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Université Libre de Bruxelles
LL.M. in International Business Law
Class of 2026

International Litigation and Arbitration

Part I – General Issues Common to International Litigation & Arbitration

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Course Content & Format

The purpose of this part of the course is to establish the basic framework of cross-border dispute resolution through a review of “core issues” that are common to international litigation and arbitration, namely forum selection, party autonomy, exequatur, parallel proceedings, and cross-border provisional measures.

The focus is placed on international dispute resolution strategy and practice, as much as on the law itself. Teaching is practical and interactive, and includes discussion of cases.

Material: Main Legislative Instruments

- Brussels *Ibis* Regulation (1215/2012 – Jurisdiction and enforcement of judgments)
 - Text: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>
- Rome I Regulation (593/2008 – Choice of law in contracts)
 - Text : <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=en>
- 2005 Hague Convention on Choice of Court agreements
 - Text: <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>
- 2019 Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters
 - Text: [806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf](https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf) (hcch.net)
- New York Convention (10 June 1958)
 - Text: <http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf>
 - Official website: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html
 - Official guide: <http://newyorkconvention1958.org/>
 - Other site : <http://www.newyorkconvention.org/>

I. Forum Selection

1. Concurrence of jurisdiction in the international arena

- Context: cross-border commercial dispute
- Major stages of cross-border dispute resolution
- Sources of the rules of jurisdiction: domestic law; internationalization of the sources
- European judicial area: Brussels Recast Regulation (EU 27), Lugano II (EU + 3)
- 2019 Hague Judgment Convention (EU, UK, Ukraine, Albanie, Monténégro, Uruguay)
- In general: multiplicity of the grounds of jurisdiction
- Forum shopping (it is *“a dirty word, but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdiction, he will naturally choose the one in which he thinks his case can be most favorably presented; this should be a matter neither for surprise nor for indignation”*, *The Atlantic Star*, 1974)
- Reasons for the parties to engage in forum shopping

2. Choice of forum clauses

- Overall objective: control of the parties over the forum for dispute resolution
- International instruments
- Brussels Recast Regulation & Lugano,
- 2005 Hague Convention on choice of court agreements (EU, UK, Switzerland, Singapore, Mexico, Ukraine, Moldavia, Macédoine du Nord)(signature (but no ratification yet) of US and China)
- 1958 NY Convention (172 Contracting State including all major players in international trades such as EU States, US, China)
- Two issues: enforcement of the choice of forum clause (declining jurisdiction) and the recognition and enforcement of the decision (exequatur)
- The choice between judicial courts and arbitration; the factors of the choice

3. Validity of choice of forum clauses

(i) Substantial validity

- **The texts**
- New York, art. II.1: the dispute must be concerning a subject matter capable of settlement by arbitration (*“arbitrability”*); art. II.3: agreement must not be *“null, and void, inoperative or incapable of being performed”*
- Brussels Ibis, art. 25: court of a MS, agreement in connection with a particular legal relationship (but no requirement of territorial connection with dispute), agreement must not be *“null and void as to its substantive validity under the law of [the] MS [designated in the clause”*; no exception based on risk of infringement of public policy by the designated court (ECJ *Cartel Damage Claim* 2015); Cass. BE *Bugati*
- Hague, art. 6: agreement is *“null and void under the law of the State of the chosen court”*; *“giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised”*; *“for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed”*
- **Principle of autonomy / separability**
- Validity of the clause is independent from the validity of the underlying contract

- **The “null and void” exception**
- Substantive validity (case law NYC; Hague Explanatory report; Art. 25(1) Brussels Ibis); by contrast to formal validity, and to the effects of the clause (*Maersk* 2024); substantive validity refers to the validity of the agreement *as a contract* (*Lastre* 2025, reflecting solutions under HC); tension of this definition with principle of separability
- **Applicable law to substantive validity**
- HC, Brussels Ibis: law of the designated forum, including conflict rules of that forum (renvoi theory); but uncertainty from ECJ case law which does not mention this reference; Rome I inapplicable to determine the applicable law
- NYC: no settled solution : law chosen by the parties to the arbitration agreement; law of the underlying contract; lex fori; law of the closest connection; law of arbitral seat; substantive rules of international arbitration (France); *UniCredit* UK Supreme Court – Lord Leggatt (2024)(issue of applicable law to arbitration agreement in bonds subject to English law in order to determine jurisdiction to issue anti-suit injunction): rejects law designated by the conflict rules of the designated seat (“lead jurisdiction”), even if it would promote transnational consistency, because too complex and would require wide adoption; adopts law of the agreement or of the underlying contract (tension with principle of separability); UK Arbitration Act 2025: law of the seat of arbitration (substantive rules only or also conflict rules as per the “lead jurisdiction” system?)
- **Competence-Competence**
- Competence of the designated forum to rule on its own competence
- Distinction positive effect & negative effect
- New York: implicit positive effect, negative effect is not mandated, but allowed (cf. French law, with the exception of the manifestly void clause)
- Hague: positive effect, not negative effect (non-designated court can ruled on validity of clause)
- Brussels Ibis: positive effect, negative effect (if designated court is seized); exception of the clause that is manifestly void or inapplicable?

(2) *Formal validity*

- New York, art. II: agreement in writing
- Brussels Ibis, art. 25: agreement in writing (each party must have accepted the agreement in writing), evidenced in writing (unilateral confirmation is accepted if referring specifically to the agreement, and no objection), established practices between the parties, international trade usage in the particular trade; electronic communication with a durable record is deemed to be in writing
- Hague, art. 3(c): agreement in writing or by other means of communication which renders information accessible so as to be usable for subsequent reference

4. Effects of the clause

- New York, art. II.1: the court shall recognize the agreement; Art. II.3 New York: the court shall, at the request of one of the parties, refer the parties to arbitration
- Brussels Ibis, art. 25: prorogation & derogation; exclusive v. non-exclusive jurisdiction agreement
- Asymmetrical clause: *Rothschild* Cass. France 2013 (invalidity of the clause under the French law prohibition of “potestative clauses”); criticisms; is it not an issue of the effect of the clause?; ECJ *Lastre v. Agora*: EU national law governs validity, not national law;

“substantive validity” (subject to national law) only concerns the grounds that undermine consent as contract law defences (cf. fraud, duress, error)(curiously no reference to distinction between substantive validity and effect of the clause); asymmetrical clauses are not invalid as a matter of EU law (party autonomy; validity cannot be challenged based on imbalance in bargaining power between the parties, as regulated for the 3 contracts involving a weaker party); but requirement of “precision”: the clause must identify the alternative courts objective based on factors that are sufficiently precise; clause that allows bringing proceedings outside the EU/Lugano States lack precision and foreseeability; Cass. Fr. after referral: “any other competent court” must be construed as designating EU/Lugano State courts

- Hague: prorogation (art. 5) and derogation (art. 6)

5. New models of dispute resolution

- Development of international commercial courts
- Objective to compete with arbitration; dispute resolution as a legal product; attract litigation
- Singapore: International Commercial Court (SICC); a division of the Singapore High Court; specific court for international disputes; local and foreign judges (“international judges”); jurisdiction by specific choice or transfer from ordinary court; evidence: IBA Rules
- Dubai International Financial Centre (DIFC) Court: court of the UAE; common law; English language; foreign judges (mainly UK); jurisdiction by choice; enforcement both as UAE judgment and common law judgment; Practice Directions 2015: when a DIFC Court judgment is not paid and there is a dispute about enforcement (“a judgment payment dispute”), option to refer this dispute to arbitration (from 2021, DIFC-LCIA Arbitration Centre was abolished and turned into the Dubai International Arbitration Centre or DIAC); DIFC Court judgment turned into an arbitral award enforceable under New York Convention; objective to synthesise litigation and arbitration by giving concurrent remedies for enforcement; difficulties: is a dispute about enforcement of a judgment subject to arbitration? does not undermine the enforceability of the judgment (“two titles?”)
- Qatar Financial Centre Court
- Netherlands Commercial Court (District and Appeal) in Amsterdam
- International Chamber of the Court of appeal of Paris
- Chinese International Commercial Court
- Astana International Financial Centre Court
- Specific features of “delocalisation”: foreign judges; foreign lawyers, rules of procedure/evidence, languages (submissions, evidence, hearing, judgment), legal costs

II. Party autonomy

1. Principle of party autonomy

- Principle of free choice by the parties of the applicable law
- Almost universally accepted; in Europe, article 3 Rome I Regulation
- Choice of the applicable law either expressly in the contract ("this agreement is subject to the law of Vietnam") or implicitly if it is sufficiently certain (choice of court, arbitration in a particular country, use of standards contracts (cf. Lloyd's insurance policy), legal terminology of a particular country, former contracts)
- In the absence of choice: subsidiary connecting factor; various systems: closest connection, specific connecting factor (place where contract was made, place of performance of the

contract, place of the establishment of the party who is to effect the characteristic performance - art. 4 Rome Convention); connecting factors adapted to each category of contract (art. 4 Rome I)

- Exception when the contract is more closely connected with another country (art. 4(4), Rome I)
- The choice of a non-State system; difference between litigation and arbitration?

2. Derogations to party autonomy

(i) (Simple) Mandatory Rules

- Only in purely internal situations: national (art. 3(3) Rome I) or European (art. 3(4) Rome I)

(ii) Overriding Mandatory rules

- Statutory provisions that are considered to be of such vital importance that courts will always apply them irrespective of the applicable law
- Not simply mandatory, internationally mandatory; "*lois de police*", "*lois d'application immédiate*"
- Art. 9 Rome I Regulation
- Distinction between mandatory rules of the forum (obligation of application, with no condition) and mandatory rules of a foreign state (faculty of application, provided that they are from the State of performance of the contract and that they render the performance illegal); *Nikiforidis* (2016): art. 9 does not permit the application of the foreign mandatory rules of Greece that provide for reduction of salary a worker posted in Germany; but possibility to give effect to Greek rules as a factual element
- Definition of overriding mandatory rules: descriptive v. substantive (provisions which are regarded as crucial by a country for safeguarding public interests)
- Qualification of mandatory rules protecting private interest; Cass. BE *Thibelo* 2023; CJ *Unamar* 2013
- Mandatory rules in international arbitration; denial of party autonomy? Obligation of arbitrators to render an enforceable award?

(iii) Public policy

- Article 16 Rome I
- Comparison between mechanism of overriding mandatory rules and public policy

III. Recognition and Enforcement of Decisions (Exequatur)

- Main international legal instruments: NY Convention; Brussels Recast Regulation; Lugano Convention; Hague Conventions

1. Exequatur process

- Distinction between exequatur (recognition and enforcement; permission to execute) and measures of execution

- Arbitration: requirement to go through an exequatur process to obtain the recognition and enforcement of an arbitral award as a private title; New York, art. III and IV: obligation in principle to recognize and enforce foreign arbitral awards; process governed by domestic law; often on an *ex parte* basis, followed by option of the defendant to set aside the exequatur judgment.
- Court proceedings: traditionally, requirement to go through exequatur, often on an *ex parte* basis (Brussels I system); new Brussels Ibis regime: abolishes exequatur (direct enforcement of judgment from other Member States); right of the defendant to bring an application to oppose enforcement and to request suspension

2. Grounds for refusal

- New York, article V: incapacity of a party, lack of proper notice of arbitration, dispute outside of the scope of the arbitration agreement, violation of agreement of the parties, award not binding upon the parties, dispute not subject to settlement by arbitration, contradiction with public policy
- Brussels Ibis: public policy, rights of defense (judgment in default of appearance), irreconcilability of judgments (from the forum or another earlier judgment)

3. Public policy

- Brussels Recast: court must refuse enforcement in case of manifest infringement of public policy (in exceptional circumstances); New York: court “may” refuse recognition and enforcement in case of contradiction with public policy
- Distinction between internal public policy and international public policy; between substantive public policy & procedural public policy
- Procedural public policy: manifest infringement of right to fair trial under article 6 HRC (ECJ *Krombach* C-7/98); disbarment for breach of freezing injunction / disclosure order “may” involve a breach of public policy if, in view of all circumstances, there is a “*manifest and disproportionate infringement of the defendant’s right to be heard*” (ECJ *Gambazzi* (C-394-07))
- Principle of exhaustion of remedies in the State of origin: *Diageo Brands* C-681/13 (substantive public policy: competition law), *Meroni* C-559/14 (freezing injunction affecting third parties)
- Is there a principle of exhaustion in the context of arbitration? right to seek the setting aside of the award in the State of the seat of the arbitration (art. VI New York); in that case, right of the enforcement court to suspend the decision until decision in the State of the set aside proceedings; but still right to oppose exequatur
- **European public policy**
- Distinction procedural (art. 6 HRC) v. substantial (fundamental principles of EU law; Real Madrid 2024)
- Impact on review of arbitral awards
- *Eco Swiss* (1999): “a national court to which application is made for annulment of an arbitration award “must” grant that application if it considers that the award in question is in fact contrary to competition law, where its domestic rules” of procedure require it to grant an application for annulment found on failure to observe national rules of public policy”; *Genentech* (2015, Adv Gen): obligation to control respect of European public order both in annulment proceedings and enforcement proceedings; the French approach of the infringement which “pierce the eye” (a manifest infringement) is contrary to principle of

effectiveness of European law; the court of origin is bound by European law and may ask a preliminary question, unlike arbitrators; obligation to respect European public policy applies even when issue not raised before arbitrators

- *Elysée v. Hannibal Pictures* (Comm. Nivelles 2017): arbitration in California, distribution agreement provides for California law and arbitration; contract prohibits to sell outside of the territory of the distribution; parallel imports in France; arbitral award awarding damages for breach of contract; non-exequatur for infringement of European public policy
- *Seraing v. FIFA* (2025): where an EU law right is involved, national courts must carry out an in-depth judicial review of awards; application in the case of a CAS award confirming disciplinary sanctions to FC Seraing for infringement of FIFA rules prohibiting third-party ownership of economic rights in players; control of compliance with EU rules; Swiss Federal Tribunal judgment rejecting annulment of award does not have res judicata effect precluding review
- Case law confirms the requirement to enforce European public policy in the context of arbitration (compare with judgments)

IV. Parallel Proceedings

1. Parallel proceedings before State courts

- Four basic methods to address the issue of parallel proceedings

(i) Res judicata

- Both proceedings are allowed to continue until judgment subject to recognition
- Default rule applicable in many countries around the world (including US)
- Race for judgment

(ii) Prior tempore

- EU regime (art. 29 Brussels Ibis): court first seized of the claim; automatic stay, without discretion (with exception of exclusive jurisdiction); autonomous definition of date of seizure (lodging with court or service)
- Race for the courthouse
- Action for a negative declaration
ECJ *The Tatry* (C-406/92)
- Torpedo proceedings
ECJ *Gasser* (C-116/02)
- Exception for choice of court agreement (art. 31(2) Brussels Ibis): duty of the non-designated court (even if first seized) to stay proceedings in favour of the designated court (negative effect of competence-competence); risk of abuse by the defendant; comparison with the arbitration principle of competence-competence; exception for manifestly invalid/inapplicable clauses?

(iii) Forum non conveniens

- Discretionary stay based on considerations of appropriateness
- Two basic conditions:
 - (i) effective alternative forum (with jurisdiction and due process)

(ii) alternative forum (manifestly) more appropriate

US Supreme Court *Piper Aircraft*, 454 U.S. 235 (1981): action against the US manufacturer of an airplane which crashed in Scotland; discretion based on balancing private and public interest; distinction between US and foreign plaintiffs (who “*deserve less deference*”); justification by reference to advantages of the US forum (pro-plaintiff?)

- Compatibility with EU jurisdictional regime
ECJ *Owusu* (C-281/02): UK claim with respect to beach accident in Jamaica against Jamaican owner and UK travel agent; no discretion to decline jurisdiction based on EU Regulation (domicile of the defendant)
- Impact of Brexit

(iv) *Anti-suit injunction*

- Order not to bring or not to continue proceedings before another court; most drastic and far-reaching solution to parallel proceedings; issued under the penalty of contempt of court
- Civil law response: an infringement of public international law
- Compatibility with EU jurisdictional regime
ECJ *Turner v. Grovit* (C-159/02): prohibition against anti-suit injunctions with respect to proceedings in another MS; principle of mutual trust
- Impact of Brexit

2. Parallel proceedings in international arbitration

- The arbitration context: prevalence of party autonomy, bar to court proceedings (duty of courts to refer the parties to arbitration: art. II.3 NY Convention), competence-competence
- Consequence: parallel proceedings should be rare
- **First situation:** parallel proceedings before an arbitral tribunal and a court
- Parallel proceedings as to the validity/applicability of the arbitration agreement: competence-competence (positive effect / negative effect)
- Parallel proceedings as to the substance of the dispute
- Anti-suit injunction issued by the court (typically of the seat of the arbitration)
ECJ *West Tankers* (C-185/07): the issue of the power to grant injunctions in support of arbitration with respect to proceedings in another Member State
- Anti-suit injunction issued by the arbitral tribunal
ECJ *Gazprom* (C-536/13): the issue of the recognition of the injunction by the Member State courts
- The test of virtual reality: virtual application of Brussels Recast to arbitration
London Steamship – Prestige (2022): dispute about the *Prestige* sinking; claim in Spanish court against the shipowner and insurer for the environmental damage caused by the oil spill; claim for non-liability in arbitration in London (“pay to be paid”); exequatur of arbitral award; English exequatur judgment cannot prevent the enforcement of the Spanish judgment if a court could not have issued a judgment equivalent to the award without infringing the fundamental objectives of Brussels Recast Regulation (including rule on *lis pendens*)
- **Second situation:** parallel proceedings before two arbitral tribunals
- Parallel arbitral proceedings with respect to the *same dispute*: dual arbitration clauses (for instance, depending on which party is the claimant), defective arbitration clauses (for example, with respect to the arbitral institution chosen), different versions of the arbitration

agreement; no obvious remedy; each arbitral tribunal will address the issue based on the remedies identified above

- Parallel arbitral proceedings with respect to *related disputes*: limitations derived from the principle of party autonomy (arbitrators owe professional duties, and have powers in respect of, solely the parties to the arbitration agreement); seek consensual solution with agreement of the parties (with involvement of parties to the parallel dispute); delimit the scope of the arbitration agreement; stay or suspend the proceedings (compatibility with duty to adjudicate the dispute?); availability of the traditional methods to deal with parallel proceedings (lis pendens? forum non conveniens? anti-suit injunction?; remedies application based on international public policy?); consolidation and joinder (compatible with contractual limitation?); appointment of the same arbitral tribunal?
- Parallel proceedings with respect to provisional measures (see below)

V. Cross-Border Provisional Measures

1. Provisional measures granted by State courts

- Different kinds of provisional measures: attachment/arrest of property, interim payment, *in personam* injunctions
- *Ex parte* or *Inter partes*
- English practice: freezing injunction, disclosure order, search order, receivership order, Norwich Pharmacal Order, gagging order, restraining order, passport confiscation order, super injunction
- Development of extraterritorial orders: worldwide freezing injunction; IP cross-border injunctions
- Legal issues: jurisdiction to grant the measure; effect of the measure; recognition and enforcement of the order in other jurisdictions
- Jurisdiction: two basic requirements : ECJ *Van Uden* 1998, two conditions: (i) measure must be reversible; (ii) real connecting link with the subject-matter of the measure; Recital 33 Brussels Ibis: effect of measures ordered by a court not having jurisdiction as to the substance “*should be confined, under this Regulation, to the territory of that Member State*”; *TOTO* 2021: confirms real connecting link test of *Van Uden* but also suggests that provisional measures could be territorially limited
- Enforcement (art. 35): restrictions on enforcement of provisional measures (art. 2(a) Brussels Ibis: (i) court must have jurisdiction as to the substance of the matter, (ii) defendant must have been summoned to appear, unless the judgment is served on defendant prior to enforcement

2. Provisional measures in international arbitration

(a) Power of arbitral tribunals to grant provisional measures

- Modern acceptance of the power (with few exceptions, such as China where provisional measures are reserved to local courts, in aid of arbitration)
- Source of the power: national arbitration legislation; art. 17 Model Law (“*unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures*”), institutional rules (art. 28 ICC Rules), agreement of the parties, implied authority of the tribunal (part of the adjudicatory function)
- Limitations

- (i) Lack of power in principle to order of provisional measures against third parties (inherent to party autonomy: provisional measures ordered by arbitral tribunal are binding only on the parties to the arbitration); but power to order the parties to the arbitration to take steps vis-à-vis third parties to prevent or accomplish specified actions
- (ii) Lack of power to directly enforce provisional relief; no coercive measures; enforcement must be sought from local courts, upon application of a party; but tribunal may draw adverse inferences in case of non-compliance; and power to impose financial sanctions for failing to comply with interim orders (but issue of enforceability of the penalties in some jurisdictions)
- (iii) Lack of power to grant provisional measures until arbitral tribunal is properly constituted; but option of emergency arbitration (cf. ICC Rules: system of emergency arbitrator to whom a party can apply if it needs urgent interim or conservatory measures that cannot wait the constitution of the tribunal (the order is binding on the parties, but not on the tribunal when constituted))
- (iv) Prohibition of *ex parte* provisional measures? *Ex parte* measures seem to run counter the basic arbitration requirements of providing an opportunity to be heard and equality of treatment; precluded under most national laws; but power to order *ex parte* measures was introduced in 2006 in the Model Law

(b) Concurrent jurisdiction of the judicial courts

- Art. 9 of the Model Law: “*it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court to grant [provisional] measures.*”
- Principle of concurrent jurisdiction of arbitral tribunals and courts
- Distinction between three situations
- Prior to the commencement of arbitration proceedings: courts or emergency arbitration
- After commencement of arbitral proceedings but before establishment of the tribunal: same
- After establishment of arbitral tribunal: concurrence of jurisdiction, unless exclusive jurisdiction of the arbitral tribunal (by agreement or institutional arbitration rules)
- Parallel claims for provisional measures: preference to arbitral tribunal?