Reappreciating the Composite Approach with Anupam Mittal v Westbridge II

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I. INTRODUCTION

The debate surrounding the composite approach i.e., the approach of accommodating the application of both the law applicable to the substantive contract and the *Lex Fori* to the arbitration clause has recently resurfaced with *Anupam Mittal v Westbridge Ventures II* ("Westbridge"). In this case, the Singapore Court of Appeal paved way for application of both the law governing substantive contract and the *Lex Fori* to determine the arbitrability of the concerned oppression and mismanagement dispute. The same was based on principle of comity, past precedents and s 11 of the International Arbitration Act. The text of s 11 (governing arbitrability) does not specify and hence limit the law determining public policy to *Lex Fori*. In any event, the composite approach regardless of any provision, majorly stems from basic contractual interpretation that extends the law governing substantive contract to the arbitration clause unless the presumption is rebuttable. For instance, in the instant case, the dispute would have been rendered in-arbitrable with the application of Indian law (law governing substantive contract) and hence the Singapore law was inferred to be the implied choice.[1]

The test as initially propounded in *Sulamérica CIA Nacional de Seguros v Enesa Engenharia* ("Sulamerica") by the EWCA and later also adopted in Singapore[2] states that the law governing the substantive contract will also govern the arbitration clause unless there is an explicit/implicit choice inferable to the contrary. The sequence being 1) express choice, 2) determination of implied choice in the absence of an express one and 3) closest and the most real connection. The applicability of *Lex Fori* can only be inferred if the law governing

the substantive contract would completely negate the arbitration agreement. There have been multiple criticisms of the approach accumulated over a decade with the very recent ones being listed in (footnote 1). The aim of this article is to highlight the legal soundness and practical boons of the approach which the author believes has been missed out amidst the rampant criticisms.

To that end, the author will *first* discuss how the composite approach is the only legally sound approach in deriving the applicable law from the contract, which is also the source of everything to begin with. As long as the arbitration clause is a part of the main contract, it is subject to the same. To construe it as a separate contract under all circumstances would be an incorrect application of the separability doctrine. Continuing from the first point, the article will show how the various nuances within the composite approach provide primacy to the will and autonomy of the parties.

II. TRUE APPLICATION OF THE 'SEPARABILITY' PRINCIPLE

The theory of separability envisages the arbitration clause to be separate from the main contract. The purpose of this principle is to immunize the arbitration clause from the invalidity of the main contract. There are various instances where the validity of a contract is contested on grounds of coercion, fraud, assent obtained through corruption, etc. This, however, does not render the arbitration clause inoperable but rather saves it to uphold the secondary obligation of resolving the dispute and measuring the claims arising out of the breach.[3]

It is imperative to note from the context set above that the doctrine has a specific set purpose. What was set as its purpose in seminal cases such as *Heyman v Darwins Ltd* has now been cemented into substantive law with Article 16 of the UNCITRAL Model law which has further been adapted by multiple jurisdictions such as India, Singapore and the UK also having a version in s 7. The implication of this development is that separability cannot operate in a vague and undefined space creating legal fiction in areas beyond its stipulated domain. Taking into consideration this backdrop, it would be legally fallacious to strictly follow the *Lex Fori* i.e., applying the substantive law of the seat to the arbitration clause as a default or the other extreme of the old common law approach of extending the law applicable to the substantive contract as a default. The author submits that the composite approach which was first taken in *Sulamerica* and recently seen in *Westbridge* to determine the law applicable to arbitrability at a pre-award stage,

enables the true application and effectuation of the separability doctrine.

A. Lex Fori

To substantiate the above made assertion, the author will first look at the *Lex Fori* paradigm. Any legal justification for the same will first have to prove that an arbitration clause is not subject to the main contract. This is generally carried out using the principle of separability. However, when we examine the text of article 16, Model law or even the provisions of the impugned jurisdictions of India and Singapore (in reference to the Westbridge case), separability can only be operationalised when there is an objection to the validity or existence of the arbitration clause. It would be useful to borrow from Steven Chong, J's reading of the doctrine in *BCY v BCZ*, which is also a case of the Singapore High Court that applied the composite approach of *Sulamerica*. Separability according to them serves a vital and narrow purpose of shielding the arbitration clause from the invalidity of the main contract. The insulation however does not render the clause independent of the main contract for all purposes. Even if we were to examine the severability provision of the UK Arbitration Act (Sulamerica's jurisdiction), the conclusion remains that separability's effect is to make the arbitration clause a distinct agreement only when the main contract becomes ineffective or does not come into existence.

To further buttress this point, it would be useful to look at the other contours of separability. For instance, in the landmark ruling of *Fiona Trust and Holding Corp v Privalov* (2007), both Lord Hoffman and Lord Hope illustrated that an arbitration clause will not be severable where it is a part of the main contract and the existence of consent to the main contract in itself is under question. This may be owing to the fact that there is no signature or that it is forged, etc. To take an example from another jurisdiction, arbitration clauses in India seize to exist with the novation of a contract and the position remains even if the new contract does not have an arbitration clause. In these cases, the arbitration clause seized to be operational when the main contract turned out to be non-est. However, the major takeaway is that as a general norm and even in specific cases where the arbitration clause is endangered, it is subject to the main contract and that there are limitations to the separability doctrine. Hence, it would be legally fallacious to always detach arbitration clauses from the main contract and apply the law of the seat as this generalizes the application of separability, which in turn is contrary to

its scheme. It is also imperative to note that the Sulamerica test does not impute the law governing the substantive contract when the arbitration clause is a standalone one hence treating it as a separate contract where ever necessary.

B. Compulsory Imposition of Law of Substantive Contract

Having addressed the Lex Fori approach, the author will now address the common law approach of imputing the law governing the main contract to the arbitration clause. The application and reiteration of which was recently seen in *Enka v Chubb* and *Kabab-ji v Kout Food Group.* If we were to just examine the legal tenability of a blanket imposition of the governing law on the main contract, the author's stand even at this end of the spectrum would be one that the approach is impeding the true effectuation of separability. While it is legally fallacious to generalize the application of separability, the remark extends when it is not operationalized to save an arbitration clause. There may be circumstances as seen in *Sulamerica* and *Westbridge* wherein the arbitration clause will be defunct if the law of the main contract is applied. In such circumstances the arbitration clause should be considered a distinct contract and the law of the seat should be applied using a joint or even a disjunctive reading of prongs 2 and 3 of the *Sulamerica* test i.e., 'implied choice' and 'closest and most real connection'. Although, in the words of Lord Moore-Bick, J, the two prongs often merge in inquiry as "*identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law*" [para 25]. In any event, when the law governing substantive contract is adverse, the default implication rendered by this inquiry is that the parties have impliedly chosen the law of the seat and the arbitration clause in these circumstances has a more real connection to the law of the seat. This is because the reasonable expectation of the parties to have their dispute resolved by the stipulated mechanism and the secondary obligation of resolving the dispute as per the contract (apart from the primary obligation of the contract) can only be upheld by applying the law of the seat.

When we specifically look at *Enka v Chubb* and *Kabab-ji,* it is imperative that these cases have still left room for the 'validation principle' which precisely is saving the arbitration clause in the manner described above. While the manner in which the principle was applied in Kabab-ji may be up for criticism, the same is beyond the scope of this article. A narrow interpretation of the validation

principle is nonetheless avoidable using the second and third prongs of the *Sulamerica* test as the inquiry there gauges the reasonable expectation of the parties. Irrespective, Kabab-ji is still of the essence for its reading of Articles V(I)(a) of the New York Convention("NYC") r/w Article II of the NYC. Arguments have been made that the composite approach (or the very idea of applying the law governing substantive contract) being antithetical to the NYC. However, the law of the seat is only to be applied to arbitral agreements referred to in Article II, 'failing any indication'. This phrase is broad enough to include not just explicit choices but also implicit choices of law. The applicability of *Lex Fori* is only mentioned as the last resort and what the courts after all undertake is finding necessary indications to decide the applicable law. Secondly, statutory interpretation should be carried out to give effect to international conventions only to the extent possible (para 31, *Kabab-ji*). An interpretation cannot make redundant the scheme of separability codified in the statute. Lastly, even if the approach were to be slightly antithetical to NYC, its domain of operation is at the enforcement stage and not the pre-arbitration stage. Hence, it can never be the sole determining factor of the applicable law at the pre-arbitral stage. While segueing into the next point of discussion, it would be imperative to mention amidst all alternatives and criticisms that the very creation of the arbitral tribunal, initiation of the various processes, etc is a product of the contract and hence its stipulation can never be discarded as a default.

III. PLACING PARTY AUTONOMY & WILL ON A PARAMOUNT PEDESTAL

The importance of party autonomy in international arbitration cannot be reiterated enough. It along with the will of the parties constitute the very fundamental tenets of arbitration. As per Redfern and Hunter, it is an aspiration to make international arbitration free from the constraints of national laws.[4] There will always be limitations to the above stated objective, yet the aim should be to deliver on it to the most possible extent and it is safe to conclude that the composite approach does exactly that. Darren Low at the Asian International Arbitration Journal argues that this approach virtually allows party autonomy to override public policy. Although they state this in a form of criticism as the chronology in their opinion is one where the latter overrides the former. However, even they note that the arbitration in *Westbridge* was obviously not illegal. It is imperative to note that the domain of various limitations to arbitration such as public policy or comity needs to be restricted to a minimum. When the parties are

operating in a framework which provides self-determining authority to the extent that parties the freedom to decide the applicable substantive law, procedure, seat, etc, party autonomy is of paramount importance. The Supreme Court of India in *Centrotrade Minerals v Hindustan Copper* concluded party autonomy to be the guiding principle in adjudication, in consideration of the abovementioned rationale.

As stated in *Fiona Trusts,* the insertion of an arbitration clause gives rise to a presumption that the parties intend to resolve all disputes arising out of that relation through the stipulated mechanism. This presumption can only be discarded via explicit exclusion. An arbitration clause according to Redfern and Hunter gives rise to a secondary obligation of resolving disputes. Hence, as long as the parties intend to and have an obligation to resolve a dispute, an approach that facilitates the same to the most practicable extent is certainly commendable.

This can be further elucidated by taking a closer look at the line of cases on the topic. The common aspect in all these cases is that they have paved way for the application of laws of multiple jurisdictions which in turn has opened the gates to a very pro-validation approach. For instance, the SCA in *Westbridge* applied Singapore's law as the application of Indian law would have rendered the dispute in-arbitrable. There may also be circumstances wherein the *Lex Fori* may be rendering a dispute in-arbitrable. While the court in *Westbridge* stated that owing to the parallel consideration of the law of the seat, the dispute would be in-arbitrable, using the composite approach one could also pave the way for the arbitration of that dispute. This can be done by construing the place of the forum as a venue and not a seat. There are multiple reasons for parties to choose a particular place for arbitration, including but not limited to neutrality, quality of adjudication, cost, procedure applicable to arbitration, etc. And while it may be true that an award passed by a following arbitration may not be enforceable in the venue jurisdiction, it can still be enforced in other jurisdictions. There are 2 layers to be unravelled here – the first one being that it is a well settled principle in international arbitration that awards set aside in one jurisdiction can be enforced in the others as long as they do not violate the public policy of the latter jurisdiction. This was seen in *Chromalloy Aeroservices v Arab Republic of Egypt,* wherein the award was set aside by the Egyptian Court of Appeal yet it was enforced in the U.S.A. The same principle although well embedded in other cases was recently reiterated in *Compania De Inversiones v. Grupo Cementos de*

Chihuahua wherein the award for an arbitration seated in Bolivia was annulled there but enforced by the Tenth Circuit in the U.S.A. The second ancillary point to this is the practicality aspect. The parties generally select the law governing the substantive contract to be one where the major operations of the company, its assets related to the contract are based and hence that is also likely to be the preferred place of enforcement. This is a good point to read in Gary Born's proposal of imputing the law of a jurisdiction that has "*materially closer connections to the issue at hand*".[5]

Apart from the pro-validation approach which upholds the rational expectation of the parties, there are other elements of the composite approach that ensure the preservation of party autonomy and will. For instance, the courts will *firstly*, not interfere if it can be construed that the parties have expressly stipulated a law for the arbitration clause. *Secondly*, as has been mentioned above, the courts will impute the law governing the substantive contract as the applicable law when the arbitration clause is a standalone one. What can be observed from here is that the approach maintains a proper degree of caution even while inferring the applicable law. And *lastly*, the very idea of maintaining a presumption of the same law being applicable to both the main contract and the arbitration clause also aligns with upholding the will and autonomy of the parties. Various commentators have observed that parties in practice rarely stipulate a separate clause on the substantive law applicable to the arbitration clause. As observable, model clauses of the various major arbitral institutions do not contain such a stipulation and certain commentators have even gone as far as to conclude that the inclusion of such a clause would only add to the confusion. In light of this background, it was certainly plausible for Steven Chong, J in *BYC v BCZ* to conclude that "*where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law. If the intention is otherwise, I do not think it is unreasonable to expect the parties to specifically provide for a different system of law to govern the arbitration agreement*" [para 59]. However, it has been shown above that the composite approach has not left any presumption irrebuttable in the presence of appropriate reasoning, facts and will trigger separability if necessary to avoid the negation of the arbitration agreement.

IV. CONCLUDING REMARKS

In a nutshell, what can be inferred from this article is that the composite

approach keeps at its forefront principles and characteristics of party autonomy and pro-arbitration. The approach is extremely layered and well thought out to preserve the intention of the parties to the most practicable extent. It delivers on all of this while truly effectuating the principle of separability and ensuring its correct application. Hence, despite all the criticisms it is still described as a forward-looking approach owing to its various characteristics.

FOOTNOTES:

[1] For recent literature and more detailed facts, See Darren Jun Jie Low, 'The Composite Approach to Issues of Non-Arbitrability at the Pre-Award and Post-Award Stage: Anupam Mittal v. Westbridge Ventures II Investment Holdings [2023] SGCA 1', in Lawrence Boo and Lucy F. Reed (eds), *Asian International Arbitration Journal* (Kluwer Law International 2023, Volume 19, Issue 1), 83 – 94; Khushboo Shahdapuri and Chelsea Pollard, 'Dispute over Matrimonial Service Website: Singapore Adopts Composite Approach in Declaring Dispute to be Arbitrable', *(Kluwer Arbitration*, 2023) < Dispute over Matrimonial Service Website: Singapore Adopts Composite Approach in Declaring Dispute to be Arbitrable – Kluwer Arbitration Blog>; Nisanth Kadur, 'Determining Arbitrability at the Pre-Award Stage: An Analysis of the Singapore Court of Appeal's "Composite Approach"', (*American Review of International Arbitration*, 2023) <Determining Arbitrability at the Pre-Award Stage: An Analysis of the Singapore Court of Appeal's "Composite Approach" – American Review of International Arbitration (columbia.edu)>

[2] See *BCY v BCZ* [2016] SGHC 249; *BNA v BNB* [2019] SGHC 142; *Anupam Mittal v Westbridge II* [2023] SGCA 1.

[3] Martin Hunter and others, *Redfern and Hunter on International Arbitration, (6th edn, 2015 OUP) [2.101 – 2.104].*

[4] Redfern and Hunter (n 1) [1.53].

[5] Gary Born, *International Commercial Arbitration*, (3rd Ed, Kluwer Law International 2021) §4.05 [C] [2].

Measure twice, cut once: Dutch case Presta v VLEP on choice of law in employment contracts

Presta v VLEP (23 june 2023) illustrates the application of the CEJU's Gruber Logistics (Case C-152/20, 15 July 2021) by the Dutch Supreme Court. In order to determine the law applicable to an individual employment contract under article 8 Rome I, one must compare the level of protection that would have existed in the absence of a choice of law (in this case, Dutch law) with the level of protection offered by the law chosen by the parties in the contract (in this case, the laws of Luxembourg), thereafter, the law of the country offering the highest level of employee protection should be applied.

Facts

Presta is a Luxembourg based company. It employs workers of different nationalities who carry out cross-border work in various EU countries. Their employment contracts contain a choice of Luxembourg law.

From 2012 to 2017, Presta provided employees to Dutch companies working in the meat processing industry. This industry has a compulsory (Dutch) pension fund VLEP. Membership in VLEP and payments to the fund are compulsory for the meat processing industry companies, even for the companies, which are not bound by the collective labour agreement.

According to VLEP, Presta falls within the scope of the compulsory membership in the pension fund. Based on this assertion, VLEP sent payment notices to Presta for the period from 2012 to 2017, but Presta left the invoices unpaid.

Proceedings

In 2016, VLEP obtained a writ of execution against Presta for the payment of €1,779,649.86 for outstanding pension premiums, interest, a fine, and costs. Presta objected, filing a claim before a Dutch court. The first instance court dismissed its claim. Presta appealed, but the appellate court has also dismissed its claims, reasoning as follows.

On the one hand, the employment contracts between Presta and the employees contained a choice of Luxembourg law as referred to in Article 8(1) Rome I. On the other hand, the employees 'habitually' carried out work in the sense of Article 8(2) Rome I Regulation in the Netherlands. Although some factors assessed pointed to Luxembourg, the court considered that these factors carried insufficient weight to apply Article 8(4) Rome I. Therefore, Dutch law would apply if the parties had not made a choice of law.

Based on this, the court held that since the Dutch law would apply if the parties had not made a choice of law, the employees should not lose the protection of mandatory Dutch law, including the rules which oblige Presta to pay the pension premiums. The court went on to apply the said Dutch rules and confirmed Presta's obligations to pay VLEP.

EU freedom of services?

On a side note: noteworthy is that one of Presta's arguments relied on article 56 Treaty on the Functioning of the European Union (TFEU) on freedom of services. According to Presta, the rules that oblige to participate in VLEP's pension scheme constituted a restriction on the freedom to provide services, violating article 56 TFEU. The argument was rejected: as the relevant legal provisions cover all employees working in the meat industry in the Netherlands, excluding workers employed by foreign employers would result in an unjustified difference in their treatment.

Cassation based on *Gruber Logistics*

Back to Presta's main argument in cassation: Presta filed a cassation claim, invoking the CJEU ruling of 15 July 2021, C-152/20 *Gruber Logistics*. In that case, the CJEU has ruled that under Article 8 Rome I Regulation, the court must compare the level of protection that would have existed in the absence of a choice of law with the level of protection offered by the law chosen by the parties in an employment contract. The CJEU has thereby dismissed an interpretation of article

8 Rome I, according to which courts need not to compare the two relevant legal systems, but have to apply, next to chosen law, mandatory law of the country where the employee habitually carries out work. According to Presta, lower courts had to compare the level of employees' protection provided by the Dutch law to the level of protection under the Luxembourg law.

As the lower courts made no such comparison, the Dutch Supreme Court has followed *Gruber Logistics*, Presta's cassation claim has been honoured, and the dispute is referred back to a lower court. It shall have to determine whether the Dutch law or the law of Luxembourg offers a higher level of protection and thereafter apply the law to the dispute.

Presta v *VLEP* offers an illustration of a dispute in which a national court has followed CJEU's reasoning in *Gruber Logistics*. Article 8 Rome I, as interpreted by the CJEU, charges national judges or anyone who needs to define applicable law, with a complex task. To identify applicable law, one should engage with two legal systems, identify the relevant sets of rules, define the parameters of comparison, and make the actual comparison, before drawing the conclusion on the applicable law. This is a proper comparative law exercise. For example, in this case, may the comparison be limited to specific pension payments? May it be extended to a broader range of issues forming in their entirety high level of protection? Answering such questions requires a rigorous method, and given the various existing methods and diverging views on the proper way(s) to conduct a comparative law study, can imply new uncertainties. Meanwhile, the task reconfirms the relevance of comparative law for private international law, and has the potential to offer the highest possible tailor-made solutions.

U.S. Supreme Court Renders Personal Jurisdiction Decision

This post is by Maggie Gardner, a professor of law at Cornell Law School. It is cross-posted at Transnational Litigation Blog.

The U.S. Supreme Court yesterday upheld the constitutionality of Pennsylvania's corporate registration statute, even though it requires out-of-state corporations registering to do business within the state to consent to all-purpose (general) personal jurisdiction. The result in *Mallory v. Norfolk Southern Railway Co.* re-opens the door to suing foreign companies in U.S. courts over disputes that arise in other countries. It may also have significant repercussions for personal jurisdiction doctrine more broadly.

The Case

Robert Mallory worked for Norfolk Southern for nearly twenty years in Ohio and Virginia. He has since been diagnosed with cancer, which he alleges was caused by the hazardous materials to which he was exposed while in Norfolk Southern's employ. Although he currently lives in Virginia, he sued Norfolk Southern (a company then incorporated and based in Virginia) in state court in Pennsylvania, asserting claims under the Federal Employers' Liability Act (FELA).

Norfolk Southern contested personal jurisdiction. But Mallory argued that by registering to do business in Pennsylvania, it had agreed to appear in Pennsylvania courts on any cause of action. While the Pennsylvania Supreme Court agreed with that interpretation of Pennsylvania's corporate registration statute, it held that the statute violated the Due Process Clause of the Fourteenth Amendment in light of the Supreme Court's caselaw since *International Shoe Co. v. Washington* (1945).

The Holding

A majority of the Supreme Court disagreed. Justice Alito joined Justice Gorsuch's plurality (with Justices Thomas, Sotomayor, and Jackson) to hold that the question was controlled by a pre-*International Shoe* decision, *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.* (1917). *Pennsylvania Fire* approved a Missouri statute that required out-of-state insurance companies to appoint a state official as an agent for service of process for any suit. In *Pennsylvania Fire*, that Missouri statute was invoked to establish jurisdiction over a Pennsylvania insurance company regarding a contract formed in Colorado to insure a Colorado facility owned by an Arizona company. The five Justices agreed that the Supreme Court has never overruled *Pennsylvania Fire* and that it thus controls this case.

There is another, broader point on which the five Justices also seem to agree: *Pennsylvania Fire* does not conflict with *International Shoe* because *International Shoe* only addressed jurisdiction over *non-consenting* defendants. As Alito put it, "Consent is a separate basis for personal jurisdiction"—or as Gorsuch put it, "*International Shoe* simply provided a 'novel' way to secure personal jurisdiction that did nothing to displace other 'traditional ones.'" An entirely separate avenue for establishing personal jurisdiction exists outside of *International Shoe*'s framework, which includes (according to the plurality) "[f]ailing to comply with certain pre-trial court orders, signing a contract with a forum selection clause, accepting an in-state benefit with jurisdictional strings attached," or making a general appearance. And in this consent-based track, the five Justices also seem to agree that federalism concerns are no longer applicable.

Points of Disagreement

Alito wrote separately, however, to argue that Pennsylvania's statute runs afoul of the dormant Commerce Clause. Even if the statute didn't discriminate against out-of-state businesses, Alito explained, it significantly burdens interstate commerce, and it does so without any legitimate local interest. While a state "certainly has a legitimate interest in regulating activities conducted within its borders," and while it "also may have an interest 'in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors,'" a state "generally does *not* have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State."

It is not particularly surprising that Alito was alone in elaborating this dormant Commerce Clause concern, given the split opinions earlier this Term in *National Pork Producers Council v. Ross*. As I discussed in a preview of the *Mallory* decision, Gorsuch and Thomas in that case found the balancing approach required by the dormant Commerce Clause jurisprudence to simply be infeasible. (Perhaps Alito hoped he might win them over if he could establish a *complete* lack of legitimate local interest, which would obviate the need for balancing). And if Sotomayor was unconvinced by the plaintiffs' showing of a substantial burden on interstate commerce in *National Pork Producers*, she was unlikely to sign onto Alito's rather vague paragraph about how statutes like Pennsylvania's could burden small companies.

But why did Alito not join more of the plurality opinion? The plurality embraced a framing of the case that emphasized Norfolk Southern's significant and permanent presence in Pennsylvania, including its 5,000 employees, 2,400 miles of track, and three locomotive shops (including the largest in North America). That framing is reminiscent of Sotomayor's emphasis on fairness in her prior personal jurisdiction writings, as well as her questions at oral argument last fall. The plurality opinion also begins by contrasting this case with Mallory's ability to "tag" an individual employee of Norfolk Southern in Pennsylvania, asking why Mallory shouldn't be able to assert personal jurisdiction as easily over Norfolk Southern itself. That framing recapitulates a key point in Gorsuch's concurrence in *Ford Motor Co. v. Montana Eighth Judicial District Court* (2021).

But neither of those framings resonates with Alito's prior writings, to say the least. He tends to be more skeptical of litigation and court access policies, and he notably did not join Gorsuch's concurrence in *Ford*. Further, both framings would have undermined Alito's argument that Pennsylvania lacked any legitimate local interest in this case.

Jackson also wrote a brief concurrence that emphasized that personal jurisdiction is a waivable right, focusing on the Court's opinion in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* (1982). Her invocation of "waiver" rather than "consent" was clearly purposeful (and a distinction that Robin Effron and John Coyle have recently explored).

The Dissent

Justice Barrett's dissent (joined by Chief Justice Roberts and Justices Kagan and Kavanaugh) staunchly defended the *International Shoe* paradigm. "For 75 years," it begins, "we have held that the Due Process Clause does not allow state courts to assert general jurisdiction over [out-of-state] defendants merely because they do business in the State." The Court's decision in *Mallory*, Barrett explains, invites states to evade *International Shoe*'s limits on personal jurisdiction by simply rewording their long-arm statutes to include implied consent. Indeed (she notes), this case is remarkably like *BNSF Railway Co. v. Tyrrell* (2017), another FELA suit involving out-of-state parties and a cause of action that arose out of state as well. In *Tyrell*, the Court rejected the state's assertion of personal jurisdiction in light of the Court's recent decisions in *Daimler AG v. Bauman*

(2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011). Approving Pennsylvania's statute effectively robs all three of those precedents of meaning.

Foreign Defendants in U.S. Courts

The dissent is at least right about the practical implications of the Court's holding: states that are inclined to do so now have a roadmap for evading the limits on general personal jurisdiction that the Court staked out in *Goodyear*, *Daimler*, and *BNSF*. While the mere fact of doing business is still not enough to subject a "non-consenting" business to jurisdiction in a forum, the mere fact of doing business plus a broadly worded statute might be. Indeed, it's possible that Sotomayor joined the majority precisely because of her consistent concern that the Roberts Court has gone too far in paring back both general and specific jurisdiction under *International Shoe*. As the lone justice who refused to join the Court's opinion in *Daimler*, she has now helped reclaim some of that state power.

Daimler, itself a case involving a foreign defendant, made it much harder for plaintiffs to hale non-U.S. companies into U.S. courts. After *Daimler*, plaintiffs have had to establish specific jurisdiction over foreign defendants, which can be hard to do even when the plaintiff resides in the U.S. forum and was injured there, as in *J. McIntyre Machinery, Ltd. v. Nicastro* (2011). *Mallory* gives states a different avenue for protecting their citizens' ability to sue foreign defendants. As the plurality asserts, "all *International Shoe* did was stake out an *additional* road to jurisdiction over out-of-state corporations," separate from the consent-based road upon which states can now rely.

It will be interesting to see how many states take up this invitation. My prediction is that we will see few open-ended statutes like Pennsylvania's, but that we will see some more tailored statutes, for example asserting all-purpose jurisdiction over any claims brought by in-state residents against companies doing business in the state.

Broader Implications for Personal Jurisdiction Doctrine

It will also be interesting to see how much of a sea change *Mallory* makes in

personal jurisdiction doctrine more broadly. While the holding may appear narrow, five Justices have agreed to limit the ambit of *International Shoe*'s paradigm to *non-consenting* defendants—a rather significant restriction. And given how broadly the Court construes "consent" in the age of forum selection clauses and compelled arbitration (and now corporate registration statutes), that could render *International Shoe* largely obsolete.

The approach of the plurality may also signal that there is more to come. Gorsuch's opinion focuses on history and tradition and encourages reliance on pre-*International Shoe* cases. He has found a way to wind back the clock without having to directly overrule *International Shoe*—but would a future case encourage these Justices to wind back the clock even further?

I do worry that Gorsuch and his like-minded colleagues are too sanguine about the challenges that a return to broad general jurisdiction would entail. As I have written with others, there are real systemic costs to a paradigm of general jurisdiction—precisely the costs that *International Shoe* was written to address. A fundamental flaw in the plurality's approach is its syllogism that because the Court approved tag jurisdiction over individuals in *Burnham v. Superior Court* (1990), it should also continue to recognize broad general jurisdiction over corporations. First, *Burnham* was a splintered decision, and a majority of the Justices did *not* agree that tag jurisdiction was completely unmoored from *International Shoe*'s framework. But second, why isn't *Burnham* itself the mistake? Why not level up the protections for individual defendants, requiring some connection between the forum, the dispute, and the defendant greater than the defendant's fleeting physical presence?

Conclusion

I have started wondering if the binary distinction between general and specific jurisdiction might have outlived its usefulness as a legal construct. Perhaps registration statutes and tag jurisdiction (and some modified forum of doing business jurisdiction?) belong in an intermediate category—but one that must still satisfy *International Shoe*'s overarching command that the defendant have minimum contacts with the forum such that notions of fair play and substantial justice will not be offended.

The New Saudi Civil Transaction Act and its Potential Impact on Private International Law in Saudi Arabia

The Kingdom of Saudi Arabia (KSA) has recently enacted a new Civil Transactions Law (Royal Decree No. M/199, dated June 16, 2023). The law will enter into force on December 16, 2023, 180 days after its enactment (hereinafter referred to as "the new law"). This law has been rightly described as "groundbreaking" because, prior to the enactment of the new law, there has been no codification of civil law in the Kingdom, and civil law issues have traditionally been governed by the classical rules of Islamic Sharia according to the teachings of the prevailing school of *fiqh* (religio-legal jurisprudence) in the Kingdom (Hanbali School). Like most of the civil law codifications in the region, the new law focuses mainly on the so-called "patrimonial law," i.e., property rights and obligations (contractual and non-contractual). Family relations and successions are dealt with in a separate law, which was previously enacted in 2022 and entered into force the same year (Personal Status Act, Royal Decree No. M/73 of 9 March 2022, entered into force on June 18, 2022).

From a private international law perspective, one particular aspect of the new law compared to other civil law codifications in the region is that, unlike most of the Arab civil law codifications, the new law does not contain rules on the choice of the applicable law. In other neighboring countries (namely Egypt, Jordan, Syria, Iraq, Qatar, Oman, and Yemen) as well as in other Arab jurisdictions (including Libya and Algeria), the civil law codifications include at the beginning of their respective Civil Code/Civil Transactions Act a chapter dealing with the "application of the law in space". These choice-of-law codifications generally contain provisions on characterization, choice of law in family law and succession, property, contractual and non-contractual obligations, and some general rules

such as *renvoi* (or its prohibition) and public policy, etc. Only a few Arab states have chosen to codify choice-of-law rules outside of their Civil Code (Kuwait and Bahrain) or Code of Obligations and Contracts (Morocco and Tunisia). Lebanon is the only country where choice-of-law principles have been developed mainly through case law. Thus, Saudi Arabia remains the only Arab jurisdiction where conflict of laws rules are *almost* non-existent and where the courts have not been able to develop a body of principles dealing with choice-of-law issues. This is because, in general, Saudi courts apply Saudi law when they assume jurisdiction, regardless of whether or not the dispute has a connection with another legal system or not. Whether there will be a codification of choice-of-law rules in the same way that rules on international jurisdiction and enforcement of foreign judgments have been codified remains to be seen.

Interestingly, however, the new law may affect the assessment of public policy in the context of the enforcement of foreign judgments. Indeed, based on the traditional Sharia rules and principles recognized in the Kingdom, Saudi courts have often relied on public policy and inconsistency with Sharia to refuse enforcement of foreign judgments. For example, in a case decided in 1996, the Saudi court refused to enforce a Dubai judgment on the ground that the said judgment allowed for compensation for lost profits and payment of moral damages (*Board of Grievances, Case No. 1783/1/Q of 30/12/1417 Hegira [November 12, 1996]*). The court cited Sharia rules and principles on compensation, according to which only real and quantifiable losses can be compensated. The new law departed from this traditional principle by clearly allowing compensation for both lost profits (article 137) and moral damages (article 138). Therefore, the traditional position of the Saudi court is no longer tenable under the new rules, as compensation for lost profits and moral damages are now available under the newly adopted rules.

Another important issue concerns interest. It is well known that the payment of interest is prohibited under Sharia rules and principles. Saudi courts have been particularly eager to refuse enforcement of those parts of the foreign judgments that order the payment of interest, including legal interest available under the laws of other Arab and Islamic states (see, for example, *Board of Grievances, Case*

No. 2114/Q of 21/8/1436 Hegira [June 9, 2015] refusing enforcement of legal interests ordered by Bahraini courts but allowed partial enforcement of the main award). However, unlike lost of profits and moral damages, the new law's position on interest is less clear. Several indicators in the new law suggest that the legislature did not wish to depart from the traditionally prevailing position. For example, the prohibition on agreeing to repay amounts that "exceed" the capital in loan agreements, either at the time of the conclusion of the agreement or at the time of the deferment of payment, is clearly stated in article 385 of the new law. Moreover, article 1 of the new law clearly refers to the "rules [*al-ahkam*] derived from the Islamic Sharia which are most consistent with the present law" as the source of law in the absence of an applicable provision of the new law or a rule of general principles contained in its last chapter. Accordingly, it can be expected that Saudi courts will continue to refuse to enforce the portion of the foreign judgments awarding interests on the ground of public policy and the inconsistency of interests with the principles of the Sharia as understood in the Kingdom.

Book Review: The UN Guiding Principles on Business & Human Rights

This book review was written by Begüm Kilimcioglu, PhD researcher, Research Groups Law & Development and Personal Rights & Property Rights, University of Antwerp

Barnali Choudbury, *The UN Guiding Principles on Business & Human Rights- A Commentary*, Edward Elgar Publishing, 2023

The endorsement of the United Nations Guiding Principles (UNGPs) in 2011 represents a milestone for business and human rights as the principles

successfully achieved to put the duties of different actors involved in (possible) human rights abuses on the international agenda. The UNGPs provide a non-binding yet authoritative framework for a three-pillared scheme to identify and contextualize the responsibilities with regard to business and human rights: the State's responsibility to protect, businesses' responsibility to respect, and facilitating access to remedy. However, although the impact of the principles can be described as ground-breaking, they have also been criticized for their vague and generic language which provides for a leeway for certain actors to circumvent their responsibilities (see Andreas Rasche & Sandra Waddock, Surya Deva, Florian Wettstein).Therefore, it is important to determine and clarify the content of the principles to increase their efficiency and effectiveness. In this light, this commentary on the UNGPs which examines all the principles one-by-one through the inputs of various prominent scholars, academics, experts and practitioners is indeed a reference guide to when working on corporate social responsibility.

The UNGPs and private international law are inherently linked. UNGPs aim to address issues regarding human rights abuses and environmental degradation which are ultimately transnational. Therefore, every time we talk about the extraterritorial obligations of the States, or the private remedies attached to cross-border human rights violations, we have to talk within the framework of private international law. For instance, in a case where a multinational company headquartered in the Global North causes damage through its subsidiaries or suppliers located in the Global North, the contractual clauses regarding their respective obligations or the private remedies in their contracts brings the questions of which law is applicable or how to enforce such mechanisms. Furthermore, in cases where the violations are brought before a court, it is inevitable that the court will have to decide on which law to be applied to the conflict at hand. In this regard, although the commentary does not go into detail about conflict of laws/ private international law issues, we know that the implementation of the UNGPs requires the consideration of private international law rules.

The commentary consists of two parts; the first part is dedicated to the UNGPs, and the second part focuses on the Principles for Responsible Contracts (PRCs) which is an integral addition to the UNGPs.

The first part starts with the UNGPs' first pillar, the State's duty to protect in context. The authors Larry Cata Backer and Humberto Cantu Rivera (UNGPs 4&5) emphasize the centrality of the State as an actor in many interactions when it engages in various commercial transactions and the privatization of essential services. Such instances pose a unique opportunity for the State to exercise its influence over businesses, service providers, or investors to facilitate respect for human rights and to fulfill its duty to protect human rights. Furthermore, as Olga Martin-Ortega and Fatimazahra Dehbi highlights (UNGP 7) when a company is operating in a conflict zone, the States that are involved must engage effectively with the situation to protect human rights considering the heightened vulnerability. Overall, actions of privatization or other commercial transactions do not exempt the State from its own duties. On the contrary, the State has heightened duties to ensure and support respect for human rights through various means such as its legislation, policies, agencies or through (effective) membership of multilateral institutions or its contracts.

Moving onto the second pillar, the business' responsibility to respect, Sara L. Seck
emphasizes

that this responsibility is not framed as a duty—like the State duty to protect but rather is a more flexible term—and is independent of the State. However, more regard could have been given to common situations such as where the lines between the States and the businesses are blurred. I do not mean here the situations where the business enterprises are

fully or partially owned by the State but rather – *de facto*—the businesses have more power (both in economic and political terms) on the ground. More examples could have been given such as how the revenues of Shell exceed the GDP's of Malaysia, Nigeria, South Africa and Mexico. In the increasingly globalized and competitive world of today, the (possible) role of businesses changes rapidly. Conversely, the disconnect between the policies, statements, and pledges businesses make with respect to human rights and their actual performance has been identified and highlighted quite accurately. The analysis of the lack of incentives for businesses to respect and engage with human rights by Kishanthi Parella (UNGP 13) provides an excellent mirror to the situation on the ground. It is rightfully identified that although the pressure from the consumers, investors, and/or other stakeholders can incentivize companies to do better, it may be insufficient. For instance, although Shell has been criticized by civil society, affected stakeholders, and the public for over a decade, and has faced several high-profile cases, the change beyond its corporate policies and documents remains highly contested.

Naturally, this brings to the fore the importance of having legally binding, national, regional, and international, rules putting concrete obligations with strong enforcement mechanisms to force companies to do better and create a level playing field for the ones who already are genuinely engaged in human rights issues. Maddelena Neglia discusses the different mandatory legislations initiatives from different countries regarding the implementation of the UNGPs, and Claire Bright and Celine Graca da Pires examine the same initiatives through the lens of Human Rights Due Diligence processes.

However, as the analysis of the current transparency frameworks within the framework of UNGP 13, considering that there are already legally binding rules on non-financial information disclosure, foreshadows the possible outcomes of future legally binding rules, such as the Corporate Sustainability Due Diligence Directive (See also the last documents, the Council position and the Parliament position.) The commentary does not discuss the positions adopted by the Council and the Parliament as they were not yet adopted at the time the commentary was written). The current transparency laws show that unless such rules have teeth, they are bound to be ineffective.

Of course, the efforts of the States and businesses must be accompanied by strong and effective both State-based and non-State based and judicial and non-

judicial remedies for the victims of corporate harm. On this matter, the commentary highlights the mechanisms that we are more prone to forgetting, such as the national human rights institutions (NHRIs) or multistakeholder initiatives (MSIs). It is usually the case that when thinking about remedies, the first thing that comes to mind are State-based judicial remedies. However, as Jennifer A. Zerk and Martijn Scheltema remind us there are several different types of remedies which can even be more effective depending on the context. Furthermore, on an academic level, we tend to focus more on Platon's 'theory on forms/ideas' rather than how things work in practice. As a result of this disconnection between the academics and the victims, we also tend to forget to discuss whether the 'form/idea' complies with the reality on the ground. Therefore, the emphasis in the commentary on the (obvious) link between the remedies and the persons for whom these remedies are intended reminds us that remedies must be stakeholder centric.

Overall, the commentary points out several important issues about the UNGPs:

- The uncertainty surrounding the UNGPs is real—although this was an intentional choice by Professor Ruggie, considering the current frameworks and how far we have come in the business & human rights world, we should not religiously hold onto the UNGPs but rather search for ways to improve and build upon them. UNGPs indeed were a marvelous achievement at the time, in 2011, when it was even unthinkable for most people that businesses could have any kind of responsibility regarding human rights; yet a worldwide consensus was reached. However, now, there is an enormous momentum to genuinely address corporate disasters through better regulation and enforcement.
- Another important prong in this process still is the international treaty. The commentary does not go into much detail about the Legally Binding Instrument on Business and Human Rights (Penelope Simmons discusses the international treaty within the framework of UNGP 26 as a way to strengthen access to remedy and Barnali Choudhury proposes the international treaty as a way to tackle the remaining problems with the implementation of the UNGPS and the PRCs), however I do believe that the international treaty must also be discussed as an option to better implement the UNGPs. The drafting process of the treaty is evidence of one of many problems with the implementation of the UNGPs. As Daniel

Augenstein (UNGP 1), Gamze Erdem Turkelli (UNGP 10) and Dalia Palombo (UNGP 25) point out, international cooperation is very important to effectively address the multi-faceted and transnational problem of respecting and protecting human rights and facilitating remedy when human rights abuses occur within the context of corporate harm. They show that no sole State can fix such a problem, and cooperation between States is essential. This cooperation can be done through could be done by engaging with other States in cases of corporate harm and exchanging information (or making it easy to exchange information) between authorities and courts, or information, as we increasingly see in private international law instruments. However, when we look at the process of drafting such a treaty which would provide common frameworks and rules to do so, it is clear that there is reluctance of the Global North countries whereas the recipient countries of damage are naturally much more enthusiastic.

- The second part of the commentary concerns the Principles for Responsible Contracts which provide guidance for the preparation, management and monitoring of Investor-State (investment) contracts, together with options for access to remedy for the (possible) victims. The PRCs reflect the same principles as the UNGPs and they are supposed to be read in conjunction.

The focus on the PRCs is valuable because historically international investment law and international human rights law were seen as two separate fields of law with no intersection. However, today, as the understanding of human rights is significantly evolving, the link between investments and human rights is becoming all the more evident. Investments – in all sectors but especially the extractive sector- can adversely impact to a significant extend, environmental degradation and human rights, lives of local and indigenous communities and marginalized and vulnerable groups. Rightly so, as the first part of the commentary on UNGPs, the second part, especially within the scope of PRC 7, Tehtena Mebratu-Tsegaye and Solina Kennedy highlight the importance of meaningful stakeholder engagement with the (potentially) affected stakeholders and the ways to design more inclusive community involvement strategies.

Secondly, PRCs is a great opportunity to provide guidance to increase the effectiveness and efficiency of the contractual clauses used in investment

contracts. Contractual clauses are the most widely used tools among businesses to pledge and ensure human rights compliance in their activities (see p 63). However, the effectiveness of these clauses is rather limited. Therefore, this wide use must be seen as an advantage and be built upon. In other words, the clauses must be structured in such a way that they do not leave unnecessary wiggle room for the companies and successfully cover the governance gaps.

Lastly, the importance of human rights impact assessments by investors before, during and after a project is a common narrative through the part on the PRCs. This emphasis is important as we are on the verge of adopting hard laws on human rights due diligence that may successfully enforce companies to be more engaging, robust and effective when they address human rights concerns. It has to be borne in mind that investors are also businesses enterprises, and they also must conduct their own Human Rights Due Diligence regarding their projects. In this regard, it is sometimes even the case that investors have more adverse impacts than other types of business actors because of their indirect impact via the projects they finance. Thus, the engagement of the investors with human rights is crucial for effective human rights protection.

Overall, the commentary is a must-have for everyone who is working on business and human rights. The UNGPs constitute the base of all the work that has been done over the years in the field. Thus, to be able to comprehend what business and human rights mean and to build on them, it is essential to examine the UNGPs in detail, which is what the commentary provides.

The Visible College of International Lawyers and the HCCH 2019 Judgments Convention

– Conference in Bonn

The HCCH 2019 Judgments Convention has been the subject of an ever-growing body of academic research and discussion ever since it was signed; but due to the pandemic, almost all of it had to happen in writing. Just in time for its entry into force, though, and thus perfectly timed, the first international conference on the HCCH 2019 Judgments Convention Cornerstones – Prospects – Outlook took place a week ago at the University of Bonn, hosted by **Matthias Weller** together with **Moritz Brinkmann** and **Nina Dethloff**, in cooperation with the Permanent Bureau of the HCCH, and with the support of the German Federal Ministry of Justice.

The conference brought together much of the aforementioned discussion between a range of academics, practitioners and policymakers, including the contributors to the book of the same title, edited by **Matthias Weller**, **João Ribeiro-Bidaoui**, **Moritz Brinkmann**, and **Nina Dethloff**, for which the conference doubled as a launch event. It accordingly followed the same structure, organized into seven panels overall that were split into three larger blocks.

The first of those ("Cornerstones") focused on some of the core concepts underpinning the Convention. **Wolfgang Hau** (LMU Munich) discussed the meaning of 'judgments', 'recognition', and 'enforcement'; **Pietro Franzina** (Catholic University of Milan) focused on the jurisdictional filters (with an emphasis on contractual obligations, i.e. Art. 5(1)(g)); and **Marcos Dotta Salgueiro** (University of the Republic of Montevideo) discussed the grounds for refusal. After some lively discussion, the block continued with papers on the Convention's much-discussed Art. 29 (**Cristina Mariottini** (Luxembourg)) and on its interplay with the 2005 Choice of Court Convention (**Paul Beaumont** (University of Stirling)).

Also in light of some less nuanced recent interventions, Cristina Mariottini's paper was particularly welcome to dispel some myths surrounding Art. 29. The speaker rightly pointed out that the mechanism is not only very different from the much-criticized bilateralization requirement of the 1971 Convention but can also be found, in one form or another, in a range of other instruments, including the rather successful 1970 Evidence and 1980 Child Abduction Conventions.

A much wider angle was then taken in the second block ("Prospects for the World"), which brought together perspectives from the European Union (**Andreas Stein** (European Commission)), the US (**Linda Silberman** (NYU)), Canada (**Geneviève Saumier** (McGill University)), the Balkan Peninsula (**Ilja Rumenov** (Skopje University)), Arab countries (Béligh Elbalti (University of Osaka)), Africa (**Abubakri Yekini** (University of Manchester) and **Chukwuma Okoli** (University of Birmingham)), the MERCOSUR Region (**Verónica Ruiz Abou-Nigm** (University of Edinburgh)), the ASEAN countries (**Adeline Chong** (SMU)), and China (**Zheng (Sophia) Tang** (Wuhan University)) in four consecutive panels. While the first block had already highlighted some of the compromises that had to be made during the drafting of the Convention and at the diplomatic conference, it became even clearer that the Convention (or, more precisely, the prospect of its ratification) may be subject to vastly different obstacles and objections in different parts of the globe. While some countries may not consider the Convention to be ambitious enough, others may consider it too much of an intrusion into their right to refuse the recognition and enforcement of foreign judgments – or raise even more fundamental concerns regarding the implementation of the Convention, its interplay with existing bilateral treaties (seemingly a particularly pertinent problem for Arab countries), or with

multilateralism in recognition and enforcement more generally. The conference gave room to all of those concerns and provided important context through some truly impressive comparative research, e.g. on the complex landscape of bilateral agreements in and between most Arab states.

The different threads of discussion that had been started throughout the event were finally put together in a closing panel ("Outlook"). **Ning Zhao** (HCCH) recounted the complicated genesis of the Convention and reflected on the lessons that could be learned from them, emphasizing the need for bridging differences through narrowing down the scope of projects and offering opt-out mechanisms, and for enhancing mutual trust, including through post-convention work. She also provided an update on the ongoing jurisdiction project; **José Angelo Estrella Faria** (UNIDROIT) advocated a holistic approach to judicial cooperation and international commercial arbitration; and **Hans van Loon** (HCCH) finally summarized the conference as a whole, putting the emphasis both on the significant achievement that the convention constitutes and the need to put further work into its promotion.

The conference had set out to identify the cornerstones of the 2019 Convention, to discuss its prospects, and to provide an outlook into the future of the Convention. It has clearly achieved all three of these goals. It included a wide range of perspectives on the Convention, highlighted its achievements without shying away from discussing its present and future obstacles, and thus provided ample food for thought and discussion for both the proponents and the critics of the Convention.

At the end of the first day, **Burkhard Hess** (MPI Luxembourg) gave a dinner speech and reflected on the current shape of the notorious 'invisible college of international lawyers' in private international law. As evidenced by the picture above, the college certainly was rather visible in Bonn.

Review of Choice of Law in International Commercial Contracts

While doing research on a choice of law article, I found it necessary to consult a book generally co-edited by Professors Daniel Girsberger, Thomas Graziano, Jan Neels on *Choice of Law in International Commercial Contracts* ('Girsberger et al'). The book was officially published on 22 March 2021. I began reading sections of the book related to tacit choice of law sometime in December 2022 and found the work truly global and compelling. At the beginning of June this year, I decided to read the whole book and finished reading it today. It is 1376 pages long!

To cut the whole story short, the book is the bible on choice of law in international commercial contracts. It covers over 60 countries, including regional and supranational bodies' rules on choice of law. Professor Symoen Symeonides had previously written a single authored award winning book on *Codifying Choice of Law Around the World,* but that work did not cover as much as Girsberger et al's book in terms of the number of countries, and regional and supranational instruments (or principles) covered.

The book arose from the drafting of the Hague Principles on Choice of Law in International Commercial Contracts, headed by Professor Girsberger and commissioned by Professor Marta Partegas. The central aim of the Hague Principles is to promote party autonomy, as the Hague Principles does not touch on the law applicable in the absence of choice.

The book starts with a general comparative outline of choice of law around the world and its comparison to the Hague Principles. This outline is derived from the works of many other scholars that contributed to the book. In other preliminary chapters, there are discussions devoted to party autonomy, provenance of the Hague Principles, roadmap to promoting the Hague Principles, international commercial arbitration, and perspectives from UNIDROIT and UNCITRAL.

The essential part of the book focuses on regional and national reports of countries around the world, with a focus on comparison to the Hague Principles.

The format used is consistent, and easy to follow for all the reports in this order: introduction and preamble, scope of the principles, freedom of choice, rules of law, express and tacit choice of law, formal validity of the choice of law, agreement on the choice of law and battle of forms, severability, exclusion of renvoi, scope of the chosen law, assignment, overriding mandatory rules and public policy, establishment, law applicable in the absence of choice, and international commercial arbitration.

The Hague Principles has been successful so far given the regional or supranational bodies such as Asia,[1] and Latin America[2] that have endorsed it.

From 31st May to 3 June 2023, the Research Centre for Private International Law in Emerging Countries in University of Johannesburg held a truly Pan-African Conference on the African Principles on Choice of Law in International Commercial Contracts.[3] Many African scholars (including myself) and some South African government officials were present and spoke in this very successful conference. The African Principles also draws some inspiration from the Hague Principles, which involved the participation of African scholars like Professors Jan Neels and Richard Frimpong Oppong.

Girsberger et al's book and the Hague Principles success so far may be due to the more inclusive approach it took, rather than other Hague Conventions that are not fully representative of countries around the world, especially African stakeholders.

More please.

[1] Asian Principles on Private International Law 2018.

[2] Guide of the Organization of American States on the Applicable Law to International Commercial Contracts 2019

[3] See generally JL Neels and EA Fredericks, "An Introduction to the African Principles of Commercial Private International Law"(2018) 29 Stellenbosch Law Review 347; JL Neels, 'The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment' (2021) 25 Uniform Law Review 426, 431; JL Neels and EA Fredericks, 'The African Principles of Commercial Private International Law and the Hague Principles' in Girsberger et al paras 8.09-8.11.

Denial of Natural Justice as a Defence to Enforcement of a Chinese Judgment in Australia

In *Yin v Wu* [2023] VSCA 130, the Court of Appeal of the Supreme Court of Victoria set aside a judgment[1] which had affirmed the enforcement a Chinese judgment by an Associate Justice of the Supreme Court.[2] This was a rare instance of an Australian court considering the defence to enforcement of a foreign judgment on the basis that the judgment debtor was denied natural justice—or procedural fairness—before the foreign court.

Background

The dispute concerned a payment made by a Chinese national living in China, Di Wu, to a Chinese national living in Australia, Ke Yin. The payment was made pursuant to a foreign exchange agreement: Yin had promised to pay Wu a sum of US Dollars in exchange for Wu's Chinese RMB.

The arrangement was made unusually through a series of Telegram and WhatsApp messages, from accounts with different numbers and aliases. (In Australia, we would say that the arrangement sounded 'suss'.) The agreement was seemingly contrary to Chinese law, which may have contributed to the clandestine character of communications underlying the agreement; see [30].

After Wu transferred the funds—RMB ¥3,966,000—Yin denied that the full sum was received and did not transfer any sum of US Dollars to Wu. Yin eventually returned RMB ¥496,005 but not the balance of what Wu had paid. Wu went to the police on the basis he had been 'defrauded'; they refused to act. Meanwhile, while broadcasting video under a pseudonym on Twitter, Yin suggested that his

accounts had been frozen at the instigation of Wu's cousin and with the participation of 'communists'.

On 13 October 2017, Wu commenced a proceeding against Yin in the Ningbo People's Court. The Court characterised the foreign exchange agreement as 'invalidated and unenforceable', but nonetheless provided judgment and costs to Wu for RMB ¥3,510,015 ('Chinese Judgment').

The Chinese Judgment recorded that: *'[t]he defendant [Yin] failed to attend despite having been legally summoned to attend. As such, the court shall enter default judgment according to the law. … Any party dissatisfied with this judgment may, within 15 days from the date of service of the written judgment, file an appeal …'*: [27].

Wu commenced enforcement proceedings in China. An affidavit in those proceedings recounted that Yin's whereabouts were then unknown, but Yin had been served according to relevant procedure of the Chinese forum, which allowed service 'by way of public announcement': [31]. The 'Public Notice' provided as follows (see [32]):

> *'In relation to the private loan dispute between the plaintiff Wu Di and defendant Yin Ke, you are now, by way of public notice, served with the Complaint and a copy of the evidence, notice to attend, notice to adduce evidence, risk reminder, summons to attend court, notice of change of procedure, civil ruling and the letter of notice. You are deemed to have been served with the said documents after sixty days from the date of this public notice.'*

Recognition and enforcement sought in Australia

Wu filed an originating motion in the Supreme Court of Victoria, seeking an order for enforcement of the Chinese Judgment, or alternatively, reimbursement of the sum paid to Yin.

The latter and alternative order may be understood in terms of an order seeking the *recognition* of the obligation created by the Chinese Judgment, to be given effect through the remedial powers of the Australian forum: see *Kingdom of Spain v Infrasructure Services Luxembourg S.À.R.L.* (2023) 97 ALJR 276; [2023] HCA 11, [43]–[46]; *Schibsby v Westenholz* (1870) LR 6 QB 155, 159.

Australia has a fragmented regime for recognition and enforcement of foreign judgments; see generally Michael Douglas, Mary Keyes, Sarah McKibbin and Reid Mortensen, 'The HCCH Judgments Convention in Australian Law' (2019) 47(3) *Federal Law Review* 420. New Zealand judgments are treated with deference under the *Trans-Tasman Proceedings Act 2010* (Cth); judgments of various other jurisdictions are easily registered under the *Foreign Judgments Act 1991* (Cth), where the relevant court is identified in the *Foreign Judgments Regulations 1992* (Cth) on the basis of reciprocal treatment of Australian judgments in the relevant foreign jurisdiction. For other *in personam* money judgments, recognition and enforcement may occur pursuant to common law principles.

At common law, a foreign judgment may be recognised and enforced if four conditions are satisfied—subject to defences:

'(a) the foreign court must have exercised jurisdiction that Australian courts will recognise;

(b) the foreign judgment must be final and conclusive;

(c) there must be an identity of the parties; and

(d) the judgment must be for a fixed sum or debt': *Doe v Howard* [2015] VSC 75, [56].

Here, the Chinese Judgment was assessed according to the common law principles.

In his defence, Yin pleaded (among other things) that he was not served with the documents commencing the foreign proceeding which produced the Chinese Judgment, or any other documents relevant to the foreign proceeding while it was on foot. He also pleaded that he was unaware of the existence of the Chinese Judgment until the Australian proceeding was commenced. As an extension of that plea, Yin said that enforcement of the Chinese Judgment should be refused

on the basis of public policy, or because there was a failure by the Chinese court to accord Yin natural justice: [6].

Wu sought summary judgment on the basis that Yin's defence had no prospects of success. On 22 October 2021, summary judgment was entered in favour of Wu by an Associate Justice of the Supreme Court: *Wu v Yin* (Supreme Court of Victoria, Efthrim AsJ, 22 October 2021); see *Wu v Yin* [2022] VSC 729, [5].

The Associate Justice referred (at [33]) to *Boele v Norsemeter Holding AS* [2002] NSWCA 363, [28], where Giles JA of the New South Wales Court of Appeal held as follows:

> *'In determining whether due notice has been given regard will be had to the notice provisions of the foreign court: for example, notification not by personal service but in accordance with the rules of the foreign court may be held to be consistent with affording natural justice even if not in accord with notice provisions of the forum (see Jeannot v Fuerst (1909) 25 TLR 424; Igra v Igra (1951) P 404; Terrell v Terrell (1971) VR 155).'*

Efthrim AsJ considered that the statement in the Chinese Judgment that Yin had 'been legally summoned to attend' was enough to defeat the natural justice defence: [2022] VSC 729, [74]–[79]. Although the 'public notice' service underlying the Chinese Judgment would generally be insufficient for service within Australia under Australian law, it was considered sufficient for the purposes of overcoming the defence.

Yin appealed to the Supreme Court's trial division on the ground (among others) that Efthrim AsJ erred in holding that Yin's defence that he was not accorded natural justice in the Chinese proceeding had no prospect of success. Tsalamandris J rejected this ground, and Yin's appeal: [2022] VSC 729, [124], [133]. Yin applied for leave to appeal the decision of Tsalamandris J to the Court of Appeal.

Before the Court of Appeal

The Court of Appeal overturned the decision of Tsalamandris J, granting leave to appeal and allowing the appeal on the following ground (see [79]):

> *Ground 1: the judge erred in upholding the associate justice's conclusion that the defence to the enforcement claim had no real prospect of success, and in doing so erred by imposing an onus on Yin to adduce evidence about applicable Chinese law relating to service by public announcement and why that method of service had not been properly invoked in this case. Further, the judge erred by relying on the Wang affidavit [the affidavit in the Chinese enforcement proceeding, mentioned above] which was not in evidence, or not relied on by Wu, on the hearings before either the associate justice or the judge.*

The Court of Appeal's decision turned on the available evidence. Yin deposed that he was not served with any documents in connection with the Chinese proceedings. That evidence was uncontradicted: [90]. In these circumstances, 'the associate justice and the judge erred in placing the onus on Yin to establish that there was no valid service on him by alternative means permitted by Chinese law': [84]. Yin's evidence raised a prima facie case that he had been denied natural justice in the Chinese proceedings: [91].

In *obiter*, the Court of Appeal also considered that even if it were assumed 'that the evidence was sufficient to establish that Yin had been "legally summoned", the evidence as a whole [did] not establish that the public notice procedure apparently adopted complied with the requirements of natural justice in the circumstances of the case': [84]; [95].

The Court of Appeal cited (at [96]–[99])) *Terrell v Terrell* [1971] VR 155, which was also cited in *Boele*, [28]. *Terrell* was about a petition for divorce by an American husband who had left his wife in Australia and returned to the US. The husband obtained a decree of divorce in the US. The Australian court considered a forum statute that would give effect to foreign decrees if they would be recognised under the law of the domicile. But the statute provided that a foreign decree would not be recognised 'where, under the common law rules of private international law, recognition of it[s] validity would be refused on the ground that a party to the marriage had been denied natural justice'; see [96].

Barber J considered that 'natural justice' was 'not a term of great exactitude, but in this context probably refers to the need for the defending party to have notice of the proceedings and the opportunity to be heard': *Terrell*, 157. A foreign judgment produced in circumstances where the respondent to the foreign

proceedings had no notice of them or an opportunity to be heard would be amenable to a natural justice defence. Barber J considered an exception to that position, which was inapplicable in the circumstances as the husband had withheld the wife's address from the foreign court (see *Terrell*, 157):

> *'To this basic rule there is an exception, that where the foreign court has power to order substituted service or to dispense with service, and that power has been properly exercised upon proper material, even where the respondent was not in fact made aware of the proceedings, such proceedings cannot be held to be unjust, as similar powers are available to our courts. However, there must have been some attempt to effect personal service: Grissom v Grissom, [1949] QWN 52. Moreover, if the order for substituted service is based on a false statement that the petitioner did not know the respondent's whereabouts, or where a false statement is made as to the respondent's address for service, the decree will not be recognized as valid: Norman v Norman (No2) (1968) 12 FLR 39; Grissom v Grissom, supra; Macalpine v Macalpine, [1958] P35; [1957] 3 All ER 134; Brown v Brown (1963) 4 FLR 94; [1963] ALR 817;Middleton v Middleton, [1967] P 62; [1966] 1 All ER 168.*

After considering *Terrell* and other authorities, the Court of Appeal concluded as follows (at [107]):

> *… even if Wu had established by admissible evidence that service of the Chinese proceeding was legally effected on Yin by some form of public notice — albeit one which did not come to Yin's attention — the Court should not have recognised the Chinese judgment on a summary basis. This is because at the time Wu commenced the Chinese proceeding he well knew of a number of alternate means of giving notice of the proceeding to Yin, namely, by Twitter, WhatsApp and Telegram. Indeed, Wu's case in the Chinese proceeding and in this Court was based on money paid under an alleged contract made by these means. In these circumstances, there is a case to be investigated at trial as to whether Wu informed the Chinese court of these alternative means of giving notice of the Chinese proceeding to Yin.*

The Court then provided (at [108]) some helpful dicta on the future application of the natural justice defence to enforcement of foreign judgments, considering the

following proposition in *Nygh's Conflict of Laws* (LexisNexis, 10th ed, 2020) at 990 [40.84]:

> *It matters not that the forum would not have dispensed with notice in the same situation, although a line would have to be drawn somewhere as in the case where the rules of a foreign court dispensed with the need of giving a foreign defendant any form of personal notification even in peacetime.*

The Court opined (at [109]):

> *In our view, in considering whether natural justice has been provided, modern courts should move with the times in their assessment of the sufficiency of foreign modes of service which do not aim to give defendants personal notification by the many electronic means now commonly available. Courts should draw the line and look unfavourably on modes of service by foreign courts which do not attempt to give notice by such means where a defendant's physical whereabouts are unknown but electronic notice in some form is possible.*

Yin failed on his other grounds of appeal. As the underlying decision also provided summary judgment for Wu's restitution claim, the Court of Appeal characterised the restitution claim as separate to the enforcement claim: [111]. The Court of Appeal affirmed the decision that Yin's defence that he did not know Wu went 'nowhere': [118]. Wu ultimately succeeded: he obtained summary judgment for the restitution claim, together with interest: [158].

Some takeaways

Yin v Wu provides a few insights for the natural justice defence to recognition and enforcement of foreign judgments in common law courts.

The first concerns the onus of proof. The onus of making out a defence to recognition of a foreign judgment would ordinarily fall on a defendant: *Stern v National Australia Bank* [1999] FCA 1421, [133]. The Court of Appeal's decision demonstrates how burdens may shift in the practical operation of private international law in the context of litigation. (On the difference between legal and evidentiary burdens, and how they may shift, see *Berry v CCL Secure Pty Ltd*

(2020) 271 CLR 151; [2020] HCA 27.) Once Yin had produced evidence he was not served, it was up to Wu to contradict that evidence. The omission may be understood on the basis that the underlying decision was one for summary judgment.

Second, the decision is notable for framing enforceability in terms of a natural justice defence rather than in terms of the first criterion for recognition or enforcement: 'the foreign court must have exercised jurisdiction that Australian courts will recognise'. This element is often framed as a requirement of 'international jurisdiction'. Yin was not within the territorial jurisdiction of the Chinese court at any relevant time, and nor did he submit to the foreign court. International jurisdiction was seemingly predicated on Yin's nationality. Arguably, this is insufficient for recognition and enforcement at common law in Australia (but see *Independent Trustee Services Ltd v Morris* (2010) 79 NSWLR 425, cf *Liu v Ma* (2017) 55 VR 104, [7]). The focus on natural justice defence rather than international jurisdiction would be a product of how the parties ran their cases.

Third, although the Court of Appeal allowed the appeal as regards the natural justice defence, the judgment supports the orthodox view that this defence should have a narrow scope of operation. As Kirby P opined in *Bouton v Labiche* (1994) 33 NSWLR 225, 234 (quoted at [73]), courts should not be 'too eager to criticise the standards of the courts and tribunals of another jurisdiction or too reluctant to recognise their orders which are, and remain, valid by the law of the domicile'. Australian courts provide for substituted service in a variety of circumstances; it would be odd if a foreign court's equivalent procedure was held to engage the natural justice defence.

Finally, the case serves as a warning for litigants seeking to enforce a judgment of a Chinese court in Australia: relying purely on the 'public notice' mechanism of the Chinese forum, without taking further steps to bring the proceeding to the attention of the defendant, may present problems for enforcement. The same can be said for transnational litigation in any jurisdiction that does not require 'personal service' in the sense understood by common law courts.

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[1] *Wu v Yin* [2022] VSC 729 (Tsalamandris J).

[2] *Wu v Yin* (Supreme Court of Victoria, Efthrim AsJ, 22 October 2021).

Change of gender in private international law: a problem arises between Scotland and England

Written by Professor Eric Clive

The Secretary of State for Scotland, a Minister of the United Kingdom government, has made an order under section 35 of the Scotland Act 1998 blocking Royal Assent to the Gender Recognition Reform (Scotland) Bill 2022, a Bill passed by the Scottish Parliament by a large majority. The Scottish government has challenged the order by means of a petition for judicial review. The case is constitutionally important and may well go to the United Kingdom Supreme court. It also raises interesting questions of private international law.

At present the rules on obtaining a gender recognition certificate, which has the effect of changing the applicant's legal gender, are more or less the same in England and Wales, Scotland and Northern Ireland. The Scottish Bill would replace the rules for Scotland by less restrictive, de-medicalised rules. An unfortunate side effect is that Scottish certificates would no longer have automatic effect by statute in other parts of the United Kingdom. The United Kingdom government could remedy this by legislation but there is no indication that it intends to do so. Its position is that it does not like the Scottish Bill.

One of the reasons given by the Secretary of State for making the order is that having two different systems for issuing gender recognition certificates within the United Kingdom would cause serious problems. A person, he assumes, might be legally of one gender in England and another in Scotland. There would therefore be difficulties for some organisations operating at United Kingdom level – for

example, in the fields of tax, benefits and pensions. This immediately strikes a private lawyer as odd. Scotland and England have had different systems in the law of persons for centuries – in the laws on marriage, divorce, legitimacy, incapacity and other matters of personal status – and they have not given rise to serious problems. This is because the rules of private international law, even in the absence of statutory provision, did not allow them to.

In a paper on *Recognition in England of change of gender in Scotland: a note on private international law aspects*[1] I suggest that gender is a personal status, that there is authority for a general rule that a personal status validly acquired in one country will, subject to a few qualifications, be recognised in others and that there is no reason why this rule should not apply to a change of gender under the new Scottish rules.

The general rule is referred to at international level. In article 10 of its Resolution of September 2021 on *Human Rights and Private International Law*, the Institute of International Law says that:

> *Respect for the rights to family and private life requires the recognition of personal status established in a foreign State, provided that the person concerned has had a sufficient connection with the State of origin … as well as with the State whose law has been applied, and that there is no manifest violation of the international public policy of the requested State ….*

So far as the laws of England and Scotland are concerned, there are authoritative decisions and dicta which clearly support such a general rule. Cases can be found in relation to marriage, divorce, nullity of marriage, legitimacy and legitimation. A significant feature is that the judges have often reasoned from status to particular rules. It cannot be said that there are just isolated rules for particular life events. And the rules were developed at common law, before there were any statutory provisions on the subject.

Possible exceptions to the general rule – public policy, no sufficient connection, contrary statutory provision, impediment going to a matter of substance rather than procedure – are likely to be of little if any practical importance in relation to the recognition in England of changes of gender established under the proposed new Scottish rules.

If the above arguments are sound then a major part of the Secretary of State's reasons for blocking the Scottish Bill falls away. There would be no significant problem of people being legally male in Scotland but legally female in England, just as there is no significant problem of people being legally married in Scotland but unmarried in England. Private international law would handle the dual system, as it has handled other dual systems in the past. Whether the Supreme Court will get an opportunity to consider the private international law aspects of the case remains to be seen: both sides have other arguments. It would be extremely interesting if it did.

From the point of view of private international law, it would be a pity if the Secretary of State's blocking order were allowed to stand. The rules in the Scottish Bill are more principled than those in the Gender Recognition Act 2004, which contains the existing law. The Scottish Bill has rational rules on sufficient connection (essentially birth registered in Scotland or ordinary residence in Scotland). The 2004 Act has none. The Scottish Bill has a provision on the recognition of changes of gender under the laws of other parts of the United Kingdom which is drafted in readily understandable form. The corresponding provisions in the 2004 Act are over-specific and opaque. The Scottish Bill has a rule on the recognition of overseas changes of gender which is in accordance with internationally recognised principles.

The 2004 Act has the reverse. It provides in section 21 that: A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. This is alleviated by provisions which allow those who have changed gender under the law of an *approved overseas country* to use a simpler procedure for obtaining a certificate under the Act but still seems, quite apart from any human rights aspects, to be unfriendly, insular and likely to produce avoidable difficulties for individuals.

[1] Clive, Eric, Recognition in England of change of gender in Scotland: A note on private international law aspects (May 30, 2023). Edinburgh School of Law Research Paper No. 2023/06, Available at SSRN: https://ssrn.com/abstract=4463935 or http://dx.doi.org/10.2139/ssrn.4463935

Judgments Convention – No Thanks?

On September 1st, 2023, the 2019 Hague Judgments Convention will enter into force for the Member States of the EU and Ukraine. According to the HCCH, the Convention is “a true gamechanger in international dispute resolution”, which will “reduce transactional and litigation costs, facilitate rule-based multilateral trade and investment, increase certainty and predictability” and “promote effective justice for all”. The international conference taking place in Bonn later this week will likely strike an equally celebratory tone.

This sentiment is not shared universally, though. In a scathing article just published in *Zeitschrift für Europäisches Privatrecht (ZEuP)* entitled ‘Judgments Convention: No Thanks!‘, Haimo Schack (University of Kiel) labels the Convention as “evidently worthless”.

Schack comes to this damning conclusion in three steps. First, he argues that the 2005 Choice of Court Convention, the first outcome of the decades-long HCCH Jurisdiction Project, has been of minimal use for the EU and only benefited Singapore and London. Second, he points out the limited scope of the 2019 Convention, which is not only (inherently) unable to limit the exorbitant exercise of jurisdiction or avoid, let alone coordinate parallel proceedings, but also

contains a long list of excluded areas of law in its Art. 2 (including, most significantly, the entire field of intellectual property: Art. 2(1)(m)). Schack argues that combined with the equally long list of bases for recognition and enforcement in Art. 5, the Convention will make recognition and enforcement of foreign judgments significantly more complicated. This effect is exacerbated, third, by a range of options for contracting states to further reduce the scope of application of the Convention, of which Art. 29 is particularly "deadly", according to Schack. The provision allows contracting states to opt out of the effect of the Convention vis-à-vis specific other contracting states, which Schack fears will lead to a 'bilateralisation' similar to what prevented the 1971 Convention from ever getting off the ground, which will reduce the 2019 Convention to a mere model law. All in all, Schack considers the Convention to do more harm than good for the EU, which he fears to also lose an important bargaining chip in view of a potential bilateral agreement with the US.

Leaving his additional criticism of the HCCH's ongoing efforts to address the problem of parallel proceedings aside, Schack certainly has a point in that the 2019 Convention will not be easy to apply for the national courts. Whether it will be more complicated than a myriad of rarely applied bilateral conventions may be subject to debate, though. It also seems worth pointing out that the 1971 Convention contained a significantly more cumbersome mechanism of bilateralisation that required all contracting states to conclude additional (!) bilateral agreements to enter into force between any given pair of them, which is quite different from the opt-out mechanism of Art. 29. In fact, it seems at least arguable that the different ways in which contracting states can tailor their accession to the Convention to their specific needs and concerns, up to the exclusion of any treaty relations with a specific other contracting state, may not be the proverbial nail in the coffin as much as it might be a key to the Convention's success. While it is true that these mechanisms appear to undermine the internationally binding nature of the Convention, bringing it closer to a model law than a binding treaty, they also make it possible to accommodate different degrees of mutual trust within a single legal framework. The fact that the 2005 Convention has preserved some degree of judicial cooperation between the EU Member States and the UK in an area now otherwise devoid of it may be testimony to the important purpose still served by international conventions in the area of international civil procedure despite – but maybe also as a result of – their increasingly limited, tailor-made scope(s).

Postscript: A more sophisticated reaction to the article (written by Holger Jacobs and myself) is forthcoming in ZEuP 1/2024.