue.³² However, avoiding the hermeneutical intricacies of this concept, it is relevant to highlight that decisions as the one in *Jane W. v. Thomas*³³ would support the idea that residence is sufficient to satisfy the touch and concern threshold. Against this backdrop, Dodge³⁴ already noted the importance of the fact that the Supreme Court relied one standard over the other, narrowing the application of the ATS to actions taking place in US soil.

Two interesting issues arise from this. On the one hand, by narrowing the scope of ATS claims through the application of the standard in *RJR Nabisco* instead of the touch and concern test, it would seem as if the Court gave place to a conflict between claims brought against corporations and claims against natural persons. This is apparent when contrasting the Court’s approach with that of the Second Circuit’s decision in *Filartiga v. Peña-Irala*,³⁵ in which ATS claims brought by relatives of a teenager tortured and murdered in Paraguay by a

police inspector of the same nationality were allowed on the basis that the defendant was living in the US at the time. The interpretation of the territoriality nexus in *Filartiga* was definitely much more lenient than the strict one in *Nestlé v. Doe*, which arguably creates a gap between different types of cases, paving the way for potential future cases against natural persons, but showing reluctance to accept ATS claims against corporations.

On the other hand, by maintaining ambiguous concepts such as “mere corporate presence” and “general corporate activity”, the Court allows a significant degree of speculation about how direct for ATS purposes must be those actions taking place abroad but attributable to US nationals. To the plaintiffs’ argument that Nestlé and Cargill coordinated forced labor in cocoa farms overseas, and despite the Ninth Circuit’s ruling that human rights violations had been orchestrated from US headquarters, the Court response was that such actions were merely “operational decisions” that did not suffice to establish domestic application of the ATS. Then, as stressed by Desierto & Song³⁶, this somehow evasive assessment of the claim ignores and downplays the complexity of parent-subsidiary relationships which currently occupies a major portion of the hot spot in debates regarding human rights regulations, corporate responsibility, and of course transnational torts litigation³⁷. It seems to require more proof to support at least some direct participation of U.S. parent corporations.

Secondly, on the cause of action for ATS claims, three Justices (Thomas joined by Gorsuch and Kavanaugh) considered that it should be limited to the three events foreseen by the Congress when the statute was enacted: (i) infringement of the rights of ambassadors, (ii) violation of safe conducts, and (iii) piracy. In this way, they relied primarily on an argument about separation of powers, suggesting that this was an issue that could only be decided by the Congress and that “the ATS is a jurisdictional

³¹ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. (2013).

³² Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 *Notre Dame Law Review* 1749 (2014).

³³ *Jane W. v. Thomas*, 354 F. Supp. 3d 630, 639 (E.D. Pa. 2018).

³⁴ William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, *Just Security* (June 18, 2021), <https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/>.

³⁵ *Filartiga v. Peña-Irala*, 630 F.2d 876 82d Cir. 1980.

³⁶ Diane Desierto & Doori Song, *SCOTUS Further Narrows Parent Corporate Liability under the Alien Tort Statute: Ambiguities and*

Evidentiary Thresholds in the June 2021 Judgment in Nestlé USA Inc. v. Doe et al., *EJIL: Talk!* (June 25, 2021),

<https://www.ejiltalk.org/scotus-further-narrows-parent-corporate-liability-under-the-alien-tort-statute-ambiguities-and-evidentiary-thresholds-in-the-june-2021-judgment-in-nestle-usa-inc-v-doe-et-al/>.

³⁷ Vivian Grosswald, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, *Chicago Journal of International Law* (December, 2016)

<https://cjil.uchicago.edu/publication/harmonizing-multinational-parent-company-liability-foreign-subsidiary-human-rights>.

statute creating no new causes of action”. In contrast, other three Justices disagreed (Sotomayor joined by Breyer and Kagan) considering that the Congress enacted the ATS expecting that federal courts would identify actionable torts “based on the present-day law of nations”, which would allow a broader scope for causes of action in ATS claims.

What is interesting about this discussion is that it portraits two approaches to the scope of ATS claims concerning the question on whether causes of action should be interpreted according to the eighteenth-century framework of the ATS or read within a larger set of torts likely developed as part of the law of nations. In *Sosa v. Álvarez-Machain*,³⁸ the Court considered that drafters of the ATS most probably had in mind a “narrow set of violations of the law of nations”. However, scholars tend to consider that human rights violations in the international arena are to be considered from an evolutionary perspective.³⁹ *Nestlé v. Doe* shows that Court opinions are split, but the position for a broader understanding has a significant meaning for transnational human rights litigation before US courts. This interpretation not only opens a door for future cases but could align the judiciary with the international law parading on the assessment of human rights issues.

Thirdly, regarding the question of the liability of US corporations under the ATS, this issue was not decided upfront by the Court despite being considered the most critical aspect of such discussions by most authors. In this sense, Justice Alito departed from the majority considering precisely that this was the real subject matter of the dispute according to the *certiorari*. Earlier, the Trump administration had argued that the Court had to reject any hint of corporate liability under the ATS because such precedent would interfere with powers assigned exclusively to the Congress. Nevertheless, *Nestlé v. Doe* was pivotal as five Justices firmly asserted that “[n]othing in the ATS supplies corporations with special protections against suit” and that “the ATS has never distinguished between [individual and corporate] defendants,” in the words of Justice Gorsuch. This approach would then suggest that further claims against corporations under the ATS would not be completely prevented.

From a transnational torts/human rights litigation perspective, the case of *Nestlé v. Doe* advanced several major developments.

The majority approach to the case is a powerful statement that the scope of the ATS is very narrow and demands higher standard of proof from plaintiffs. It also seems to deselect the touch and concern test for determining ATS jurisdictions for corporations. Of course, this creates a concern for human rights protection in complex situations like parent-subsidiary relations and related companies spread out in transnational supply chains, where the worst-case scenario would be that US corporations can avoid liability for offshore violations. In contrast, the case leaves open the chapter of ATS claims as it would seem to admit causes of action beyond the traditional three grounds initially foreseen by Congress and make possible bringing claims against legal persons without facing corporate immunities *ex ante*. While the specifics of these claims remain to be defined, there is no doubt that the door of transnational human rights litigation before US courts has not been completely shut.

Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) (United Kingdom)

This case was an appeal for arguing international jurisdiction. The dispute dealt with whether the parent company Shell registered in the United Kingdom has a duty of care in common law to be responsible for its subsidiary company registered in other jurisdictions, and whether it would be an appropriate party in the litigation. On February 12, 2021, the UK Supreme Court held that that the court has jurisdiction over the parent company for its subsidiary company’s tortious act in Nigeria.

The appeal confirmed that there were a number of oil spill accidents involving oil pipes and related infrastructure operating near the appellant’s community, causing extensive environmental damage, including water and ground pollution, and the community’s natural water sources could not be used safely for drinking, fishing, agriculture, and washing, or for entertainment purposes. The above oil spill situation was caused by the oil pipeline operator Nigeria Shell Petroleum Development Company (SPDC), and SPDC is a subsidiary of the first appellee Royal Dutch Shell Company (RDS), which was registered in the UK as the parent company of the Shell Multinational Group. Proceedings were commenced while the UK was still a Member State of the European Union. Hence, appellants relied on the rules of domicile in Brussels I

³⁸ *Sosa v. Álvarez-Machain*, 542 U.S. 692 (2004).

³⁹ Gloria Gaglioli, *The Strength of Evolutionary Interpretation in International Human Rights Law*, en *Abi-Saab*, Kenneth Keith,

Gabrielle Marceau, and Clément Marquet (eds) (2019), *Evolutionary Interpretation and International Law*, Hart Publishing.



Regulation to bring a claim against the RDS, while SPDC was joined in litigation as a necessary or proper party under English common law.

In the Court of Appeal (CoA) decision, three judgments were delivered. Based on the principle of proximity, Simon SJ considered that the appellant did not prove that RDS controlled the operation of SPDC or was directly responsible for the practice or failure of the subject of the appeal. Secondly, The Chancellor even considered that, even if the mandatory policies, standards and manuals of SPDC were very specific, the control was still in the SPDC and operated by SPDC. However, Sales SJ had a dissenting opinion; he considered that RDS was aware of the particularly serious problems in Nigeria and would like to directly control the management of the problem. And he also considered the group management structure was designed to allow the central management of the group to exercise administration through the RDS CEO and executive committee.

The main issues for the UK Supreme Court to review during appeal are: (1) Are there major legal errors in the majority opinion of the CoA? (2) If yes, does the majority opinion wrongly determine that there are no real issues to be heard?

On the first issue, the UK Supreme Court held that a major legal error did exist with two reasons. On one hand, even the documentary evidence was not completely provided, the resolution of the jurisdictional challenge depended upon whether the appellants' claim satisfied the summary judgment test of real prospect of success, and the relevance of future disclosure on the basis that a good arguable case has to be demonstrated on the basis of the material currently available is not well considered. On the other hand, other alleged errors of law existed, especially on the recognition of the relationship between the parent company and its subsidiary. The Supreme court held that the company's control and the actual management of some of its activities are two different things, in result, there was a legal error in the handling of the CoA.

On the second issue, the Supreme court believed that the appellant's complaint and its reliance on the RDS-related control framework were sufficient to raise a real issue and was supported by relevant witness evidence, thus held that the majority opinion of the Court of Appeal wrongly determined that there was no real problem for trial. The Supreme Court

decision strongly affirmed the court's own jurisprudence in *Lungowe v Vedanta Resources*⁴⁰, with certain development. *Okpabi* could inform a narrow reading as a case on evidentiary standards. The Supreme Court found that CoA erred in law by summarily dismissing the case after conducting an assessment of the available evidence. The CoA had erroneously concluded that such evidence did not disclose an arguable duty of care of Shell towards the affected communities and therefore the UK courts had no jurisdiction.

Okpabi comes just one week after another judicial decision concerning Shell's activities in Nigeria had been delivered, by the Court of Appeals in the Netherlands. In that decision, the Dutch CoA applied the *Vedanta* jurisprudence that it considered an integral part of Nigerian common law and found Shell in breach of that duty.

Conclusion

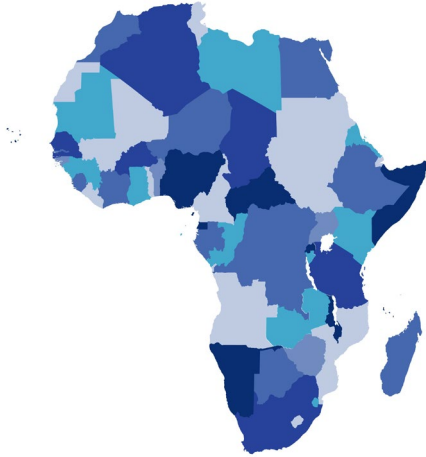
Based on comparable facts, *Nestle* and *Okpabi* line of cases could have important implications in shifting magnetic field in pursuing tortious claims against multinationals globally. A broad reading of ATS since the 1980s once made US the transnational litigation hub for marshalling its own resources to enhance global compliance with international law, which *Nestle* seems to be further down the hill of the recent line of cases further limiting uses of US forums for pursuing against transnational torts. On the other hand, under the duty of care doctrine, EU courts seem to become a bit more lenient towards holding multinationals liable for subsidiary conduct abroad. It is predicted that the *Shell* series of cases could trigger a wave of climate litigation against big polluters. Now that the U.S. has recessed its positions as an international norm guardian, would more cases be drawn to EU courts? Would this sense of fear drive more multinationals to relocate their headquarters? We would like to gather more hints before rushing to jump to any conclusive statement.

⁴⁰ [2019] UKSC 20.



AFRICA

—Editors: Lamine Balde & Sedat Sirmen



The increased movement of goods, services, capital, and people to/from and within Africa contributes to the development of private international law in the continent. This movement is in part driven by continental and regional integration agreements, which serve as a powerful lever for growth and development, with significant spin-off benefits on trade and investment. States recognize the need to engage in these agreements further. Central African Republic, Angola, Lesotho, Tunisia, Cameroon, Nigeria, Malawi, Zambia, Algeria, Burundi, and Tanzania are all committed to supporting and implementing the African Continental Free Trade Area while Cameroon has ratified the revised Treaty establishing the Economic Community of Central African States. Besides, the adherence of Namibia to the Hague Conference on Private International Law is a testament to the continued relevance and importance of the organization. Meanwhile, Niger and Congo are the new frontiers for intercountry adoption in the region following their adhesion to the Hague Adoption Convention. In the arbitration field, Malawi has followed other Sub-Saharan Africa nations that have recently acceded to the New York Convention to improve their arbitration rules and signal their friendly business environment to foreign investment. At the national level, Ethiopia and Tanzania have each passed a new arbitration law to modernize and enhance the effectiveness of their arbitration regime. In Rwanda, the government's continuous efforts to promote and facilitate foreign and domestic investment led to the recent enactment of new investment law. Also, Angola enacted new insolvency and corporate recovery law to rescue companies in financial distress and promote economic development. Last but not least,

arbitration remains the most effective dispute resolution method for private economic actors in sub-Saharan Africa, as evidenced by recent regional and national case laws. Many arbitration-related works have been published, some of which are mentioned below.

International Conventions

Tunisia: Accession to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents

Tunisia have passed new laws and regulations related to private international law issues, such as abolishing the requirement of legalization for foreign public documents and on the service abroad of judicial and extrajudicial documents in civil or commercial matters.

Tunisia accessed on July 7, 2017 to the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. This Convention was entered into force on January 2, 2018 for Tunisia.

Congo: The Hague Adoption Convention enters into force for the Republic of the Congo

The Hague Adoption Convention entered into force for the Republic of the Congo on April 1, 2020, following its instrument of accession deposit on December 11, 2019. It is the first Hague Convention that the Republic of the Congo has joined.

For more information see: <https://www.hcch.net/es/news-archive/details/?varevent=727>

Cameroon: Cameroon ratified the revised Treaty establishing the Economic Community of Central African States

On April 28, 2020, Cameroon ratified the revised Treaty establishing the Economic Community of Central African States (ECCAS), signed in Libreville on December 18, 2019. The ratification of this Treaty endows Cameroon with an important instrument of cooperation at the sub-regional level in the economic, financial, monetary, legal, and other fields.



For further information see: <https://www.prc.cm/fr/multimedia/documents/8289-decret-n-2020-238-du-28-04-2020>

Namibia: Namibia becomes a member of the Hague Conference on Private International Law

On January 19, 2021, Namibia joined the Hague Conference on Private International Law, becoming the organization's 87th member state. The accession gives Namibia priority access to technical assistance for the implementation and operation of the Apostille and Adoption Conventions and a voice in the negotiations of any new instrument.

For more information, see: <https://www.hcch.net/en/news-archive/details/?varevent=782>

Ethiopia, Sierra Leone, and Malawi accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")

On March 4, 2021, Malawi deposited its instrument of accession to the New York Convention, becoming the 167th state party to the convention. Ethiopia and Sierra Leone were the most recent signatories prior to Malawi, respectively joining the convention on August 24 and October 28, 2020.

For more information, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=en; https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=7&id_news=1029

Niger: Niger accedes to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the "Hague Adoption Convention")

On May 24, 2021, the Republic of the Niger deposited its instrument of accession to the Hague Adoption Convention, becoming the 104th nation to accede to the convention. With the convention's entry into force on September 1, 2021, Niger becomes a member of two Hague Conventions, although not yet an HCCH member.

For more information see: <https://www.hcch.net/en/news-archive/details/?varevent=801>; <https://www.hcch.net/en/states/other-connected-parties/details2/?sid=116>

Central African Republic, Angola, Lesotho, Tunisia, Cameroon, Nigeria, Malawi, Zambia, Algeria, Burundi, and Tanzania ratified the agreement establishing the African Continental Free Trade Area

Central African Republic, Angola, Lesotho, Tunisia, Cameroon, Nigeria, Malawi, Zambia, Algeria, Burundi, and Tanzania 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 September 9, 2021, Tanzania is the 36th country to ratify the agreement.

For further information see: <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html>

National Legislation

Tanzania: Tanzania's new Arbitration Act is now effective

On February 7, 2020, the Tanzanian Parliament passed a new Arbitration Act, repealing and replacing the Arbitration Act of 1931, which has roots in the English Arbitration Act of 1889 and has undergone several amendments, the latest being on November 30, 2019. The 2020 Arbitration Act came into effect on January 18, 2021. It provides for all aspects related to the arbitration agreement, the appointment of arbitrators, the examination of evidence, enforcement, the setting of an arbitration center, among others, to ensure the proper handling of arbitration proceedings.

The full text to the Arbitration Act may be found here: <https://www.osg.go.tz/uploads/publications/sw1599657355-Act%20No.%202%20of%202020%20THE%20ARBITRATION%20ACT,%202020%20Final%20chapa.pdf>

For more information see: <http://arbitrationblog.kluwarbitration.com/2021/04/21/the-first-year-of-tanzanias-2020-arbitration-act/>

Rwanda: Rwanda enacts a new Investment Promotion and Facilitation Law

On February 5, 2021, Rwanda enacted the Investment Promotion and Facilitation Law n° 006/2021, repealing and



replacing the 2015 law of the same name. This new Law enlarges the list of priority economic sectors, adds a new investor category for some strategic projects, sets a validity period for investment certificates, expands the list of investors eligible for incentives, offers new investment incentives for investors. It aims to improve Rwanda's competitiveness, attract cross-border investment, draw new businesses, and entice financial institutions.

For further information see: <https://gazettes.africa/archive/rw/2021/rw-government-gazette-dated-2021-02-08-no-4bis.pdf>

Angola: Angola enacts a new Insolvency and Corporate Recovery Law

On May 10, 2021, Angola enacted Law No. 13/21 on corporate recovery and insolvency, repealing the legal regime provided for in articles 1122 to 1274 and 1279 to 1325 of the 1961 Civil Procedure Code, unsuited to the current socio-economic climate of the country and the modern, simplified, and more efficient mechanisms of insolvency proceedings. This Law will regulate judicial and non-judicial recovery procedures for both individuals and companies in financial difficulties in Angola. It will cover the legal vacuum of protection of economic agents, streamline cross-border insolvency proceedings, and improve the business environment.

For further information see: <https://cfa.legal/wp-content/uploads/2021/05/L-13.21-insolve%CC%82ncia-1.pdf>

Ethiopia: Ethiopia enacts a new Arbitration Law

On April 2, 2021, Ethiopia enacted the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021, which repealed the arbitration and conciliation provisions set out in the Civil Code, the Civil Procedure Code, and other scattered laws. The Proclamation applies to commerce-related domestic and international arbitrations seated in Ethiopia and arising from arbitration agreements. It also contains some provisions that govern international arbitrations seated outside Ethiopia.

The full text to the Proclamation may be found here: <https://chilot.me/wp-content/uploads/2021/06/Arbitration-and-Conciliation-Working-Procedure-Proclamation.pdf>

Regional Case Law

The Common Court of Justice and Arbitration set aside an arbitral award for contravening international public policy

The case arose from a 2014 contract for customs services between the Republic of Benin and Société General de Surveillance SA (SGS). After two years of execution, the Republic of Benin requested the Cotonou Court of First Instance (the “Court”) to annul the contract. In a February 13, 2017 ruling, the Court granted the request, but SGS had already initiated on January 31 arbitration proceedings against the Republic of Benin. The latter raised an objection to jurisdiction, which the arbitral tribunal dismissed in a partial award dated April 6, 2018. The Republic of Benin appealed to the Ouagadougou Court of Appeals to set aside the award on the grounds that the arbitration agreement did not exist and that international public policy had been violated, an appeal that was dismissed on September 21, 2018. On February 27, 2020, the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa quashed the Ouagadougou Court of Appeal ruling and set aside the arbitral tribunal partial award.

The full text of the judgment can be found here: http://biblio.ohada.org/pmb/opac_css/doc_num.php?explnum_id=4613

The OHADA Common Court of Justice and Arbitration ruled that the arbitrator's application of public policy provisions shall not preclude the arbitrability of a dispute

On May 28, 2020, the OHADA Common Court of Justice and Arbitration (“OHADA Court”) in GRANT THORNTON S.A v MBENGUE held that the arbitrator's application of public policy provisions does not prevent the arbitrability of a dispute. The OHADA Court ruled in favour of GRANT THORNTON following its appeal against the Dakar Court of Appeal, which had ruled in June 2019 that a dispute relating to certain public policy provisions of OHADA law could not be subject to arbitration and that, consequently, only national courts had jurisdiction to decide the dispute. The OHADA Court upheld a November 2018 judgment of the Dakar Commercial Court, which had declined jurisdiction based on Article 42 of the MoU whereby an arbitration clause was provided, making a distinction between the arbitrator's application of public policy provisions and the non-arbitrability of the dispute.



The full text of the judgment can be found here: http://biblio.ohada.org/pmb/opac_css/doc_num.php?explnum_id=4764

National Case Law

Mauritius: The Judicial Committee of the Privy Council clarifies the powers of national courts to challenge international arbitration awards on public policy grounds

On June 14, 2021, the Judicial Committee of the Privy Council ruled in favor of Betamax in the case *Betamax Ltd v State Trading Corporation (Mauritius)* on an appeal from the Supreme Court of Mauritius. The latter had set aside an award rendered under the Arbitration Rules of the Singapore International Arbitration Centre, which had found State Trading Corporation liable to Betamax for breach of contract and had granted Betamax over US\$115 million in damages, plus interest and costs. The court found that the award was contrary to Mauritian public policy as the parent contract between Betamax and State Trading Corporation violated the Mauritian Public Procurement Act and was therefore illegal. The Privy Council reversed the Supreme Court's decision and restored the arbitral award, thereby framing the power of national courts to set aside or deny enforcement of international arbitration awards on public policy grounds.

The full text of the judgment can be found here: <https://www.jcpc.uk/cases/docs/jcpc-2019-0109-judgment.pdf>

South Africa: Supreme Court of Appeal found NEC3 Engineering and Construction Contract based adjudication decisions binding unless and until revised by arbitration

On June 28, 2021, the South African Supreme Court of Appeal, in *Sasol South Africa (Pty) Ltd v Murray & Roberts Limited*, dismissed an appeal from the Gauteng Division of the High Court, Johannesburg (High Court). M&R had approached the High Court seeking to enforce as a contractual obligation an adjudicator decision following Sasol's refusal to comply on the ground that the decision was invalid, which resulted in the High Court ruling in favor of M&R. On appeal, the Supreme Court of Appeal upheld the High Court's decision and concluded that a party to a contract is not entitled to ignore the adjudicator's decision simply on the ground that it considers it to be invalid. The decision remains binding and enforceable as a contractual obligation between the parties until and unless it is revised

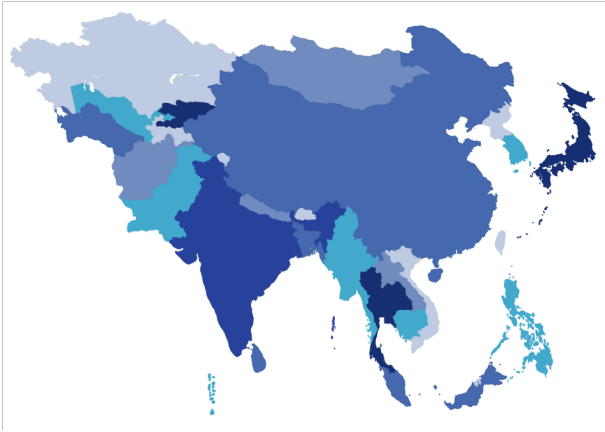
through arbitration under the NEC3 Engineering and Construction Contract.

The full text of the judgment can be found here: <http://www.supremecourtofappeal.org.za/index.php/component/jdownloads/send/35-judgments-2021/3596-sasol-south-africa-pty-ltd-v-murray-roberts-limited-case-no-425-2020-2021-zasca-94-28-june-2021>

Recent scholarly work

Agnessa O Inshakova and others, 'Recognition, Enforcement and Challenges of Decisions of the General Court of Justice and Arbitration of the Organization for the Harmonization of Commercial Law in Africa (OHADA)', *Supporting Inclusive Growth and Sustainable Development in Africa - Volume I*, vol I (Springer International Publishing 2020); Mahutodji Jimmy Vital Kodo, *Arbitration in Africa under OHADA Rules* (Kluwer Law International 2020); Oumar Bah, *L'efficacité de l'arbitrage OHADA: Le Rôle Du Juge Étatique* (Bruylant 2020); Chukwuma Okoli and Oppong Richard, *Private International Law in Nigeria* (Hart Publishing 2020); Jan L Neels, 'The African Principles on the Law Applicable to International Commercial Contracts – a First Drafting Experiment' (2021) 25 *Uniform Law Review* 426; Emmanuel Onyedi Wingate and Pontian N Okoli, 'Judicial Intervention in Arbitration: Unresolved Jurisdictional Issues Concerning Arbitrator Appointments in Nigeria' (2021) 65 *Journal of African Law* 223; Richard Frimpong Oppong, 'The Nature and Constitutionality of Statutorily-Imposed (Non-Contractual) Arbitration in Ghana' (2021) 65 *Journal of African Law* 205; Yen Kong Ngangjoh-Hodu, "'Regional Trade Courts" in the Shadow of the WTO Dispute Settlement System: The Paradox of Two Courts' (2020) 28 *African Journal of International and Comparative Law* 30.

ASIA —Editors: Yao-Ming Hsu & Charles Mak



Private International Law continues to develop vibrantly in Asia. This year, especially between Mainland China and Hong Kong, several reciprocal arrangements for mutual recognition of judgments were set. Besides, a major center of international arbitration in the Asia-Pacific region, Singapore revised its International Arbitration Act.

For case law development, notably in Taiwan there is a case concerning environmental damages caused in Vietnam, in which the jurisdiction issue is still pending.

Regional Conventions

Hong Kong: Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance

On May 5, 2021, the Legislative Council of the Hong Kong Special Administrative Region passed the Bill to implement the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region signed between the Hong Kong Government and China's Supreme People's Court on 20 June 2017.

The full text of the law may be found here: <https://www.legco.gov.hk/yr20-21/english/ord/2021ord011-e.pdf>.

Hong Kong: Record of Meeting on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region (the ROM).

On May 14, 2021, China's Supreme People's Court promulgated the Record and the Opinions, which establish the mechanism of mutual recognition and assistance in bankruptcy proceedings between the Mainland China and Hong Kong.

The full text of the Record, the Opinions, and an official practical guide law may be found here:

https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECC_J_RoM_en.pdf

and

https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECC_J_practical_guide_en.pdf

Hong Kong: Supplementary Arrangement on Reciprocal Enforcement of Arbitral Awards by the Mainland and the Hong Kong Special Administrative Region.

On May 18, 2021, Articles 2 and 3 of the Supplementary Arrangement entered into full force between the Mainland China and Hong Kong on May 19, 2021. Articles 1 and 4 of the Supplementary Arrangement came into force on 27th November 2020. The full text of the law may be found here: <http://www.court.gov.cn/zixun-xiangqing-303291.html>.

Singapore: International Arbitration (Amendment) Act

On November 13, 2021, the Singapore government has amended its International Arbitration Act (SIAA) to introduce a default procedure for the appointment of arbitrators in multi-party arbitrations.

The full text of the law may be found here: <https://sso.agc.gov.sg/Acts-Supp/32-2020/Published/20201111?DocDate=20201111>.

National Case Law

Taiwan: A case relating to Environmental Damages.

A subsidiary company of Taiwanese company infringed and caused pollution in Vietnam. This subsidiary has settled with Vietnamese government. However, the Vietnamese plaintiffs again raised a civil suit for compensation in Taipei District court. In the first instance, TDC ruled that Taiwan had no international jurisdiction since it's a case of tort happened in Vietnam. The High Court (court of appeal) upheld the same



opinion. However, in November 2020, the Supreme court ruled that Taiwan had jurisdiction *in personam*. Again, the case was removed back to the High Court and in March 2021.

AMERICAS

Central, South America & Mexico

—Editor: Juan Pablo Gomez



There appears to be a trend of reform to Private International Law issues in the region, as evidenced by the presentation of proposals to adjust regulations and the incorporation of new laws in countries like Colombia, Ecuador, and Peru. There is a particular interest in updating national instruments on arbitration and mediation considering the impact of cross-border disputes in the region. One of the most important milestones in this regard was the ratification of ICSID Convention by Ecuador, which had previously denounced the treaty in 2009. As these initiatives evolve, important changes are expected next year.

International Conventions

Ecuador: The National Assembly ratified the Protocol on Trade Rules and Transparency to the Trade and Investment Council Agreement

On May 4, 2021, the Ecuadorian National Assembly passed the New Protocol of the Trade and Investment Council Agreement with the United States. The Protocol incorporates new rules on several matters concerning cross-border operations such as customs, investments, and trade. It also includes provisions on better regulatory practices, anti-corruption policies and SMEs. To both countries, this Protocol is the first step towards a comprehensive FTA.

Link: The full text of the Protocol may be found here: https://ustr.gov/sites/default/files/files/Press/Releases/US-Ecuador_Protocol.pdf.

Ecuador: The Ecuadorian Ambassador to the United States Ivonne Juez Abuchara de Baki signs the ICSID Convention

On June 21, 2021, Ecuador's Ambassador to the US signed the ICSID Convention. Ecuador had signed the ICSID Convention in 1986, but it had denounced the agreement before the World Bank Group in 2006. The ICSID Convention must now be ratified in order to come into force for Ecuador.

Link: The full text of the decision may be found here: <https://icsid.worldbank.org/news-and-events/news-releases/ecuador-signs-icsid-convention>.

Ecuador: The Government deposited the instrument ratifying the ICSID Convention.

On August 4, 2021, the Government of Ecuador deposited the instrument ratifying the ICSID Convention before the ICSID's General Secretariat. Pursuant to its Article 68(2), the Convention enters into force for Ecuador on September 3, 2021.

Link: The official post from ICSID may be found here: <https://icsid.worldbank.org/news-and-events/news-releases/ecuador-ratifies-icsid-convention>

National Legislation

Brazil: The Legislature of Brazil has passed a new Insolvency Law

On January 23, 2021, Brazil adopted a new Insolvency Law, published under No. 14.112. This law addresses the overlapping of international arbitrations and insolvency proceedings, providing security to dispute settlement instances.



While certain processes are suspended by insolvency, arbitrations may go forward despite such circumstances and arbitration clauses are equally enforceable. Likewise, foreign insolvency proceedings cannot put a stay on arbitrations taking place domestically.

Link: The full text of the law may be found here:
<https://www.in.gov.br/en/web/dou/-/lei-n-14.112-de-24-de-dezembro-de-2020-296388917>.

Peru: The Legislature of Peru has passed a draft law to amend the Arbitration Law

On February 7, 2021, Peru passed a draft amendment published under No. 7161/2020-CR to amend the Arbitration Law. This draft law intends to amend the Arbitration Law to prevent defected arbitral awards due to the absence of qualified arbitrators and insufficient regulations. To do so, it intends to introduce a new provision 4-A to the Arbitration Law which requires that arbitrators must have a degree in law in Peru or a foreign country.

Link: The full text of the law may be found here:
https://files.lbr.cloud/public/2021-02/Bill%20No.%207161-2020-CR.pdf?UiZDjquzDzApZgVbrvsRBgf_m42SxbQ9=.

Brazil: Brazil signs the Singapore Convention on Mediation

On June 4, 2021, Brazil signed the United Nations Convention on International Settlement Agreements also known as the Singapore Convention on Mediation. The Convention must still be approved by the Congress and ratified by the President to become part of the national legal framework.

Link: No link available.

Colombia: New Project of Reform to the National and International Arbitration Statute

On July 20, 2021, the Ministry of Justice presented for Congress approval project No. 009 of 2021 incorporating over 35 changes and aimed at amending Law 1563 of 2012 also known as the National and International Arbitration Statute.

The full text of the project may be found here:
<http://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2021-2022/2222-proyecto-de-ley-009-de-2021>.

Ecuador: The President issued the Rules on Arbitration and Mediation

On August 18, 2021, the President of Ecuador Guillermo Lasso issued Executive Decree No. 165 which incorporates the Rules on Arbitration and Mediation, an instrument that puts in writing relevant practices in the field and makes clarifications.

The full text of the project may be found here:
https://www.fielweb.com/App_Themes/InformacionInteres/Decreto_Ejecutivo_No._165_20210718190912.pdf.

National Case Law

Colombia: Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v. Republic of Colombia (PCA, No. 2018-56).

On 7th May 2021, a PCA tribunal decided that it lacked jurisdiction under the Colombia-US FTA to decide on the issues brought by several claimants due to intervention by the *Superintendencia Bancaria* of the Granahorrar Bank in 1998.

Link: The full text of the decision may be found here
<https://jsumundi.com/en/document/decision/en-alberto-carrizosa-gelzis-enrique-carrizosa-gelzis-felipe-carrizosa-gelzis-v-republic-of-colombia-award-friday-7th-may-2021>.

Venezuela: Columbia District Court enforced Koch's ICSID award against Venezuela

On 18th August 2021, the District Court for the District of Columbia granted a summary judgment whereby it confirmed a 2017 ICSID award for Koch Minerals and Koch Nitrogen against Venezuela. The dispute concerned Koch's interest in FertiNitro, a fertilizer company expropriated in 2010 by the government of Hugo Chávez.

Link: The full text of the request may be found here:
<https://files.lbr.cloud/public/2021-08/D.D.C.%2017-cv->



[02559%20dckt%20000055_000%20filed%202021-08-18.pdf?VersionId=th2PdUqEdSBYwU9qBlJQyjYd7rsSlti4.](#)

North America

—Editor: Carrie Shu Shang



Among North American countries, Canada is always on the forefront of defending a multilateral world order given enough procedural due process has been ensured. Just as the final agreement on the text of the United States-Mexico-Canada Agreement (USMCA) promises to engage greater economic interactions among cross-border parties, case law in North America reveals how many fundamental issues in Private International Law are still evolving.

In the United States, a revived interest in Private International Law has been witnessed in the current Supreme Court term. *Nestlé USA, Inc. v. Doe* is a landmark case that further restricts personal jurisdiction under the Alien Tort Statute which could reshape the landscape of transnational tort litigation. The Second Circuit ended a multi-year saga involving direct conflicts of Sherman Act and a Chinese government mandate by again referring to international comity. On the other hand, the Uniform Law Commission and American Bar Association are taking additional steps in facilitating uniform state laws in multiple areas that are consistent with U.S. international obligations. Even though it is probably still premature to conclude, it is possible for international law to have a strong come back in the Biden-era Court.

International Conventions

Canada: Adopt new procedural rules and mediation rules for the CETA Investment Court reform

On 29 January 2021, the European Union and Canada adopted four decisions providing for specific rules regarding the Investment Court System (“ICS”) agreed in the 2016 EU-Canada Comprehensive Economic and Trade Agreement (“CETA”). One of them includes the Rules for Mediation.

National Case Law

Canada: Supreme Court found arbitration clause invalid in *Uber Technologies Inc v. Heller*

On June 20, 2020, in *Uber Technologies Inc v. Heller*, the Supreme Court of Canada found that the arbitration clause, choosing the Netherlands as the seat of arbitration, in Mr. Heller (an Uber driver) contract was “unconscionable,” and that the contract was null as contrary to the Employment Standard Act. Accordingly, the Court permitted Heller’s class action to proceed.

The full text of the decision may be found here: <https://www.canlii.org/en/ca/scc/doc/2020/2020scc16/2020scc16.html>

United States: New York Court Denies Enforcement of Chinese Judgment on Systemic Due Process Grounds

On April 30, 2021, in *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*, the Supreme Court of New York denied enforcement of a Chinese court judgment on the ground that the judgment “was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.” The decision disagrees with every other U.S. and foreign court to have considered the adequacy of the Chinese judicial system in the context of judgments recognition. The case will be appealed.

The full text of the decision may be found here: https://www.nycourts.gov/reporter/pdfs/2021/2021_31459.pdf

United States: Supreme Court Further Limits Corporate Liability for Human Rights Violations Overseas under the ATS



In *Nestlé USA, Inc. v. Doe*, the SCOTUS revisited the Alien Tort Statute (ATS), a concise 1789 provision that allows federal district courts to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The Court held that the ATS does not confer jurisdiction over claims against US corporations stemming from injury that occurred overseas if the only domestic conduct consists of “general corporate activity.” However, the Court did not hold that the ATS bars suits against all US corporations operating around the globe, as the defendants and some amici had advocated (decision rendered on June 17, 2021).

The full text of the decision may be found here: https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf

United States: Second Circuit Overturns Multi-Million Dollar Price-Fixing Judgment on Comity Grounds

The U.S. Court of Appeals for the Second Circuit issued a decision in *In re Vitamin C Antitrust Litigation*, reversing a \$148 million price-fixing judgment against two Chinese exporters of vitamin C. The Second Circuit once reversed the lower court finding on international comity grounds, finding there was a *true* conflict between U.S. and Chinese law and, as a result, declining to “construe U.S. antitrust law to reach defendants’ conduct.” The Second Circuit ruling was based on the Supreme Court remand decision in June 2018, which instructed that U.S. courts should give “careful consideration but not conclusive deference to foreign governments’ submissions in U.S. litigations.” In earlier proceedings, the Chinese government through the Ministry of Commerce, appeared and agreed that it required price fixing as a means of nurturing its nascent vitamin C industry in China (decision rendered Aug 10, 2021).

The full text of the decision may be found here: https://www.ca2.uscourts.gov/decisions/isysquery/91e903e4-551e-414a-8a0e-0cbce752b1a0/14/doc/13-4791_complete_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/91e903e4-551e-414a-8a0e-0cbce752b1a0/14/hilite/

United States: Eleven Circuit Supports a Choice-of-Law Provision in a Cruise Shipping Contract

On August 19, 2021, the U.S. Court of Appeals for the Eleventh Circuit issued its latest decision in *Turner v. Costa Crociere S.P.A.* The plaintiff was an American cruise ship passenger who brought a class action in federal district court in Florida alleging that the cruise line’s negligence contributed to an outbreak of COVID-19 aboard the Costa Luminosa during his transatlantic voyage beginning on March 5, 2020. The cruise line moved to dismiss the case on the basis of a forum selection clause in the ticket mandating that all disputes be resolved by a court in Genoa, Italy. The contract also contained a choice-of-law clause selecting Italian law. The Eleventh Circuit the Italian forum selection clause, and dismissed the case on the basis of *forum non conveniens*.

The full text of the decision may be found here: <https://cases.justia.com/federal/appellate-courts/ca11/20-13666/20-13666-2021-08-19.pdf?ts=1629397880>

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). The IJEB, among other activities, facilitates the promulgation of uniform state laws that deal with international and transnational legal matters and that are consistent with U.S. law and 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 IJEB met on Friday, September 10 and was particularly interested in areas related to international and transnational legal matters in which uniform state laws would be useful. IJEB is also interested in whether uniform state laws in these areas should be developed in Expansion of Foreign Country Money Judgments Act and Commercial Courts, and is interested in receiving feedbacks from ASIL members.

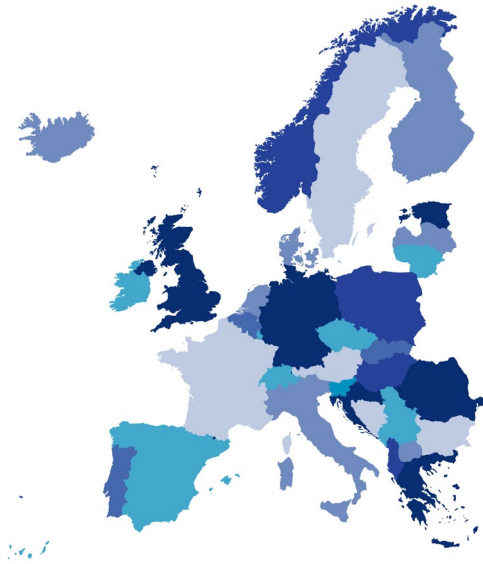
United States: the 34th Annual Survey of American Choice-of-Law (2020) is posted on SSRN. You can download it by



clicking on this link
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3758978

EUROPE

—Editors: Patricia Snell, Charles Mak & Christos Liakis



The year 2021 has seen the European Union remain committed to a multilateral legal order via its proposals to accede to the Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters (2019 Hague Judgments Convention). Most significantly, the last year has seen significant developments in the Environmental, Social, and Governance (ESG) space. The EU introduced regulations concerning the conflict minerals trade, as the supply chains for such minerals may be linked to forced labor. Furthermore, ESG litigation was front and center with decisions in the Dutch courts concerning the liability of parent companies for environmental damage of their subsidiaries overseas and the liability of corporate for CO2 emissions. These decisions have opened new horizons for the environmental mitigation obligations and duty of care of corporates headquartered in the Netherlands; however, it remains to be seen what approach other European jurisdictions will take. Finally, the past year saw developments in the arbitration space, with decisions on the applicable law of the arbitration agreement and the validity of service by electronic means.

International Conventions

European Union: Proposal for a Council Decision on Accession to the 2019 Hague Judgments Convention

On July 16, 2021, the European Commission issued a [proposal](#) for a Council decision on the accession of the European Union to the 2019 Hague Judgments Convention. The 2019 Hague Judgments Convention, which is complementary to the 2005 Hague Convention on Choice of Court Agreements, aims to create a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, in the interests of enhanced judicial cooperation.

The full text of the 2019 Hague Judgments Convention is found here:

<https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf>.

European Union Regulations

European Union: Regulation of the Conflict Minerals Trade

The Conflict Minerals Regulation came into force on January 1, 2021. The full explanation of the Regulation is available here: https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/index_en.htm. The Regulation aims to stem the trade in four minerals, including tin, tantalum, tungsten, and gold (referred to as 3TG) – which may finance armed conflict or are mined using forced labor. The Regulation ensures that EU importers of 3TG meet international responsible sourcing standards, set by the OECD, to assist with breaking the link between conflict and the illegal exploitation of minerals and the exploitation of local communities. The Regulation requires EU companies in the supply chain to ensure they import 3TG from responsible and conflict-free sources only.

Further information is available here:

https://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=796.

EU Case law

Court of Justice of the European Union: Contract Law over Insolvency Law



On April 22, 2021, in *Case C-73/20 Oeltrans Befrachtungsgesellschaft*, the CJEU considered the question of whether a payment made in performance of a contractual obligation is governed by the law applicable to the contract. The CJEU ruled that, per Article 13 of Regulation (EC) No 1346/2000 on insolvency proceedings (European Insolvency Regulation), and Article 12(1)(b) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I Regulation), the law governing the avoidance of the payment of a contractual obligation by a third party, is that contract's law and not insolvency law, where, in insolvency proceedings, that payment is challenged as an act detrimental to all the creditors.

The full text of the judgment is found here:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=240225&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=16092185>.

Court of Justice of the European Union: “Centre of Interests” Courts and Online Infringement of Personality Rights

On June 17, 2021, in *Case C-800/19 Mittelbayerischer Verlag*, the CJEU considered whether a Polish Holocaust survivor could bring proceedings in Poland against a German newspaper publisher for the alleged violation of his personality rights through the publication of an online article in Poland. The CJEU clarified the application of Article 7(2) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation). The Court found that Article 7(2) must be interpreted such that the courts of a person's “center of interests” (where that person's personality rights have purportedly been violated by online content) have competence, only if the online content contains objective and verifiable elements permitting identification of the person, directly or indirectly as an individual. The CJEU considered the lack of predictability to a publisher of being sued at an individual's “center of interests” where an individual has not been directly targeted by the publication. The full text of the judgment is found here:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=243103&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=16091095>.

Court of Justice of the European Union: Donations Mortis Causa and EU Succession Regulation Applicability

On September 9 2021, in *Case C-277/20*, the CJEU considered whether a donation mortis causa (a deed of gift on death) giving rise to a right in rem after the death of the donor constitutes an “agreement as to succession” within the meaning of Article 3(1)(b) of Regulation (EU) No 650/2012 (European Succession Regulation). The CJEU found that there was an “agreement as to succession” in the situation of a contract of donation mortis causa entered into between two German nationals residing in Germany relating to real estate in Austria, granting the donee a personal right (upon the death of the donor) to the registration of the right of ownership in the land register on the basis of the deed of gift and the death certificate.

The full text of the judgment is found here:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=245753&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=17308806>

National Case Law

France: National Jurisdiction on Liability Claims Against Arbitrators

On June 22 2021, the International Commercial Chamber of the Paris Court of Appeal (ICCP-CA) considered the competent jurisdiction to determine a liability action brought by a Qatari party to a Paris-seated arbitration against an arbitrator resident in German, for breach of obligations under the arbitrator's contract. The ICCP-CA found that an action bringing a liability claim against an arbitrator falls within the arbitration exception of Article 1.2(d) of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation). Accordingly, the ICCP-CA held that pursuant to national law, the French courts maintain jurisdiction provided that the seat of arbitration is in France.

The full text of the judgment is found here:

<https://www.cours-appel.justice.fr/paris/22062021-ccip-ca-rg-2107623-arbitrage-international-international-arbitration>.

The Netherlands: Groundbreaking Extension of Duty of Care

On January 29, 2021, the Hague Court of Appeal handed down a landmark judgment concerning the liability of parent companies for acts of overseas subsidiaries. The Hague Court of Appeal held that Royal Dutch Shell's (RDS) Nigerian subsidiary, Shell Petroleum Development Company (SPDC),



was liable as a matter of Nigerian law for two pipeline spills that polluted several Nigerian fishing communities. The Court ordered SPDC to clean up the contamination and implement preventative measures, including a leak detection system. Most significantly, the Court ordered RDS to ensure that the leak detection system is installed within one year, failing which RDS would be subject to a penalty.

The full text of the judgment is found here:

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:1827>

In a similar case before the English courts (*Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3) brought by Nigerian citizens against RDS for environmental damage by SPDC, the UK Supreme Court held that the claim against a UK parent company may proceed.

The full text of the judgment is available here:

<https://www.bailii.org/uk/cases/UKSC/2021/3.html>

United Kingdom: Court of Appeal of England and Wales on the New Frontiers of the Law of Negligence

On March 10, 2021, the Court of Appeal in *Begum v Maran (UK) Ltd* dismissed an application for summary judgment, and held that a compensation claim against a UK-domiciled shipbroker (the agent of the ship owner) brought in relation to events that took place in Bangladesh and involving a third party demolition shipping company (the ship owner), could proceed to trial in the English courts. In this case, a shipbroker had sold its ship to a shipping company, that then undertook unsafe measures to dispose of the ship. Claims were brought against the shipbroker asserting that it had a duty of care to ensure that sale and demolition of the ship would not endanger human health, damage the environment, or breach international regulations. The full text of the judgment is found here:

<https://www.bailii.org/ew/cases/EWCA/Civ/2021/326.html>

The Netherlands: Remarkable Environmental Damage Mitigation Obligation Imposed

On May 26, 2021, the Hague District Court ordered Royal Dutch Shell plc (RDS) to reduce the CO2 emissions of the Shell group's activities by 45% by 2030. A group of NGOs and individual co-claimants brought a class action against RDS asserting that RDS had breached its duty of care to prevent dangerous climate change. Referring to the Dutch Civil Code's concept of "proper social conduct" to interpret

the duty of care and the Paris Agreement, the Court declared that RDS bears an obligation of environmental damage mitigation. The Court explained that RDS owed an "obligation of result" to reduce the CO2 emissions of the Shell group and a "significant best-efforts obligation" to reduce CO2 emissions of its business partners.

The full text of the judgment is found here:

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>

Russian Federation: Supreme Court of the Russian Federation Holds that Service of Process by Email is Valid

In *Case 2020 N 306-ES20-2957 / N A12-20691 / 2019*, the Supreme Court confirmed a lower court decision to enforce a judicial decision rendered in Cyprus against a Russian defendant. The claim was notified to the defendant only by email, and after a default judgment was entered against the defendant, the claimant filed to enforce it in Russia. The lower court had established that the defendant had been "promptly and duly notified under the laws of the Contracting Party in the territory of which the judgment was made" under the Treaty on Legal Assistance of the USSR-Cyprus 1984 on civil and family matters.

Further information is found here:

<https://conflictoflaws.net/2021/service-of-process-on-a-russian-defendant-by-e-mail-international-treaties-on-legal-assistance-in-civil-and-family-matters-and-new-technologies/comment-page-1/>

United Kingdom: The Applicable Law of the Arbitration Agreement

In *Enka Insaat Ve Sanayi AS v OOO*, the UK Supreme Court set out principles for determining the applicable law of an arbitration agreement when the governing law of the contract differs from the law of the seat. The Court held that where the parties have chosen that the governing law of the contract will apply to the contract containing the arbitration agreement, the law of the contract will generally apply to the arbitration agreement. However, the Court found that where the parties have not chosen a law to govern the arbitration agreement, whether expressly or impliedly, a court must determine which law has the closest connection to the arbitration agreement. In general, the law of the seat will be most closely connected to



the arbitration agreement. The full text of the judgment is found [here](https://www.supremecourt.uk/cases/uksc-2020-0091.html):
<https://www.supremecourt.uk/cases/uksc-2020-0091.html>

For further discussion, see also the recent UK Supreme Court decision in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48:
<https://www.supremecourt.uk/cases/uksc-2020-0036.html>

Greece: New York 1958 Convention applies to the recognition and enforcement of Basketball Arbitral Tribunal awards.

A first instance court in Greece has recently recognized and enforced an arbitral award issued by the Basketball Arbitral Tribunal, maintaining a long standing jurisprudence on recognition of awards rendered by sport tribunals.

Further information <https://conflictoflaws.net/2020/new-york-convention-applies-to-the-recognition-and-enforcement-of-basketball-arbitral-tribunal-awards/>

Association and Events

The Hague Academy of International Law – Winter Courses

The Hague Academy of International Law's Winter Courses will be held on-site (registrations closed) and online from January 20-28, 2022. The course lasts three weeks and focuses on both public and private international law. Further information on The Hague Academy is found here:
<https://www.hagueacademy.nl/programmes/the-winter-courses/>



OCEANIA — Editor: Jie (Jeanne) Huang



During 2020 and 2021 there are important judgments issued by Australian and New Zealand courts to clarify issues related to parallel litigations, recognition and enforcement of judgments and investment arbitration awards, and exclusive jurisdiction clause.

Both Australia and New Zealand ratified the Regional Comprehensive Economic Partnership (RCEP) and became original parties to the world's largest free trade agreement.

October 2019 also saw the publication of a new edition of the seminal textbook, Nygh's Conflict of Laws in Australia.

International Conventions National Legislation

Australia: Australia ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the 'Mauritius Convention on Transparency')

On September 17 2020, with the deposit of the instrument of ratification at the UN Headquarters in New York, Australia ratified the Mauritius Convention on Transparency and becomes the sixth State party. The Convention entered into force for Australia on 17 March 2021.

Link: The announcement of the Hon Christian Porter MP, Attorney-General, Minister of Industrial Relations may be found here: <https://www.trademinister.gov.au/minister/simon-birmingham/media-release/enhancing-transparency-under-international-investment-treaties>

Australia and New Zealand: both countries ratified RCEP on 2 November 2021.

With Australia's and New Zealand's ratification, as of November 2, 2021, the ASEAN Secretariat has received Instruments of Ratification/Acceptance from six ASEAN Member States – Brunei Darussalam, Cambodia, Lao PDR, Singapore, Thailand, and Viet Nam – as well as from four non-ASEAN signatory States – Australia, China, Japan, and New Zealand.

Therefore, the RCEP has achieved the minimum number of IOR/A and will enter into force sixty days later, which is January 1 2022.

Link: announcements of Australia and New Zealand may be found here: <https://www.trademinister.gov.au/minister/dan-tehan/media-release/australia-become-original-party-worlds-largest-free-trade-agreement>; <https://www.beehive.govt.nz/release/new-zealand-ratifies-rcep-agreement-enter-force-early-next-year>.

ASEAN Announcement may be found here: <https://asean.org/regional-comprehensive-economic-partnership-rcep-to-enter-into-force-on-1-january-2022/>

National Case Law

Australia: Clayton v Bant [2020] HCA 44 (2 December 2020)

The High Court of Australia held that a ruling made by the Personal Status Court of Dubai in divorce proceedings by the respondent husband against the appellant wife has no effect of precluding the wife from pursuing property settlement proceedings and spousal maintenance proceedings against the husband under the Family Law Act 1975 (Cth). This is an important case regarding res judicata, cause of action estoppel, and Anshun estoppel.



Link: The full text of the judgment may be found here:
<https://jade.io/article/777766?at.hl=Clayton+v+Bant+%255B2020%255D+HCA+44>

Australia: Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l [2021] FCAFC 3 (10 February 2021); Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l (No.3) [2021] FCAFC 112 (25 June 2021)

The two judgments concern recognition and enforcement of the arbitration award of *Antin Infrastructure Services Luxembourg S.à.r.l and Antin Energia Termosolar B.V. v the Kingdom of Spain* (ICSID Case No. ARB/13/31) in Australia. **In the first decision**, the Full Court of the Federal Court of Australia held that Spain’s accession to the ICSID Convention constituted an agreement by treaty to submit itself to the Australian Federal Court’s jurisdiction. In particular, the Court characterize the proceeding as a recognition proceeding and held that Article 55 of the ICSID Convention did not apply and Article 54(1) and (2) constituted Span’s agreement within the meaning of s 10(1) and (2) of the Immunities Act. **In the second decision**, pursuant to s 35(4) of the International Arbitration Act 1974 (Cth), the Court orders the judgment be entered in favour of the applicants against the respondent for the pecuniary obligations under the arbitration award.

Link: The full text of the judgment may be found here:
<https://jade.io/article/783446?at.hl=kingdom+of+spain>
<https://jade.io/article/820871?at.hl=kingdom+of+spain>

GLOBAL CONFLICT OF LAWS

—Editor: Cristián Giménez Corte



The aim of this section is to present developments that are not necessarily linked to one particular region or country, but that are truly transnational or global. Under the heading Global Conflict of Laws, we include information on rules, regulations, judicial and quasi-judicial decisions that are global in their origin and global in their effect. In other words, rules and regulations that are not produced by national law-making processes and do not have a determined territorial scope of application.

Global Conflict of Laws issues includes, of course: international commercial arbitration, international investment arbitration, and international sport arbitration. They also include transnational principles or rules issued by intergovernmental organizations such as Unidroit, nongovernmental “formulating agencies” such as the International Chamber of Commerce, and international treaties adopted by international organizations such as the United Nations.

Global Conflict of Laws is of the opinion that PIL, as a science, can offer tools and techniques to solve problems of coordination and legitimation of different legal sources and authorities, even when such sources are not State laws and such authorities are not State courts.

In addition to the new global developments related to the ILA Guidelines on Intellectual Property and PIL, and the international tax reform proposed by the G20, which are discussed in the introduction to this issue, we would like to highlight the following global news.

Transnational Principles/Soft Law

UNCITRAL, HCCH and UNIDROIT Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales

These organizations have issued a joint “Tripartite Legal Guide” aiming at establishing a roadmap on the current legal texts on international sales contracts elaborated by each organization, including the CIGS, the UNIDROIT Principles on International Commercial Contracts, and the HCCH Principles; with a view to fostering uniformity in this area of law.



Further information
<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tripartiteguide.pdf>

ICSID and UNCITRAL publish new Draft Code of Conduct for Adjudicators in International Investment Disputes

This draft Code was elaborated and based on a comparative review of principles and norms found in codes of conduct of various investment treaties and arbitration rules. The draft Code is intended to provide principles and provisions on independence and impartiality, the duty to conduct proceedings with integrity, fairness, efficiency and civility.

Further information
https://icsid.worldbank.org/sites/default/files/documents/Code_of_Conduct_V3.pdf

UNCITRAL Expedited Arbitration Rules

The UNCITRAL Expedited Arbitration Rules have entered into force. These Rules allow parties to agree to a streamlined and simplified arbitral procedures, with the award expected to be made within a relatively short period of time. The Expedited Arbitration Rules are an appendix to the UNCITRAL Arbitration Rules, which apply only by agreement of the parties

Further information
<https://unis.unvienna.org/unis/en/pressrels/2021/unisl321.html>

UNCITRAL Working Group III considers the Draft Arbitrator Code of Conduct

Starting November 15, 2021, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) will continue its work on a draft code of conduct. Some of the focus will be on the proposed Article 3(2)(a), pursuant to which the obligation to remain independent and impartial would also “*encompass() the obligation not to: (a) be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamour.*”

Further information:
<https://undocs.org/en/A/CN.9/WG.III/WP.209>

International Courts and Arbitral Tribunals

Facebook Supreme Court

On 2020 Facebook created its own “quasi-independent” Oversight Board “to help Facebook answer some of the most difficult questions around freedom of expression online: what to take down, what to leave up, and why.” The Oversight Board has power to issue final binding decisions on Facebook, over its 2 billion users worldwide, and even over Facebook board of directors.

On May 5, 2021, this Oversight Board upheld the company’s decision to suspend former President Donald Trump from the platform and Instagram.

For more information <https://oversightboard.com/>

International Commercial Courts

A number of nations have established new “international commercial courts,” including France, the Netherlands, Germany, Kazakhstan, Dubai, Qatar, Singapore, India and China, while other countries are planning to create their own.

While the creation of these “special” courts is mostly welcomed, as in a sense these international court are official national courts and not just private arbitral tribunals, these courts are also creating a sort of dual justice system within the same nation state, which may lead to weaken the basic principle of “equality before the law.”

Further information:
<https://www.elevenjournals.com/tijdschrift/ELR/2019/1/ELR-D-19-00023>