



Transnational civil litigation and International commercial arbitration

Overview of the course – Introductory remarks
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DISPUTES RESOLUTION

Basic concepts

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- **Legal dispute** – A legal dispute is a controversy between two or more parties that gives rise to a legal proceeding (lawsuit)
 - **Dispute resolution** – Dispute resolution indicates the process through which a legal dispute is resolved
 - **Civil litigation** – When a legal dispute that involves private interests is resolved through a civil process governed by national public law (code of civil procedure or the like) and which takes place before state courts that form part of a national legal system and are permanently established to give their decisions on civil cases – Hereinafter we refer to this as Litigation
 - **Arbitration** – When a legal dispute is resolved through a private process that is based on and shaped by the will of the parties to the dispute and which takes place before private judges selected by (or on behalf of) the parties to decide that specific case

INTERNATIONAL/TRANSNATIONAL CIVIL DISPUTES

Definition

- **International/transnational dispute** – A legal dispute may be characterized as international and/or transnational when it contains an international/transnational element in it. It occurs when two or more countries are somehow and to some extent connected to the dispute.
- **International elements** – Elements that characterize a dispute as international may be: (i) the nationality of the parties to the dispute; (ii) the place where the contract to which the dispute relates was made or the legal event that leading to the dispute occurred; (iii) the law that governs the contract or the legal occurrence; (iv) the place where parties' assets are located.
- **Issues of an international dispute** – If a legal dispute involves international elements, various problems may emerge in starting litigation to resolve the dispute

INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION

Characteristic issues

- **Jurisdiction** – When a civil action relates to an international dispute, it may be critical to determine – as two or more state are connected to the dispute – which state court has jurisdiction to hear the case. Need for coordination of the jurisdiction of courts in different states
- **Service of documents** – Service of court documents can be problematic if the parties to the dispute are located in different countries. The service of documents involves, in most countries, the exercise of public authority, so when the party to be served is abroad, the assistance of the public authority of the state concerned is required. Judicial cooperation is the performance of a judicial act by one country on its territory upon the request and for the benefit of another
- **Taking evidence** – If the facts underlying the dispute occurred in a country other than the one in which the proceedings are held, problems may arise in the taking of evidence for the same reasons as above (need for judicial cooperation from the foreign authority).
- **Rules of procedure** – Domestic courts apply their own rules of civil procedure, with which foreign parties may not be familiar. As part of public law, the rules of civil procedure are in principle not flexible as parties cannot derogate from them
- **Language** – Civil proceedings before state courts are conducted in the language of the country to which the courts belong
- **Recognition and enforcement** – The domestic court will issue a domestic/national judgment to resolve the case, and in principle, the effects of a domestic judgment are limited to the territory of the state concerned. However, parties may need to rely on such a judgment in different countries, for example, to enforce it against the debtor where his assets are located

INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION

How issues may be overcome or mitigated

- **Bilateral and/or multilateral international treaties/conventions** – The two or more states that are related to the dispute may be party to an international convention/treaty (**contracting states**) designed to establish common rules for determining:
 - (i) which is the contracting state court that has jurisdiction to hear a case (so called double convention, Brussels Conventions 1968 which is no longer in force; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children)
 - (ii) how to proceed when an act instituting a proceeding should be served in a contracting state different from the state of the proceedings (The Hague Convention 1965)
 - (iii) how to take evidence in a contracting state other than the one where the proceeding is taking place (Convention on the Taking of Evidence Abroad in Civil or Commercial Matters - The Hague, 18 March 1970)
 - (iv) under which terms and conditions domestic judgments can be recognized and enforced in another contracting states (Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters - Hague 2019 Judgments Convention)
- **Uniform set of rules** – The states involved in the dispute may be part of a supranational (political and economic) organization (as the **European Union**) that has the power, among other things, to establish uniform rules in the field of judicial cooperation in civil and commercial matters that will be applied by all national courts and authorities in each member state.

INTERNATIONAL CIVIL AND COMMERCIAL DISPUTES

Arbitration vs. Litigation

- **Main features of arbitration** – Arbitration is a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudication procedures
- **Advantages of arbitration over litigation**
 - i. Arbitration provides a more neutral forum and allows parties to have their case decided by arbitrators selected for their expertise in a particular field of law
 - ii. Arbitration offers flexibility regarding the rules applicable to the proceedings, confidentiality and a quicker way to resolve the dispute
 - iii. Enforcing decisions resulting from arbitration (**awards**) is usually easier than enforcing state court judgments