A conference presented by the IBA Litigation Committee

IBA Annual Litigation Forum

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17 Apr - 19 Apr 2024 Renaissance Amsterdam Hotel, Amsterdam, Netherlands

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The latest legal issues in transnational litigation

Lucy Pert
Hausfeld

Olivier Laude
Laude Esquier & Associes

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Pedro Soriano
Ramón y Cajal Abogados

Cathalijne van der Plas
JahaeRaymakers

Leanne Zheng
JunHe

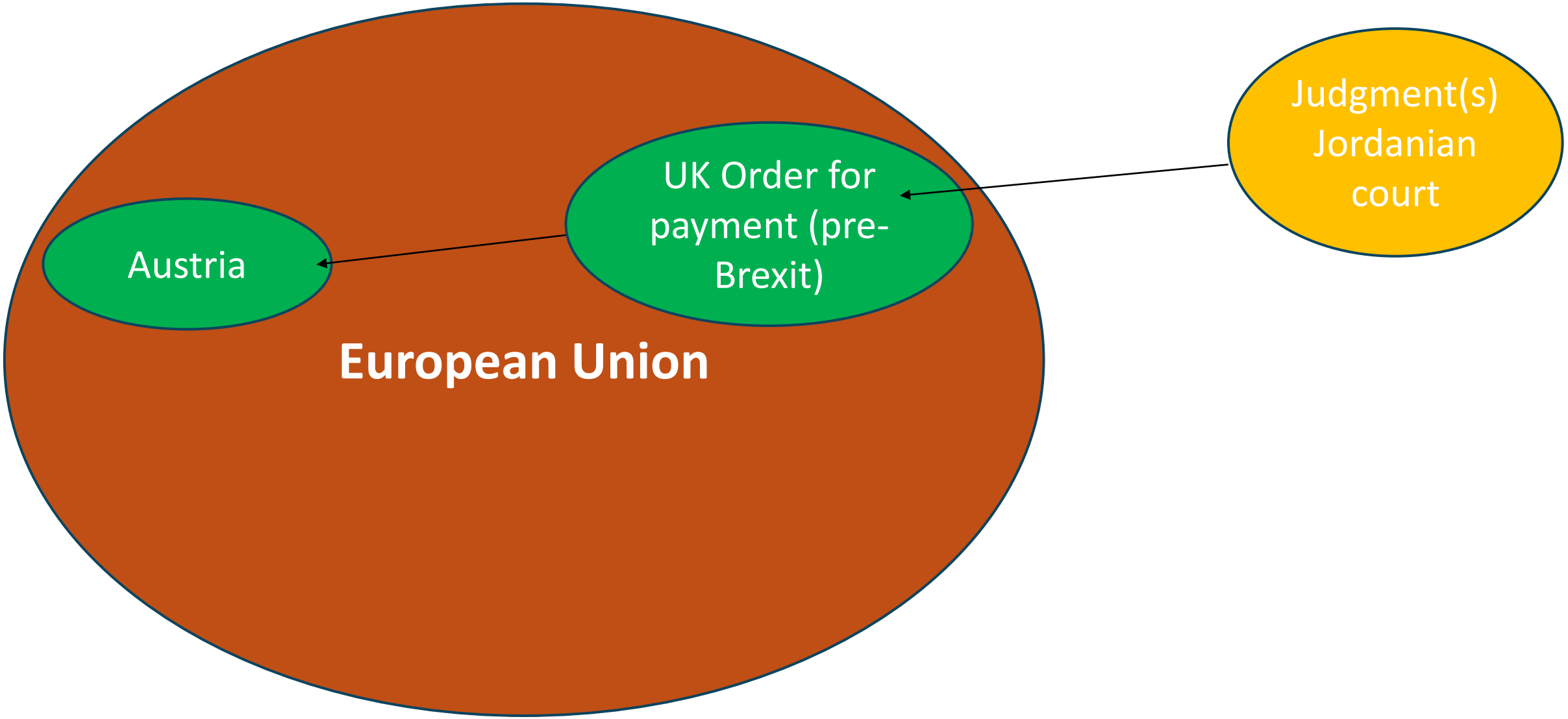
www.ibanet.org/conference-details/CONF2448

Recognition & enforcement after J/H Limited: Free circulation of third State judgments within the EU?

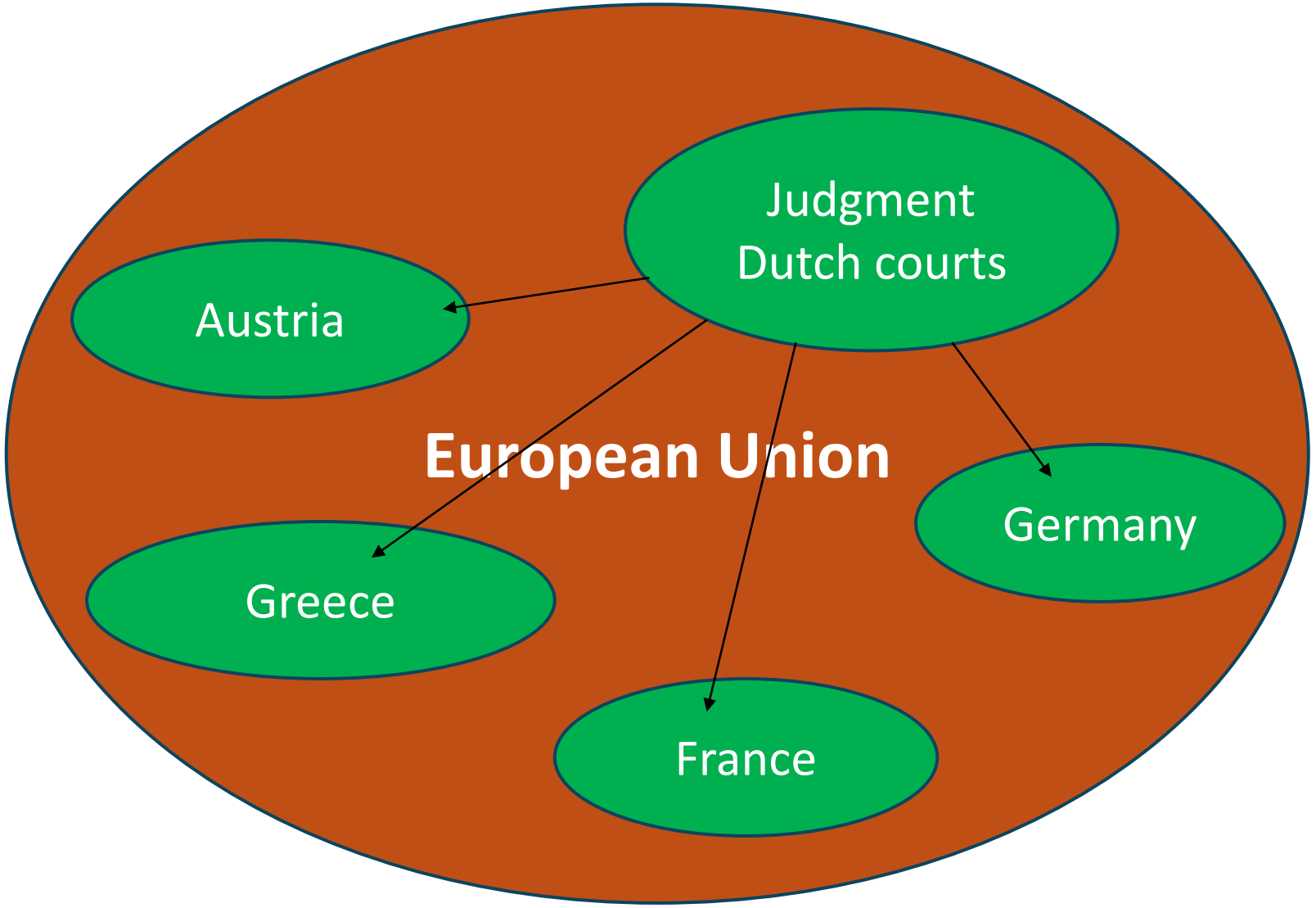
Cathalijne van der Plas

Universiteit Leiden

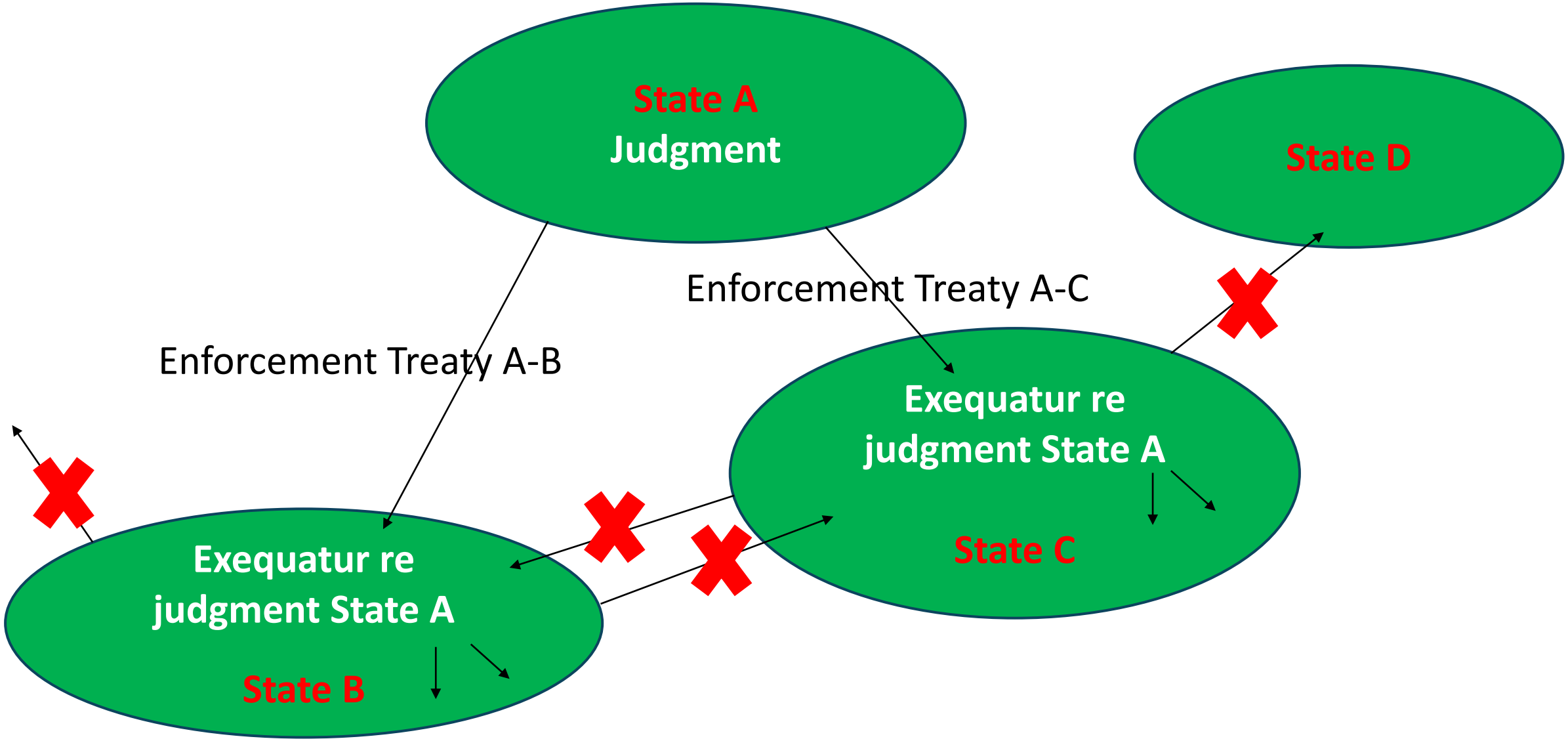
J/H Limited


Judgment(s) Jordanian court
UK Order for payment (pre-Brexit)
Austria
European Union

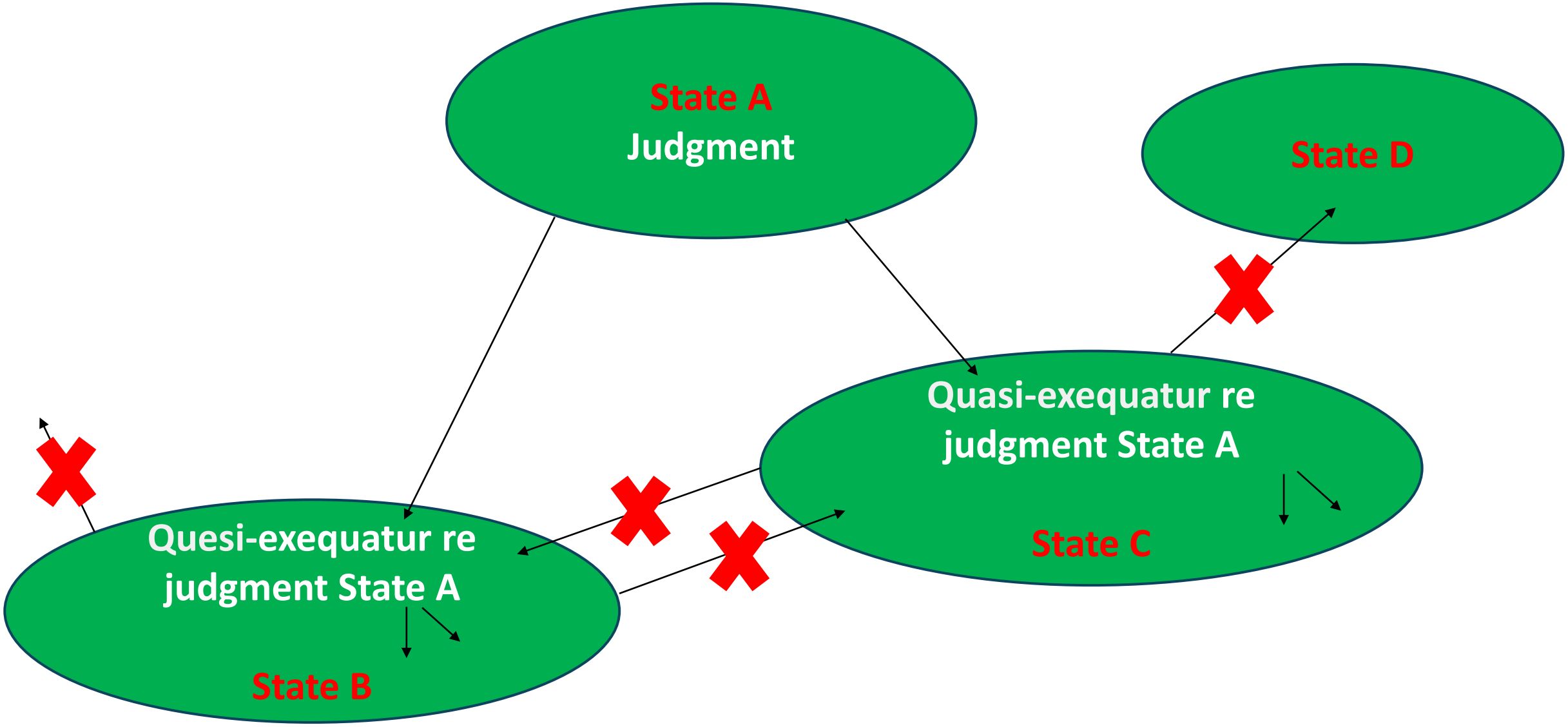
Automatic recognition & enforcement Brussels Ibis



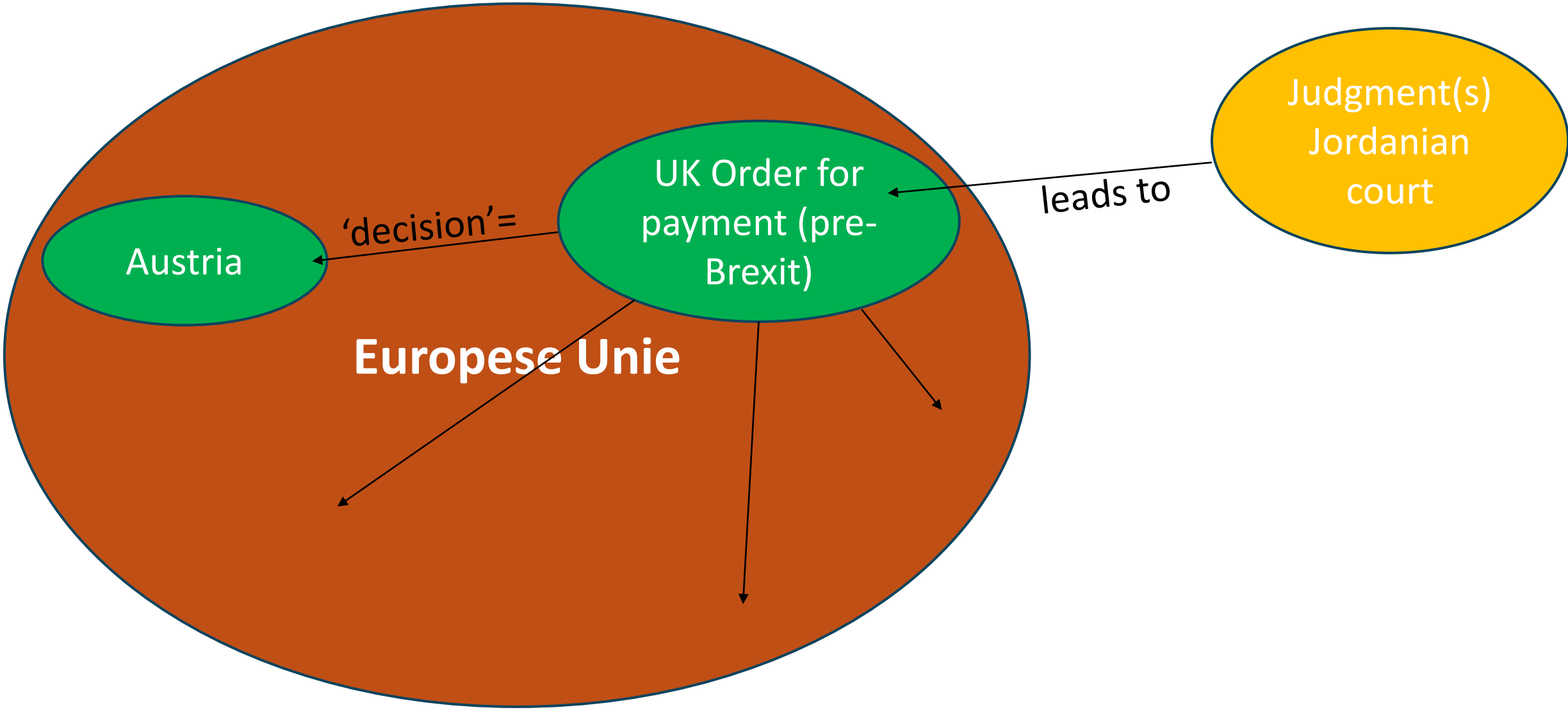
Exequatur sur exequatur ne vaut…



…also goes for quasi-exequatur



J/H Limited


Judgment(s) Jordanian court
leads to
UK Order for payment (pre-Brexit)
'decision'=
Austria
Europese Unie

IBA litigation 2024

LAUDE ESQUIER & ASSOCIÉS

Using French proceedings to collect evidence

OLIVIER LAUDE

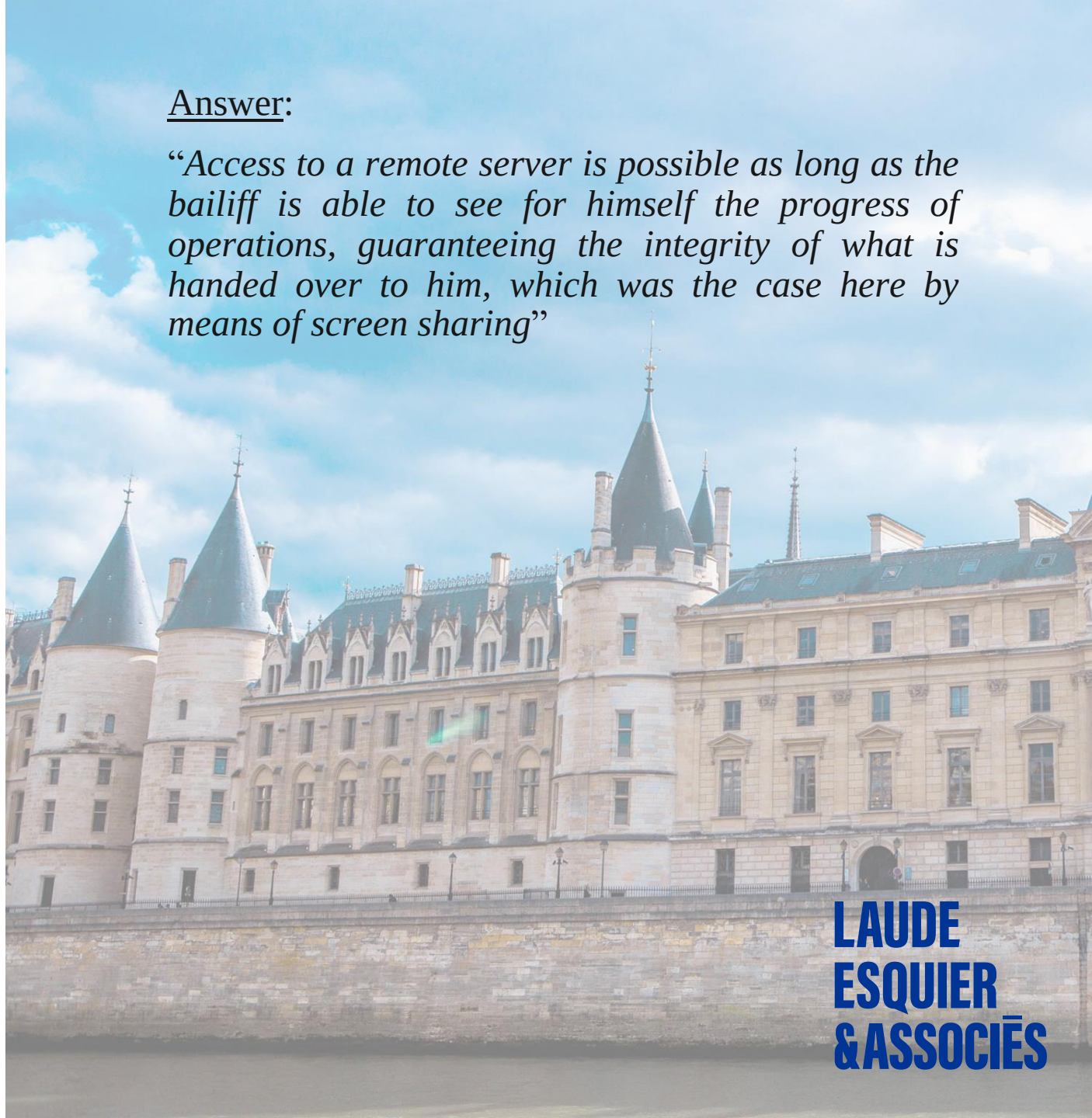
Judgment of January 16, 2023 of the Paris Court of First Instance

(Tribunal judiciaire de Paris)

- Thalès v. Philips N.V.
- Philips N.V. brought 2 patent infringement actions against Thalès in the US
- In response, Thalès tried to prove that Philips' conduct during prior negotiations was abusive

→ Thalès asked the Paris Court of First Instance to order an **investigative measure** using **Art. 145 of the French Code of civil procedure**

Can a French judge allow for the collection of data stored in distant foreign servers (e-mails, computer files etc.)?



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Article 145 of the French Code of civil procedure

- Goal: collecting evidence before a trial
- Means: request made by way of an ex-parte motion
- Types of *in futurum* investigative measures that can be ordered:
  - on-site inspections;
  - performance of technical expertises;
  - hearings of witnesses;
  - collection of documents, computer files and e-mails or texts/Whatsapp messages by a bailiff (on company premises, at the home of an employee or manager, etc.) - using keywords or keywords combinations.

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Collecting evidence in France to be used in proceedings outside of France

- An EU court has **jurisdiction** to rule on a petition for an investigative measure:
  - if the court also has jurisdiction to rule on the merits; or
  - if the investigative measure is to be carried out in the court's country.
- What if the future lawsuit on the merits is likely to **fall under non-French law**?
  - Cass. 1re civ., Nov. 3, 2016, no. 15-20.495: French law is nevertheless applicable to the ex parte motion
- What if an **arbitration clause** grants jurisdiction to an arbitration court?
  - Art. 1449 of the CPC: the French judge may order an investigative measure on the basis of Art. 145, if the arbitration court has not yet been appointed. Such provision is useful for a party wanting to start proceedings while skipping arbitration.
- What if a **jurisdiction clause** is mentioned in the contrat?
  - If the clause designates **a court in France**: the clause is ineffective and another French court may have jurisdiction, subject to the location of the measure
  - If the clause designates a court from an **EU member state** (other than France):
    - Cass. 1ère civ., March 14, 2018 no. 16-19.731: the French judge may nevertheless order investigative measures based on Art 145 CPC and Art. 35 of the Brussels I Regulation (recast)
    - Cass. 1ère civ., Jan. 27, 2021, no. 19-16.917: ...but only if such measures are needed to avoid the loss of evidence
  - If the clause designates **a court outside of the EU**:
    - Cass. 1ère civ., December 17, 1985, no. 84-16.338: the French judge has juridiction only in case of an emergency, and only if the person or the property that needs protection is located in France

Gathering evidence outside of France for a trial in France

- Within the EU: **Proof Regulation 2020/1783 of November 25, 2020** (replacing Regulation 1206/2001 of May 28, 2001)
  - ProRail February 21, 2013, C-332/11 & Lippens v/ Kortekaas, Sept. 6, 2012, C-170/11: procedure is optional if local procedures are quicker and more efficient

- Outside the EU: **letters rogatory**
  - In France: Art. 733 of the CPC
  - The Hague Convention

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Going back to the January 16, 2023 decision:

- Should evidence collection of documents located on foreign servers be considered a local or foreign measure?
- Risk of complexifying procedures
- To be continued...?

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CAMILLE PISARRO La calle Saint Honoré después del mediodía Efecto de lluvia
MUSEO
THYSSEN
BORNEMISZA

The Forced Labour and Child Labour in Supply Chains Act (Canada)

Steven F. Rosenhek

Toronto

The Genesis

- Global effort to repair social impact of economic globalization
- Reduction, if not elimination, of forced labour and child labour within the global economy.

Lessons from Europe and US

- Three different approaches:
  - Reporting legislation
  - Due diligence (mHRDD) legislation
  - Import bans

Content of Legislation

- “Soft” law (voluntary measures) to “hard” law (mandatory regulation of corporate human rights behaviour):
  - Penalties/fines for non-compliance
  - Corporation (the Board) signs off on required reports
  - Broad accessibility of reports (to government, shareholders, employees, NGOs, trade unions, etc.)

The Canadian Legislation

- Effective January 1, 2024; corporate reports due by May 1, 2024
- Reporting statute with an import ban
- Key points:
  - Addresses and defines both forced labour and child labour
  - Not well drafted
  - Government guidance late and confusing
  - Good news: emphasis on education, not enforcement

The Future

- Government intends to implement mandatory human rights due diligence (mHRDD) legislation in 2024.
- Influences from mHRDD legislation in Germany, Norway, the EU C3DD, etc?

Recency Effect:

“(Cognitive Psychology): The tendency in free recall for individuals to better recall the last items in a series or to better remember information that was more recently learned”

(Oxford Reference Dictionary)

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