6-month Internship Opportunity in The Hague

2024 applications for a 6-month internship in The Hague, Netherlands are now open for Australian law school graduates

The Australian Institute of International Affairs and the Australian Branch of the International Law Association call for applications for the 2024 Peter Nygh Hague Conference Internship.

Awarded annually, the Nygh internship offers a postgraduate student or graduate of an Australian law school the exciting opportunity to undertake a 6-month internship with The Hague Conference on Private International Law, in the Netherlands.

The successful applicant will have the chance to work with some of the world's leading private international law practitioners and will be provided with finances to assist with travel costs and living expenses.

Previous Nygh interns have worked on projects in fields including: family law; evidence and access to justice; cross border flow of personal data; migration; civil

liability for trans-boundary harm and commercial dispute resolution. For many interns, the opportunity to observe the negotiation of an international convention first-hand has been a highlight of their internship, all whilst living and working in the Netherlands.

English and French are the two working languages of the Hague Conference and Australian law graduates and final year law students with French language skills are encouraged to apply for the internship.

The Peter Nygh Hague Conference Internship was established in memory of the late Hon Dr Peter Nygh AM, a renowned international lawyer and former judge of the Family Court of Australia.

Applications for the 2024 Nygh Internship close on **30 September 2023**. For further information and application instructions visit: http://www.internationalaffairs.org.au/youth-andcommunity/nygh-internship/ or email Nicola Nygh at nicola.nygh@rllawyers.com.au

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2023 Early Career Seminar Series – Private International Law Panel

The ILA Australian Branch is pleased to present the first seminar in its 2023 Early Career Seminar Series on topics in private international law.

The event will be an online lunch time discussion on **Thursday, 17 August 2023** at **1.00pm AEST**.

The panel will feature the speakers below.

Speakers and topics:

Dr Sarah McKibbin, University of Southern Queensland: *The Australian Doctrine of Forum Non Conveniens in Practice*

Rachel Van Der Veen, Australian Public Service: *Fiduciary Duties and the 1985 Trusts Convention*

Commentator: Dr Brooke Marshall, UNSW Sydney

Chair: Danielle Kroon, Marque Lawyers

Further details including registration are here.

XVI ASADIP Conference: the official website is live

The official website of the XVI ASADIP Conference is live, click here. The full program is available here.

The EU Sustainability Directive and Jurisdiction

The Draft for a Corporate Sustainable Due Diligence Directive currently contains no rules on jurisdiction. This creates inconsistencies between the scope of application of the Draft Directive and existing jurisdictional law, both on the EU level and on the domestic level, and can lead to an enforcement gap: EU companies may be able to escape the existing EU jurisdiction; non-EU companies may even not be subject to such jurisdiction. Effectivity requires closing that gap, and we propose ways in which this could be achieved.

(authored by Ralf Michaels and Antonia. Sommerfeld and crossposted at https://eapil.org/)

1. **The Proposal for a Directive on Corporate Sustainability Due Diligence**

The process towards an EU Corporate Sustainability Due Diligence Directive is gaining momentum. The EU Commission published a long awaited Proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD), COM(2022) 71 final, on 23 February 2022; the EU Council adopted its negotiation position on 1 December 2022; and now, the EU Parliament has suggested amendments to this Draft Directive on 1 June 2023. The EU Parliament has thereby backed the compromise textreached by its legal affairs committee on 25 April 2023. This sets off the trilogue between representatives of the Parliament, the Council and the Commission.

The current state of the CSDDD already represents a milestone. It not only introduces corporate responsibility for human rights violations and environmental damage – as already found in some national laws (e.g. in France; Germany;

Netherlands; Norway; Switzerland; United Kingdom) – but also and in contrast (with the exception of French law – for more details see *Camy*) introduces civil liability. Art. 22 (1) CSDDD entitles persons who suffer injuries as result of a failure of a company to comply with the obligations set forth in the Directive to claim compensation. It thereby intends to increase the protection of those affected within the value chain, who will now have the prospect of compensation; it also intends to create a deterrent effect by having plaintiffs take over the enforcement of the law as "private attorney generals". Moreover, the Directive requires that Member States implement this civil liability with an overriding mandatory application to ensure its application, Art. 22 (5) CSDDD. This is not unproblematic: the European Union undertakes here the same unilateralism that it used to criticize when previously done by the United States, with the Helms/Burton Act as the most prominent example.

That is not our concern here. Nor do we want to add to the lively discussion on the choice-of-law- aspects regarding civil liability (see, amongst others, *van Calster*, *Ho-Dac*, *Dias* and, before the Proposal, *Rühl*). Instead, we address a gap in the Draft Directive, namely the lack of any provisions on jurisdiction. After all, mandatory application in EU courts is largely irrelevant if courts do not have jurisdiction in the first place. If the remaining alternative is to bring an action in a court outside the EU, the application of the CSDDD civil liability regime is not, however, guaranteed. It will then depend on the foreign court's conflict-of-law rules and whether these consider the CSDDD provisions applicable – an uncertain path.

Nonetheless, no mirroring provisions on international jurisdiction were included in the CSDDD, although such inclusion had been discussed. Suggestions for the inclusion of a new jurisdictional rule establishing a *forum necessitatis* in the Brussels I Regulation Recast existed (see the Study by the European Parliament Policy Department for External Relations from February 2019, the Draft Report of the European Parliament Committee on Legal Affairs with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL) as well as the Recommendation of the European Groupe of Private International Law (GEDIP) communicated to the Commission on 8 October 2021). Further, the creation of a *forum connexitatis* in addition to a *forum necessitatis* had been recommended by both the Policy Department Study and the GEDIP. Nevertheless, the report of the European Parliament finally adopted,

together with the Draft Directive of 10 March 2021, no longer contained such rule on international jurisdiction, without explanation. Likewise, the Commission's CSDDD draft and the Parliament's recent amendments lack such a provision.

2. Enforcement Gap for Actions against Defendants Domiciled within the EU

To assess the enforcement gap, it is useful to distinguish EU companies from non-EU companies as defendants. For EU companies, the Directive applies to companies of a certain size which are formed in accordance with the legislation of a Member State according to Art. 2 (1) CSDDD – the threshold numbers in the Commission's draft and the Parliament amendments differ, ranging between 250–500 employees and EUR 40–150 million annual net worldwide turnover, with questions of special treatment for high-risk sectors.

At first sight, no enforcement gap seems to exist here. The general jurisdiction rule anchored in Art. 4 (1) Brussels I Regulation Recast allows for suits in the defendant's domicile. Art. 63 (1) further specifies this domicile for companies as the statutory seat, the central administration or the principal place of business. (EU-based companies can also be sued at the place where the harmful event occurred according to Art. 7 (2) Brussels I Regulation Recast, but this will provide for access to an EU court only if this harmful event occurred within the EU.) The objection of *forum non conveniens* does not apply in the Brussels I Regulation system (as clarified in the CJEU's *Owusu* decision). Consequently, in cases where jurisdiction within the EU is given, the CSDDD applies, including the civil liability provision with its mandatory application pursuant to Art. 22 (1), (5).

Yet there is potential leeway for EU domiciled companies to escape EU jurisdiction and thus avoid the application of the CSDDD's civil liability. One way to avoid EU jurisdiction is to use an exclusive jurisdiction agreement in favour of a third country, or an arbitration clause. Such agreements concluded in advance of any occurred damage are conceivable between individual links of the value chain, such as between employees and subcontractors (in employment contracts) or between different suppliers along the chain (in purchase and supply agreements). EU law does not expressly prohibit such derogation. Precedent for how such exclusive jurisdiction agreements can be treated can be found in the

case law following the *Ingmar* decision of the CJEU. In *Ingmar*, the CJEU had decided that a commercial agent's compensation claim according to Arts. 17 and 18 of the Commercial Agents Directive (86/653/EEC) could not be avoided through a choice of law in favour of the law of a non-EU country, even though the Directive said nothing about an internationally mandatory nature for the purpose of private international law – as Art. 22 (5) CSDDD in contrast now does. The German Federal Court of Justice (BGH) extended this choice-of-law argument to the law of jurisdiction and held that jurisdiction clauses which could undermine the application of mandatory provisions are invalid, too, as only such a rule would safeguard the internationally mandatory scope of application of the provisions. Other EU Member State courts have shown a similar understanding not only with regard to exclusive jurisdiction agreements but also with regard to arbitration agreements (Austrian Supreme Court of Justice; High Court of Justice Queen's Bench Division).

Common to Arts. 17 and 18 Commercial Agents Directive and Art. 22 CSDDD is their mandatory nature for the purpose of private international law, which established by the ECJ for the former and is legally prescribed for the latter in Art. 22 (5) CSDDD. This suggests a possible transfer of the jurisdictional argument regarding jurisdiction. To extend the internationally mandatory nature of a provision into the law of jurisdiction is not obvious; choice of law and jurisdiction are different areas of law. It also means that the already questionable unilateral nature of the EU regulation is given even more force. Nonetheless, to do so appears justified. Allowing parties to avoid application of the CSDDD would run counter to its effective enforcement and therefore to the *effet utile*. This means that an exclusive jurisdiction agreement in favour of a third country or an arbitration clause will have to be deemed invalid unless it is clear that the CSDDD remains applicable or the applicable law provides for similar protection.

3. Enforcement Gap for Actions against Defendants Domiciled Outside the EU

While the enforcement gap with regard to EU companies can thus be solved under existing law, additional problems arise with regard to non-EU corporations. Notably, the Draft Directive applies also to certain non-EU companies formed in accordance with the legislation of a third country, Art. 2 (2) CSDDD. For these

companies, the scope of application depends upon the net turnover within the territory of the Union, this being the criterion creating a territorial connection between these companies and the EU (recital (24)). The Parliament's amendments lower this threshold and thereby sharpen the scope of application of the Directive.

While application of the CSDDD to these companies before Member State courts is guaranteed due to its mandatory character, jurisdiction over non-EU defendants within the EU is not. International jurisdiction for actions against third-country defendants as brought before EU Member State courts is – with only few exceptions – generally governed by the national provisions of the respective Member State whose courts are seized, Art. 6 (1) Brussels I Regulation Recast. If the relevant national rules do not establish jurisdiction, no access to court is given within the EU.

And most national rules do not establish such jurisdiction. General jurisdiction at the seat of the corporation will usually lie outside the European Union. And the territorial connection of intra-EU turnover used to justify the applicability of the CSDDD does not create a similar basis of general jurisdiction, because jurisdiction at the place of economic activity ("doing business jurisdiction") is alien to European legal systems. Even in the US, where this basis was first introduced, the US Supreme Court now limits general jurisdiction to the state that represents the "home" for the defendant company (*BNSF Railroad Co. v. Tyrrell*, 137 S.Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)); whether the recent decision in *Mallory v. Norfolk Southern Railway Co.,* 600 U.S. (2023) will re-open the door to doing business jurisdiction remains to be seen (see *Gardner*).

Specific jurisdiction will not exist in most cases, either. Specific jurisdiction in matters relating to tort will be of little use, as in value chain civil liability claims the place of the event giving rise to damages and the place of damage are usually outside the EU and within that third state. Some jurisdictional bases otherwise considered exorbitant may be available, such as the plaintiff's nationality (Art. 14 French Civil Code) or the defendant's assets (Section 23 German Code of Civil Procedure). Otherwise, the remaining option to seize a non-EU defendant in a Member State court is through submission by appearance according to Art. 26 Brussels I Regulation Recast.

Whether strategic joint litigation can be brought against an EU anchor defendant in order to drag along a non-EU defendant depends upon the national provisions of the EU Member States. Art. 8 (1) Brussels I Regulation Recast, which allows for connected claims to be heard and determined together, applies only to EU-defendants – for non-EU defendants the provision is inapplicable. In some Member States, the national civil procedure provisions enable jurisdiction over connected claims against co-defendants, e.g. in the Netherlands (Art. 7 (1) Wetboek van Burgerlijke Rechtsvordering), France (Art. 42 (2) Code de procédure civile) and Austria (§ 93 Jurisdiktionsnorm); conversely, such jurisdiction is not available in countries such as Germany.

Various Member State decisions have accepted claims against non-EU companies as co-defendants by means of joinder of parties. These cases have based their jurisdiction on national provisions which were applicable according to Art. 6 (1) Brussels I Recast Regulation: In *Milieudefensie* in December 2015, the Court of Appeal at the Hague held permissible an action against a Dutch anchor defendant that was joined with an action against a Nigerian company as co-defendant based on Dutch national procedural law, on the condition that claims against the anchor defendant were actually possible. The UK Supreme Court ruled similarly in its *Vedanta* decision in April 2019, wherein it found that English private international law, namely the principle of the *necessary or proper party gateway*, created a valid basis for invoking English jurisdiction over a defendant not domiciled in a Member State (with registered office in Zambia) who had been joined with an anchor defendant based in the UK. The claim was accepted on the condition that (i) the claims against the anchor defendant involve a real issue to be tried; (ii) it would be reasonable for the court to try that issue; (iii) the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) the claims against the foreign defendant have a real prospect of success; (v) either England is the proper place in which to bring the combined claims or there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place or the convenient or natural forum. The UK Supreme Court confirmed this approach in February 2021 in its *Okpabi* decision (for discussion of possible changes in UK decisions after Brexit, see *Hübner/Lieberknecht*).

In total, these decisions allow for strategic joint litigation against third-country companies together with an EU anchor defendant. Nonetheless, they do not

establish international jurisdiction within the EU for isolated actions against non-EU defendants.

4. How to Close the Enforcement Gap – *forum legis*

The demonstrated lack of access to court weakens the Directive's enforceability and creates an inconsistency between the mandatory nature of the civil liability and the lack of a firm jurisdictional basis. On a substantive level, the Directive stipulates civil liability for non-EU companies (Art. 22 CSDDD) if they are sufficiently economically active within the EU internal market (Art. 2 (2) CSDDD). Yet missing EU rules on international jurisdiction vis-à-vis third-country defendants often render procedural enforcement before an intra-EU forum impossible – even if these defendants generate significant turnover in the Union. Consequently, procedural enforcement of civil liability claims against these non-EU defendants is put at risk. The respective case law discussed does enable strategic joint litigation, but isolated actions against non-EU defendants cannot be based upon these decisions. At the same time, enforceability gaps exist with respect to EU defendants: It remains uncertain whether the courts of Member States will annul exclusive jurisdiction agreements and arbitration agreements if these undermine the application of the CSDDD.

This situation is unsatisfactory. It is inconsistent for the EU lawmaker to make civil liability mandatory in order to ensure civil enforcement but to then not address the access to court necessary for such enforcement. And it is inadequate that the (systemic) question of judicial enforceability of civil liability claims under the Directive is outsourced to the decision of the legal systems of the Member States. National civil procedural law is called upon to decide which third-country companies can be sued within the EU and how the *Ingmar* case law for EU domiciled companies will be further developed. This is a problem of uniformity – different national laws allow for different answers. And it is a problem of competence as Member State courts are asked to render decisions that properly belong to the EU level.

The CSDDD aims to effectively protect human rights and the environment in EU-related value chains and to create a level playing field for companies operating within the EU. This requires comparable enforcement possibilities for actions

based on civil liability claims that are brought pursuant to Art. 22 CSDDD against all corporations operating within the Union. The different regulatory options the EU legislature has to achieve this goal are discussed in what follows.

Doing Business Jurisdiction

A rather theoretical possibility would be to allow actions against third-country companies within the EU in accordance with the former (and perhaps revived) US case law on *doing business jurisdiction* in those cases where these companies are substantially economically active within the EU internal market. This would be consistent with the CSDDD's approach of stretching its scope of application based on the level of economic activity within the EU (Art. 2 (2) CSDDD). However, the fact that such jurisdiction has always been considered exorbitant in Europe and has even been largely abolished in the USA speaks against this development. Moreover, a *doing business jurisdiction* would also go too far: it would establish general jurisdiction, at least according to the US model, and thus also apply to claims that have nothing to do with the CSDDD.

Forum Necessitatis and Universal Jurisdiction

Another possible option would be the implementation of a *forum necessitatis* jurisdiction in order to provide access to justice, as proposed by the European Parliament Policy Department for External Relations, the European Parliament Committee on Legal Affairs and the GEDIP. However, such jurisdiction could create uncertainty because it would apply only exceptionally. Moreover, proving a "lack of access to justice" requires considerable effort in each individual case. Until now, EU law provides for a *forum necessitatis* only in special regulations; the Brussels I Regulation Recast does not contain any general rule for emergency jurisdiction. Member State provisions in this regard generally require a certain connection with the forum to establish such jurisdiction – the exact prerequisites differ, however, and will thus not be easily agreed upon on an EU level (see *Kübler-Wachendorff*).

The proposal to enforce claims under Art. 22 CSDDD by means of universal civil jurisdiction for human rights violations, which could be developed analogously to universal jurisdiction under criminal law, appears similarly unpromising; it would also go further than necessary.

Forum connexitatis

It seems more promising to implement a special case of a *forum connexitatis* so as to allow for litigation of closely connected actions brought against a parent company domiciled within the EU together with a subsidiary or supplier domiciled in a third country, as proposed by the European Parliament Policy Department for External Relations and the GEDIP. This could be implemented by means of a teleological reduction of the requirements of Art. 8 (1) Brussels I Regulation Recast with regard to third-country companies, which would be an approach more compatible with the Brussels Regulation system than the implementation of a *forum necessitatis* provision (such a solution has, for instance, been supported by *Mankowski*, in: Fleischer/Mankowski (Hrsg.), LkSG, Einl., para. 342 and the GEDIP). This would simultaneously foster harmonisation on the EU level given that joint proceedings currently depend upon procedural provisions in the national law of the Member States. Moreover, this could avoid "blame games" between the different players in the value chain (see *Kieninger*, RW 2022, 584, 589). For the implementation of such a *forum connexitatis*, existing Member State regulations and related case law (*Milieudefensie, Vedanta*, and *Okpabi*) can serve as guidance. Such a forum is not yet common practice in all Member States; thus, its political viability remains to be seen. It should also be borne in mind that the implementation of a *forum connexitatis* on its own would only enable harmonised joint actions that were brought against EU domiciled anchor defendants together with non-EU defendants; it would not enable isolated actions against third-country companies – even if they are economically active within the EU and fall within the scope of application of the CSDDD.

Forum legis

The best way to close the CSDDD enforcement gap would be introducing an international jurisdiction basis corresponding to the personal scope of application of the Directive. The EU legislature would need to implement a head of jurisdiction applicable to third-country companies that operate within the EU internal market at the level specified in Art. 2 (2) CSDDD. Effectively, special jurisdiction would be measured on the basis of net turnover achieved within the EU. This would procedurally protect the Directive's substantive regulatory objectives of human rights and environmental protection within EU-related value chains. Moreover, this would ensure a level playing field in the EU internal market.

Other than a forum premised on joint litigation, this solution would allow isolated

actions to be brought – in an EU internal forum – against non-EU companies operating within the EU. The advantage of this solution compared to a forum of necessity is that the connecting factor of net turnover is already defined by Art. 2 (2) CSDDD, thus reducing the burden of proof, legal uncertainty and any unpredictability for the parties. Moreover, this approach would interfere less with the regulatory interests of other states than a *forum necessitatis* rule, which for its part would reach beyond the EU's own regulatory space.

A *forum legis* should not be implemented only as a subsidiary option for cases in which there is a lack of access to justice, because this would create legal uncertainty. The clear-cut requirements of Art. 2 (2) CSDDD are an adequate criterion for jurisdiction via a *forum legis*. On the other hand, it should not serve as an exclusive basis of jurisdiction, because especially plaintiffs should not be barred from the ability to bring suit outside the EU. The risk of strategic declaratory actions brought by companies in a court outside the EU seems rather negligeable, and this can be avoided either by giving preference to actions for performance over negative declaratory actions, as is the law in Germany or through the requirement of recognisability of a foreign judgment, which would not be met by a foreign decision violating domestic public policy by not providing sufficient protection.

This leaves a problem, however: The CSDDD does not designate which Member State's court have jurisdiction. Since a *forum legis* normally establishes adjudicatory jurisdiction correlating with the applicable law, jurisdiction lies with the courts of the country whose law is applied. This is not possible as such for EU law because the EU does not have its own ordinary courts. The competent Member State court within the EU must be determined. Two options exist with regard to the CSDDD: to give jurisdiction to the courts in the country where the highest net turnover is reached, or to allow claimants to choose the relevant court. The first option involves difficult evidentiary issues, the second may give plaintiffs an excessive amount of choice. In either case, non-EU companies will be treated differently from EU companies on the question of the competent court – for non-EU companies, net turnover is decisive in establishing the forum, for EU-companies, the seat of the company is decisive. This difference is an unavoidable consequence resulting from extension of the scope of application of the Directive to third-country companies on the basis of net turnover.

5. Implementation

How could this *forum legis* be achieved? The most straightforward way would be to include a rule on jurisdiction in the CSDDD, which would then oblige the Member States to introduce harmonised rules of jurisdiction into national procedural law. This would be a novelty in the field of European international civil procedure law, but it would correspond to the character of the special provision on value chains as well as to the mechanism of the CSDDD's liability provision. An alternative would be to include in the Brussels I Regulation Recast a sub-category of a special type of jurisdiction under Art. 7 Brussels I Regulation Recast. This as well would be a novelty to the Brussels system, which in principle requires that the defendant be seated in a Member State (see also *Kieninger*, RW 2022, 584, 593, who favours reform of the Brussels I Regulation Recast for the sake of uniformity within the EU). This second option would certainly mesh with current efforts to extend the Brussels system to non-EU defendants (see *Lutzi/Piovesani/Zgrabljic Rotar*).

The implementation of such a *forum legis* is not without problems: It subjects companies, somewhat inconsistently with the EU legal scheme, to *de facto* jurisdiction merely because they generate significant turnover in the EU's internal market. Yet such a rule is a necessary consequence of the extraterritorial extension of the Directive to third-country companies. The unilateral character of the CSDDD is problematic. But if the CSDDD intends to implement such an extension on a substantive level, this must be reflected on a procedural level so as to enable access to court. The best way to do this is by implementing a *forum legis*. The CSDDD demonstrates the great importance of compensation of victims of human rights and environmental damage, by making the cicil liability rule internationally mandatory. Creating a corresponding head of jurisdiction for these substantive civil liability claims is then necessary and consistent in order to achieve access to court and, thus, procedural enforceability.

No Sunset of Retained EU Conflict of Laws in the UK, but Increased Risk of Sunburn

By Dr Johannes Ungerer, University of Oxford

The sunset of retained EU law in the UK has begun: the Retained EU Law (Revocation and Reform) Act 2023 received Royal Assent at the end of June. The Act will revoke many EU laws that have so far been retained in the UK by the end of 2023.

The good news for the conflict of laws is that the retained Rome I and II Regulations are not included in the long list of EU legal instruments which are affected by the mass-revocation. Both Regulations have been retained in the UK post-Brexit by section 3 of the European Union (Withdrawal) Act 2018 and were modified by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (as amended in 2020). The retained (modified) Rome I and II Regulations will thus be part of domestic law beyond the end of 2023. Yet this retained EU law must not be called by name anymore: it will be called "assimilated law" according to section 5 of the Retained EU Law (Revocation and Reform) Act 2023 (although the title of this enactment, like others, will strangely continue to contain the phrase "Retained EU Law" and will not be changed to "Assimilated Law", see section 5(5)).

Equally, the special conflict of laws provision in regulation 1(3) of the Commercial Agents (Council Directive) Regulations 1993 (as amended in 1998) is not revoked either. This is particularly interesting because these Regulations have not been updated since Brexit, which means they still refer, for instance, to "the law of the other member State".

Although international jurisdiction of UK courts is largely determined by domestic law these days, which replaced the Brussels I Recast Regulation, the Regulation's rules on jurisdiction in consumer and employment matters have been autonomously transposed into sections 15A–D of the Civil Jurisdiction and Judgments Act 1982 by the Civil Jurisdiction and Judgments (Amendment) (EU

Exit) Regulations 2019 (as amended in 2020). The mass-revocation will not affect them either, which means that they will continue to benefit consumers and employees in UK courts beyond the end of 2023.

However, a significant difference to the current situation will arise with regard to how strictly courts will continue to follow precedent on the interpretation of the "assimilated law". This matters for decisions by the Court of Justice of the EU (CJEU) as well as for UK court decisions on the interpretation of the Rome I and II Regulations (and the Commercial Agents Directive/Regulations). The concern is that continuing to apply the EU law which will not be sunsetted, but without continuing to strictly follow the established interpretations, has the potential of increasing the risk of uncertainty or, metaphorically speaking, sunburn.

So far, the risk of sunburn has been mitigated by section 6(3), (4)(a), and (5) of the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020: the existing body of CJEU decisions has remained binding post-Brexit on the Supreme Court to the same extent as the Supreme Court's own decisions. The Supreme Court can, like previously the House of Lords, depart from precedent in line with the Practice Statement [1966] 1 WLR 1234 (see *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, at [25]), but the Supreme Court is very hesitant to do so in order to maintain legal certainty and predictability. The Court of Appeal has been given a similar power to divert from CJEU case law, section 6(4)(b)(i) and (5A) of the amended European Union (Withdrawal) Act 2018. Decisions of the CJEU handed down after 2020 have in any event not been binding anymore on UK courts, section 6(1) of the amended European Union (Withdrawal) Act 2018, but it has been permitted to take them into account in the UK ("may have regard", section 6(2)).

The Retained EU Law (Revocation and Reform) Act 2023 will change how UK courts can deviate from CJEU case law and their own precedent. This will reduce the protection from uncertainty (or sunburn), which has been maintained so far.

- A UK court will in principle still be obliged to interpret "assimilated law" as established by the CJEU's "assimilated case law" (only the "retained general principles of EU law" have been omitted in the new section 6(3)(a)).
- However, the Supreme Court and the Court of Appeal will not anymore be

restricted by the ordinary domestic rules on deviation from precedent as mentioned above. Rather, according to the new section 6(5), CJEU case law will be treated like "decisions of a foreign court", which in principle are not binding. When deviating from "assimilated case law" by the CJEU, UK courts are solely instructed to have regard to "any changes of circumstances which are relevant to the retained EU case law, and the extent to which the retained EU case law restricts the proper development of domestic law."

- Furthermore, according to the newly inserted section 6(5ZA), a UK court will be permitted to depart from its own "assimilated domestic case law" (which means UK case law on "assimilated law" in contrast to "assimilated case law" by the CJEU) without the usual domestic restrictions on deviation from domestic precedent. Instead, when deviating from its own case law, the UK court will only have to consider "the extent to which the assimilated domestic case law is determined or influenced by assimilated EU case law from which the court has departed or would depart; any changes of circumstances which are relevant to the assimilated domestic case law; and the extent to which the assimilated domestic case law restricts the proper development of domestic law."

Departing from CJEU and UK case law on the Rome Regulations (and the Commercial Agents Directive) will thus become a lot easier, at the expense of "assimilated" legal certainty and predictability. The time at which the change by the Retained EU Law (Revocation and Reform) Act 2023 will become effective has yet to be determined in line with its section 22(3).

Interestingly, in the above-mentioned Civil Jurisdiction and Judgments Act 1982, section 15E(2) explicitly prescribes that the jurisdictional rules for consumers and employees in sections 15A–D are to be interpreted with regard to CJEU principles on consumer and employee jurisdiction under the Brussels regime. More precisely, "regard is to be had to any relevant principles laid down" before the end of 2020 by the CJEU in connection with the Brussels jurisdictional rules; by contrast, the phrases "retained EU law" or "retained case law" are not mentioned. Since the Retained EU Law (Revocation and Reform) Act 2023 does not revoke any rules of the Civil Jurisdiction and Judgments Act 1982 or the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, this specific mandate to have regard to CJEU principles when interpreting the retained jurisdictional rules

will be maintained in its own right beyond the end of 2023. And since the Civil Jurisdiction and Judgments Act 1982 does not use the technical language of retained EU law or retained case law, whose binding character would be affected by the Retained EU Law (Revocation and Reform) Act 2023, the retained jurisdictional rules should not suffer from uncertainty and sunburn. Yet, despite this reasoning, the interpretation of the consumer and employee jurisdictional rules might in practice be condemned to the same fate as the assimilated case law that will be up for grabs.

Many thanks to Professor Andrew Dickinson for his comments on an earlier draft.

The CJEU on Procedural Rules in Child Abduction Cases: private international law and children's rights law

Comment on CJEU case *Rzecznik Praw Dziecka e.a., C-638/22 PPU*, 16 February 2023)

Written by Tine Van Hof, post-doc researcher in Private International Law and Children's Rights Law at the University of Antwerp, previously published on EU live

The Court of Justice of the EU has been criticised after some previous cases concerning international child abduction such as *Povse* and *Aguirre Zarraga* for prioritising the effectiveness of the EU private international law framework (i.e. the Brussels IIa Regulation, since replaced by Brussels IIb, and the principle of mutual trust) and using the children's rights law framework (i.e. Article 24 of the EU Charter of Fundamental Rights and the principle of the child's best interests) in a functional manner (see e.g. Silvia Bartolini and Ruth Lamont). In *Rzecznik Praw Dziecka* the Court takes both frameworks into account but does not

prioritise one or the other, since the frameworks concur.

Rzecznik Praw Dziecka e.a. concerns Article 388^1(1) of the Polish Code of Civil Procedure, which introduced the possibility for three public entities (Public Prosecutor General, Commissioner for Children's Rights and Ombudsman) to request the suspension of the enforcement of a final return decision in an international child abduction case. Such a request automatically results in the suspension of the enforcement of the return decision for at least two months. If the public entity concerned does not lodge an appeal on a point of law within those two months, the suspension ceases. Otherwise, the suspension is extended until the proceedings before the Supreme Court are concluded. The Court of Justice was asked to rule on the compatibility of this Article of the Polish CCP with Article 11(3) of the Brussels IIa Regulation and with Article 47 of the EU Charter.

Private international law and children's rights law

As Advocate General Emilou emphasised in the Opinion on *Rzecznik Praw Dziecka*, (see also the comment by Weller) child abduction cases are very sensitive cases in which several interests are intertwined, but which should eventually revolve around the best interests of the child or children. In that regard, the Hague Child Abduction Convention, as complemented by Brussels IIa for intra-EU child abduction situations, sets up a system in which the prompt return of the child to the State of habitual residence is the principle. It is presumed that such a prompt return is in the children's best interests in general (*in abstracto*). This presumption can be rebutted if one of the Child Abduction Convention's exceptions applies. Next to these instruments, which form the private international law framework, the children's rights law framework also imposes certain requirements. In particular, Article 24(2) of the EU Charter, which is based on Article 3 of the UN Convention on the Rights of the Child, requires the child's best interests (*in abstracto* and *in concreto*) to be a primary consideration in all actions relating to children. The Court of Justice analyses Article 388^1(1) of the Polish CCP in light of both frameworks. The Court's attentiveness towards private international law and children's rights law is not new but should definitely be encouraged.

The private international law framework

The Court of Justice recalls that, for interpreting a provision of EU law, one should take into account that provision's terms, its context and the objectives pursued by the legislation of which it forms part. To decide on the compatibility of the Polish legislation with Article 11(3) Brussels IIa, the Court of Justice thus analyses the terms of this provision, its context (which was said to consist of the Child Abduction Convention) and the objectives of Brussels IIa in general. Based on this analysis, the Court of Justice concludes that the courts of Member States are obliged to decide on the child's return within a particularly short and strict timeframe (in principle, within six weeks of the date on which the matter was brought before it), using the most expeditious procedures provided for under national law and that the return of the child may only be refused in specific and exceptional cases (i.e. only when an exception provided for in the Child Abduction Convention applies).

The Court of Justice further clarifies that the requirement of speed in Article 11(3) of Brussels IIa does not only relate to the procedure for the issuing of a return order, but also to the enforcement of such an order. Otherwise, this provision would be deprived of its effectiveness.

In light of this analysis, the Court of Justice decides that Article 388^1(1) of the Polish CCP is not compatible with Article 11(3) Brussels IIa. First, the minimum suspension period of two months already exceeds the period within which a return decision must be adopted according to Article 11(3) Brussels IIa. Second, under Article 388^1(1) of the Polish CCP, the enforcement of a return order is suspended simply at the request of the authorities. These authorities are not required to give reasons for their request and the Court of Appeal is required to grant it without being able to exercise any judicial review. This is not compatible with the interpretation that Article 11(3) Brussels IIa should be given, namely that suspending the return of a child should only be possible in 'specific and exceptional cases'.

The children's rights law framework

After analysing the private international law framework, the Court of Justice addresses the children's rights law framework. It mentions that Brussels IIa, by aiming at the prompt adoption and enforcement of a return decision, ensures respect for the rights of the child as set out in the EU Charter. The Court of

Justice refers in particular to Article 24, which includes the obligation to take into account, respectively, the child's best interests (para 2) and the need of the child to maintain personal relations and direct contact with both parents (para 3). To interpret these rights of the child enshrined in the EU Charter, the Court of Justice refers to the European Court of Human Rights, as required by Article 52(3) of the EU Charter. Particularly, the Court of Justice refers to *Ferrari v. Romania* (para 49), which reads as follows:

'In matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation. Such cases require urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them.'

Unfortunately, the Court of Justice does not explicitly draw a conclusion from its analysis of the children's rights law framework. Nevertheless, it can be concluded that the Polish legislation is also incompatible with the requirements thereof. In particular, it is incompatible with both the collective and the individual interpretation of the child's best interests.

On a collective level, Article 388^1(1) of the Polish CCP is contrary to the children's best interests since it does not take into account that international child abduction cases require 'urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them' (as has also been acknowledged by the ECtHR as being in the best interests of children that have been abducted in general).

On an individual level, it is possible that an enforcement of the return decision is contrary to the child's best interests and that a suspension thereof is desirable.

However, Article 388^1(1) of the Polish CPP is invaluable in that regard (see also Advocate General Emilou's Opinion on *Rzecznik Praw Dziecka*, points 77-92). First, the Article exceeds what would be necessary to protect a child's individual best interests. Indeed, under that Article, the authorities can request the suspension without any motivation and without any possibility for the courts to review whether the suspension would effectively be in the child's best interests. More still, the provision is unnecessary to protect a child's individual best interests. Indeed, a procedure already existed to suspend a return decision if the

enforcement would be liable to cause harm to the child (Article 388 of the Polish CCP).

Conclusion

In this case, the private international law and the children's rights law framework concurred, and both preclude the procedural rule foreseen in Article 388^1(1) of the Polish CCP. The Court of Justice can thus not be criticised for prioritising the EU private international law framework in this case. Nevertheless, the Court of Justice could have been more explicit that the conclusion was reached not only based on the private international law framework but also on the children's rights law framework.

Finally, the Brussels IIb Regulation, which replaced Brussels IIa as from 1 August 2022, made some amendments that better embed and protect the child's best interests. It provides *inter alia* that Member States should consider limiting the number of appeals against a return decision (Recital 42) and that a return decision 'may be declared provisionally enforceable, notwithstanding any appeal, where the return of the child before the decision on the appeal is required by the best interests of the child' (Article 27(6)). While the Polish provision was thus already incompatible with the old Regulation, it would certainly not be compatible with the new one. To prevent future infringements, legislative reform of the Polish CCP seems inevitable.

Out Now: Fabrizio Marrella, "Diritto del commercio internazionale / International

Business Law", 3rd edition 2023

The third edition of Fabrizio Marrella's textbook on international business law has recently published by Wolters Kluwers/Cedam.

The author (Vice-Rector and Chair of International Law at "Cà Foscari" University of Venice, Italy) has kindly provided the following summary for our readers:

> *After an historical introduction and a clear systematic analysis of key actors and sources of International Business Law, the book focuses on transnational contracts and commercial relationships of companies by deepening international sales (including the first applications of Incoterms ® 2020), contracts of international transport, insurance, commercial distribution, payments and bank guarantees. The leading methodology used by the Author is that of private international law and best operational practices.*
>
> *The book also sets out the regulation of foreign direct investment in the light of the latest new regulatory and case-law developments. In the final part, the work examines, in one section, ADR mechanisms together with international arbitration and, in the final section, the most relevant international civil*

procedure rules for businesses.

The book can be found at the publisher's website here.

Reappreciating the Composite Approach with Anupam Mittal v Westbridge II

Written by: Aditya Singh, *BA.LL.B. (Hons) student at the National Law School of India University(NLSIU), Bengaluru and line editor at the National Law School Business Law Review (NLSBLR)*

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.

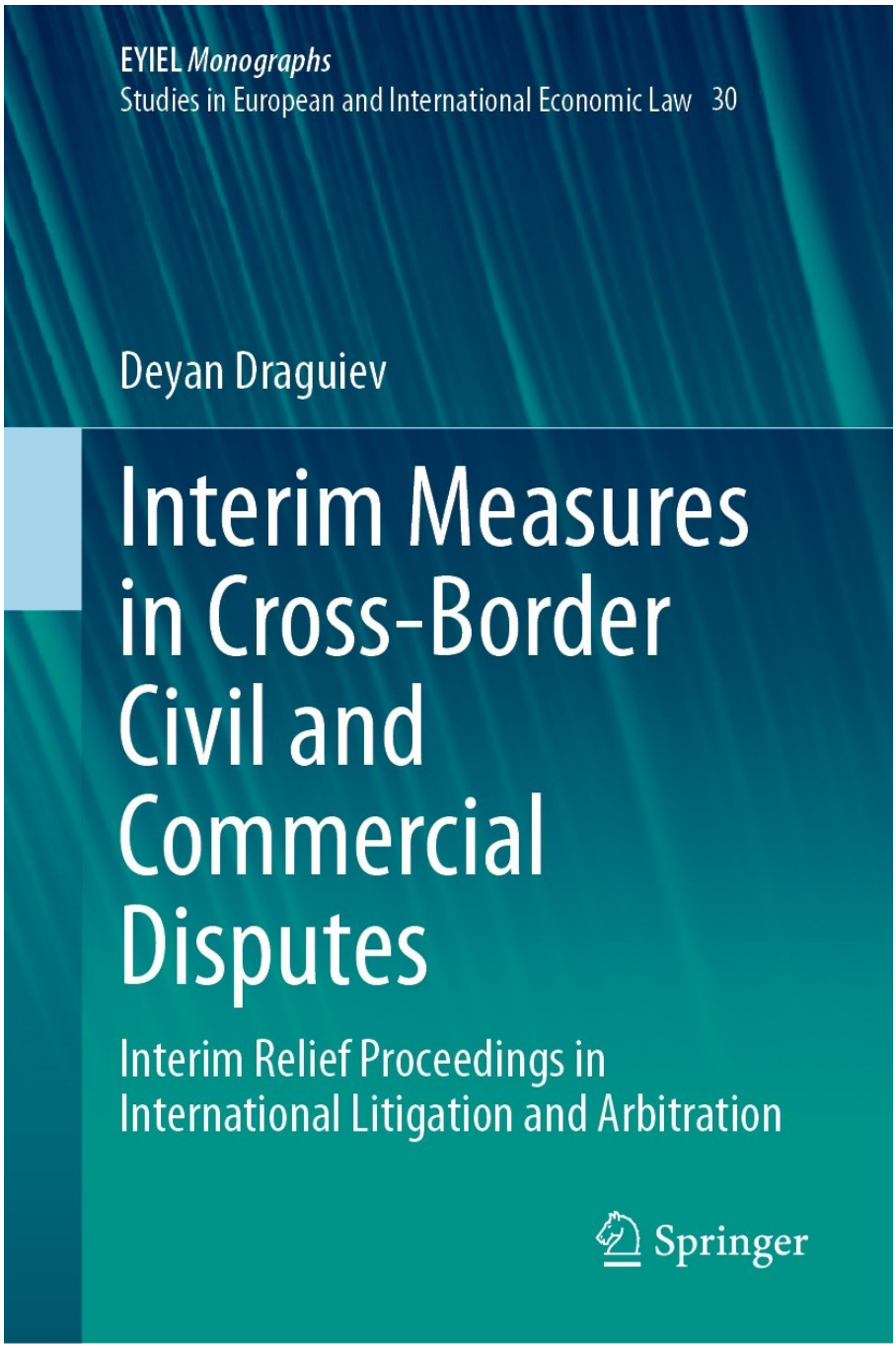
[3] Martin Hunter and others, *Redfern and Hunter on International Arbitration, (6th edn, 2015 OUP) [2.101 – 2.104].*

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

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

Out Now: Interim Measures in Cross-Border Civil and Commercial Disputes

A new volume by Deyan Draguiev on Interim Measures in Cross-Border Civil and Commercial Disputes, based on his PhD thesis supervised by Peter Mankowski, has just been published with Springer.



The blurb reads as follows:

> *The book focusses on applying a holistic overview of interim measures and associated procedures in the context of cross-border private law (civil and commercial) disputes that are the subject of international litigation and arbitration proceedings. It reexamines key features of said problem and outlines novel findings on interim relief in the area of international dispute resolution. The book analyses the rules of EU law (EU law regulations such as the Regulation Brussels Ibis and the rest of the Brussels regime) as the single system of cross-border jurisdictional rules, as well as the rules of international arbitration (both commercial and investment). In the process, it conducts a*

complete mapping of interim measures problems and explores the criteria for granting relief under national laws. For this purpose, it includes an extensive comparative law overview of many jurisdictions in Europe, Asia, Africa, the Americas, etc., to reveal common standards for granting interim relief.

Interim relief is a salient problem in dispute resolution, and serious international disputes usually require requests for such measures. This makes a more complete understanding all the more important. For scholars and practitioners alike, there are various ways to seek relief; precisely this complexity calls for a more complex and multilayered analysis, which does not (as is usually the case) adopt the perspective of either litigation or arbitration, but instead weighs the pros and cons and considers the viability and reliability of the different options, viewed from all angles.

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.