A New Precedent in Contract Conflicts: Decoding the Tyson v. GIC Ruling on Hierarchy Clauses

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Introduction

The recent decision of the UK High Court ("**Court**") in *Tyson International Company Limited* ("**Tyson**") *v. General Insurance Corporation of India* ("**GIC**") sets a critical precedent for cases that lie at the intersection of arbitration, contractual hierarchy, and judicial intervention through anti-suit injunctions. The principal issue in the case revolved around the harmonious application of two conflicting dispute resolution clauses contained in two separate agreements pertaining to the same transaction. While one provided for dispute settlement through arbitration seated in New York, the other was an exclusive jurisdiction clause that provided for dispute settlement by England and Wales courts. To resolve this apparent conflict between the two clauses, the Court relied on a confusion clause (also known as a hierarchy clause) in the parties' agreement to rule that the exclusive jurisdiction clause, in favour of England and Wales courts, prevails over the arbitration clause. Based on this conclusion, the Court issued an anti-suit injunction against GIC from arbitrating the dispute in New York.

Factual Background

Tyson entered into a reinsurance agreement with General Insurance Corporation of India ("**GIC**"), a state-owned-entity. The transaction involved two agreements; a Market Reforms Contract ("**MRC**") and second Facultative Certificates ("**Certificates**"). The MRC contained an explicit choice of law and an exclusive jurisdiction clause, submitting disputes to English courts to be governed by the laws of England and Wales (**"English DRC"**). However, the subsequently issued Certificates introduced an arbitration clause referring disputes to arbitration in New York to be governed by the laws of New York (**"Arbitration Clause"**). A pivotal provision, termed the "Confusion Clause," was embedded within the Certificates, stipulating that in the event of a confusion, the MRC would take

precedence over the Certificates.

The dispute arose when GIC claimed that Tyson had undervalued certain commercial numbers on which the insurance premium was based. Therefore, GIC sought to initiate arbitration in New York pursuant to the arbitration clause in the Certificates. In response, Tyson approached the High Court for an anti-suit injunction against the arbitration, arguing that pursuant to the English DRC, English courts would have exclusive jurisdiction over any dispute emanating from the transaction.

The Court stressed on the importance of circumspect judicial intervention when interfering in arbitration. However, considering the existence of the "confusion clause", Tyson argued that the arbitration agreement did not come into existence. Therefore, the principal question before the Court was: what is the effect of the confusion clause when interpreting the two agreements? If the confusion clause had the effect of a hierarchy clause (as argued by Tyson) and hence gave precedence to the MRC, the arbitration agreement wouldn't come into existence and the anti-suit injunction would be granted. On the other hand, if the confusion clause was merely to give meaning to confusing terms in the Certificates (as argued by GIC), the two agreements would be read harmoniously without giving preference to either. GIC argued this can be done in two ways. First, the conflicting clauses could be read as an agreement between parties to treat the arbitration as a condition precedent to raising any claims before the English Courts. Or in the alternative, the two agreements would be read together to mean that English Courts will have jurisdiction to supervise the New York arbitration. Either ways, the arbitration agreement would be valid and hence the anti-suit injunction should fail.

Submissions of Parties

The Court summarised the principles governing anti-suit injunctions in *Times Trading Corp v National Bank of Fujairah*[1] to hold that an anti-suit injunction can be granted in all cases where it is just and convenient to do so.[2] However, such power must be exercised with circumspection where the claimant can demonstrate a negative right to not be sued. Tyson can establish such a right if it can demonstrate that an arbitration agreement was not concluded between the parties. Crucial to this conclusion would be determining the effect of the confusion clause in the Certificates.

The judge cited various authorities; specifically *Surrey County Council v Suez Recycling and Recovery Surrey Limited*[3], to discuss principles of contractual construction and summarised the position in that the role of the court is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. GIC made the following submissions in this regard: First, the phrase "confusion" in the clause refers to obscurity or uncertainty in the meaning of provisions and does not refer to a conflict or a contradiction. They relied on the meaning of the word "confusion" in the Oxford dictionary to support this premise and submitted that the clause operates to address any uncertainty that may arise when reading the provisions of the Certificates. Such uncertainties must then be addressed by interpreting the provisions in light of the MRC. However, the clause does not operate to address a conflict between the MRC and the Certificates, for such an instance is a "conflict" and not a "confusion". Lastly, they submitted that there is no confusion because the arbitration clause in the Certificates should be read as a *Scott v. Avery*[4] clause[5] or, a clause conferring English Courts with supervisory jurisdiction over the New York arbitration.

Tyson submitted that by using the phrase "takes precedence" in the confusion clause, the clear objective intent of the parties is to create a hierarchy between the MRC and Certificates whereby in case of a confusion, the terms contained in the MRC will prevail over those in the Certificates. They further submitted that GIC is taking a very narrow interpretation of the word "confusion" and is reading it in isolation of the remainder of the clause to arrive at its conclusion. The word "confusion", when read in the context of the provision, has a broader purport to cover circumstances of contradicting terms between the MRC and the Certificates that create confusion regarding which clause will prevail. Thus the clause operates as a hierarchy clause whereby it clears the confusion by giving precedence to clauses in the MRC.

The Judgement

The Judge agreed with the submissions of Tyson and found that GIC's interpretation of "confusion" was too narrow to reflect an objective meaning of the language used by parties. He ruled that confusion can also arise where there are two clauses within a contract which are inconsistent such that there is confusion as to the intent of the parties as to their respective rights and

obligations under the contract because of such inconsistency. Second, when the MRC grants exclusive jurisdiction to English Courts and the Certificates provide for disputes to be resolved through arbitration in New York, there is an obvious confusion as to which dispute resolution clause should apply. The judge noted that English courts must give generally give effect to an arbitration clause but this is a case of routine construction of contracts wherein courts cannot rewrite the parties' agreement. Accordingly, when parties have explicitly agreed that the MRC must take precedence in case of a confusion, such intention must be given effect. The Court opined that any attempt to resolve the confusion through any other means such as viewing arbitration as a condition precedent to any right of action or allowing the arbitration to continue under the supervision of English Courts would amount to rewriting the contract. As a sequitur, the court ruled in favour of Tyson and granted an anti-suit injunction against GIC.

GIC's Attempt to Appeal

In response to the judgment, GIC sought permission to appeal on two grounds (i) the court misconstrued the Confusion Clause in the Certificates and (ii) the court misconstrued the MRC and the Certificates in concluding that the English Court did not have jurisdiction over New York arbitration. When considering whether to grant an appeal, the test is whether GIC has a real prospect of success in relation to any of its grounds.

In order to discharge this burden, GIC made the following arguments: (1) the 'confusion' language is novel and has not been interpreted by courts in the past which gives it considerable scope to argue about its meaning; (2) the Certificates were contractual documents intended to supersede the MRC and not merely administrative documents; and (3) the Court has failed to consider the strong policy adopted by English courts in favour of giving effect to arbitration agreements whereby the conflict should be interpreted in a manner that upholds the agreement to arbitrate. Tyson in response argued that (1) the Court's construction of the word "confusion" gives effect to the meaning of the word in light of the clause as a whole whereas GIC's construction focuses only on the word 'confusion' in isolation of the entire clause. (2) GIC's interpretation of the Confusion Clause runs against commercial common sense; for an overriding effect would essentially nullify many of the provisions contractually agreed to in the

MRC. (3) judicial precedents[6] that have ruled in favour of arbitration by resolving potential conflicts between contractual provisions lacked a hierarchy clause necessitating the courts to engage in the endeavour of contractual interpretation. In this case, where a hierarchy clause exists, it is not a matter of resolving conflicts by applying judicial standards of interpreting contracts but one giving effect to the parties' method of resolving confusion between conflicting provisions.

Based on the submissions, the Judge concluded that GIC did not have a realistic prospect of success on either of its grounds. At the outset, although one could accept GIC's construction of the Confusion Clause, it still lacks the realistic prospect of persuading the Court of Appeal to eschew the construction adopted by the Court and instead acceding to GIC's construction. Finally, the Confusion Clause in this case is a relevant factor that distinguishes this case from previous cases favouring arbitration because it operates as a hierarchy clause to mitigate any confusion when reading the Certificates and the MRC together. Since the parties have contractually agreed to the hierarchy clause when resolving any confusion, the court must give effect to the clause when resolving conflicts and cannot apply its own principles of interpreting conflicting terms of a contract; for any such attempt would amount to rewriting the parties' agreement. Therefore, even the second ground lacks a realistic prospective of succeeding before the court of appeals. Since both the grounds for appeal lacked a realistic prospective of succeeding, the application for leave to appeal was refused.

Key Takeaways and Implications

The said ruling in underscores the Court's role in upholding contractual intention of parties when resolving conflicts between competing dispute resolution clauses. By affirming the primacy of the Market Reform Contract through the Confusion Clause, the court reinforced the principle that hierarchy clauses serve as decisive mechanisms in contractual interpretation. Furthermore, the court's refusal to grant leave to appeal solidifies the precedent that courts will not rewrite contracts but will instead give effect to unambiguous terms agreed upon by parties. This case sets as an important judicial precedent for interpreting confusion clauses and strengthens the predictability of contractual enforcement in commercial agreements. As a takeaway, when drafting multiple contracts for

the same transaction, it is worth considering the harmonious impact of differing clauses in the various agreements. Parties, must discuss their commercial objectives and have a clearer communication of their intended outcomes before agreeing to multiple dispute resolution clauses that cover the same transaction.

[1] Times Trading Corp v National Bank of Fujairah (Dubai Branch) [2020] EWHC 1078 (Comm)

[2] Girish Deepak, 'ANALYSIS: UK HIGH COURT ISSUES ANTI-SUIT INJUNCTION AGAINST NEW YORK-BASED COURT ANDARBITRATION PROCEEDINGS IN DISPUTE INVOLVING INDIAN STATE-OWNED INSURANCE COMPANY' (IA Reporter, 27 February 2025) <https://www.iareporter.com/articles/analysis-uk-high-court-issues-anti-suit-injunction-against-new-york-based-court-and-arbitration-proceedings-in-dispute-involving-indian-state-owned-insurance-company/> accessed 11 March 2025

[3] Surrey County Council v Suez Recycling and Recovery Surrey Limited [2021] EWHC 2015 (TCC)

[4] Scott v Avery (1856) 5 HL Cas 811

[5] Keren Tweeddale, Andrew Tweeddale, 'Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees' [2011] 77(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, pp. 423 – 427

[6]Sulamerica CIA Nacional de Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWHC 42 (Comm), Surrey County Council v Suez Recycling and Recovery Surrey Limited. [2021] EWHC 2015 (TCC)

Australian Federal Court Backs

India on Sovereign Immunity: Another Twist in the Devas v. India Saga

by Shantanu Kanade, Assistant Professor, Dispute Resolution, Jindal Global Law School, India

The Federal Court of Australia ("**Federal Court**"), in its recent judgement in the *Republic of India v. CCDM Holdings, LLC*[1] ("**Judgement**"), held that the Republic of India ("**India**") was entitled to jurisdictional immunity from Australian Courts in proceedings seeking recognition and enforcement of foreign arbitral awards dealing with disputes arising from 'non-commercial' legal relationships. The Court's judgment was rendered with respect to an appeal filed by India against an **interlocutory judgement** of a primary judge of the same court, rejecting India's sovereign immunity claim.

Background of the Dispute

Three Mauritian entities of the Devas group ("**Original Applicants**") had commenced arbitration proceedings in 2012 under the 1998 India-Mauritius BIT, impugning India's actions with respect to an agreement for leasing of space spectrum capacity entered between Devas Multimedia Private Limited (an Indian company in which the Original Applicants held shares) and Antrix Corporation Limited (an Indian state-owned entity). In 2011, India's Cabinet Committee on Security decided to annul the said agreement, citing an increased demand for allocation of spectrum towards meeting various military and public utility needs ("**Annulment**"). The arbitration proceedings that followed culminated in a jurisdiction and merits award in 2016[2] and a quantum award in 2020 ("**Quantum Award**")[3]. The Original Applicants have since sought to enforce the Quantum Award against India in different jurisdictions, discussed **here**.[4]

Proceedings Before the Primary Judge

The Original Applicants commenced proceedings before a primary judge of the

Federal Court ("**Primary Judge**") in April 2021 for recognition and enforcement of the Quantum Award. In May 2023, the Original Applicants were substituted with three US entities of the Devas Group which were respectively assignees of each of the Original Applicants (collectively the "**Applicants**").

India asserted that it was immune to the jurisdiction of the Federal Court under section 9 of the Foreign State Immunity Act, 1985 ("**Act**"), which states: "*Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.*" An exception to this general rule of immunity is provided in section 10(1), which states: "*A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.*" Section 10(2) further provides that a State may submit to jurisdiction "*by agreement or otherwise*". The Applicants argued that by ratifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**Convention**"), India has submitted to the jurisdiction of Australian courts by agreement within the meaning of Section 10(1) and (2) of the Act in relation to proceedings for recognition and enforcement of foreign arbitral awards.

In deciding whether India has waived its immunity, the Primary judge invoked the judgement of the High Court of Australia ("**High Court**) in *Kingdom of Spain v Infrastructure Services* ("***Spain v. Infrastructure Services***")[5], which dealt with a similar claim of jurisdictional immunity by Spain with respect to enforcement of an ICSID Convention award. Observing that that the "*standard of conduct for submission by agreement under Section 10(2) requires either express words or an implication arising clearly and unmistakably by necessity from the express words used*", the Primary Judge held that ratification of the Convention by India amounts to a "*clear and unmistakable necessary implication*" that it has agreed to submit to the jurisdiction of Australian courts as per Section 10(2).[6] The Primary Judge opined that permitting India to take a sovereign immunity defence would be inconsistent with Article III of the Convention, which requires all Contracting States to "*recognize arbitral awards as binding and enforce them*".[7]

The Primary Judge noted that India had made a commercial reservation to the Convention, per which it would "*apply the Convention only to differences arising out of legal relationships [. . .] which are considered as commercial under the Law of India.*" ("**Commercial Reservation**"). However, he did not consider this

to be relevant to the instant case as enforcement of the Quantum Award was sought in Australia, which had made no such reservation.[8]

The Primary Judge thus rejected India's claim to jurisdictional immunity, while granting leave to appeal to the Full Court of the Federal Court ("**Full Court**").

The Full Court Judgement

India appealed the judgement of the Primary Judge to the Full Court, contending that he erred in rejecting India's plea on jurisdictional immunity. The Full Court framed two issues for consideration: (1) by ratifying the Convention, did India waive foreign state immunity in respect of enforcement of an award that is generally within the scope of the Convention but excluded by its Commercial Reservation ("**Issue 1**"), and (2) is the Quantum Award outside the scope of India's Commercial Reservation? ("**Issue 2**").[9]

On Issue 1, India asserted that it had not submitted to the jurisdiction of Australian courts with respect to proceedings for recognition and enforcement of awards that fell outside the scope of its Commercial Reservation. The Applicants submitted that the Commercial Reservation is a unilateral reservation that does not oblige other contracting States to the Convention ("**Contracting States**") to limit recognition and enforcement of such awards in the same manner.

In considering these submissions, the Full Court undertook a detailed analysis of the rules set out in the Vienna Convention on the Law of Treaties ("**VCLT**") that deal with the legal effects of reservations made by a State while expressing its consent to bound by a treaty. The Court observed that as the Commercial Reservation is a reservation "*expressly authorised*" by Article I (3) of the Convention, it falls within the terms of Article 20(1) of the VCLT and does not require any subsequent acceptance by other Contracting States. To determine the legal effects of the Commercial Reservation, the Court turned to Article 21 of the VCLT, read with the *Guide to Practice on Reservations to Treaties* published by the International Law Commission. Based on the foregoing analysis, the Court concluded that "*the effect of a reservation is that between the reserving and accepting state (which in the case of the New York Convention is all other states), the reservation modifies the provision of the treaty to the extent of the reservation for each party reciprocally (. . .).*"[10] Applying the said

understanding, the Full Court opined that obligations under the Convention undertaken towards or by a Contracting State that has made a commercial reservation are limited by such reservation. Both India and Australia thus had no obligation towards each other to enforce awards that do no not pertain to "commercial" relationships under Indian law.[11]

The Full Court then considered whether India's ratification of the Convention, qualified by its Commercial Reservation, entails a "*clear and unmistakable necessary implication*" that it has waived its immunity from Australian courts (as per the standard articulated in *Spain v. Infrastructure Services*). The Court found that no such implication arises as India's ratification of the Convention subject to the Commercial Reservation is "*a sufficiently (un)equivocal expression of India's intention not to waive foreign State immunity in proceedings enforcing the Convention in respect of non-commercial disputes (. . .).*" [12]

Despite the parties not contesting Issue 2, the Full Court determined the issue for the sake of completeness of legal analysis. Interestingly, given the absence of evidence on what constitutes "commercial" relationships under Indian law, the Full Court approached the question of whether the Quantum Award fell within the scope of the Commercial Reservation from the perspective of Australian law (following case law from the High Court[13]). In doing so, the Court considered Section 11 of the Act, which provides for a "commercial transaction" exception to foreign State immunity. While acknowledging that considerations under Section 11 and those concerning India's Commercial Reservation are different, the Full Court opined that there is a significant overlap between the two and proceeded to analyse the Quantum Award under Section 11. The Applicants had invoked the exception under Section 11 as a separate ground before the Primary Judge, which he rejected on the ground that the Annulment "*was made by the body vested with the highest form of executive policy-making in India, and was stated to be for reasons of public policy*" and was not thus not a "commercial transaction". Reiterating the Primary Judge's reasoning, the Full Court concluded that the Quantum Award is not an award dealing with differences arising from a "commercial" relationship.[14]

It is interesting to consider if the court's approach would have been any different if it were answering this question from an Indian law perspective. The position under Indian law on whether awards rendered in investor-State arbitrations ("**Investment Awards**") can be considered as pertaining to "commercial"

relationships is ambiguous. Of particular relevance are two Delhi High Court judgements, in which the court opined that Investment Awards cannot be considered "commercial" for the purposes of enforcement under Part II of the Arbitration and Conciliation Act (which implements the Convention in India).[15] Critics of these judgements, on the other hand, have emphasised that there is enough basis in Indian law and policy to suggest that Investment Awards are commercial in nature. Perhaps the strongest argument in this regard is that India's 2016 Model BIT expressly states that Investment Awards "*shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention*."[16]

Reflections on the Judgement

The Applicants have filed a special leave to appeal the Full Court judgement ("**Judgement**") to the High Court. The reflections shared below are thus subject to a potential reconsideration of the Judgement by the High Court.

Firstly, prevailing uncertainty regarding enforceability of Investment Awards in India (as discussed above) is what has prompted investors such as Devas to seek enforcement of such awards in other jurisdictions. In this regard, the Judgement could render Australia an unfavourable enforcement jurisdiction for Investment awards to which India is a party. This is because India could invoke jurisdictional immunity in all future enforcement proceedings until the ambiguity concerning the commercial nature of Investment Awards under Indian law is resolved (either through legislative action or a Supreme Court ruling).

Secondly, this Judgement may have significant implications for enforcement in Australia of all Investment Awards not rendered under the ICSID Convention and thus subject to enforcement under the Convention ("**Convention Awards**"). *Spain v. Infrastructure Services* has settled the position that jurisdictional immunity is not available to a foreign State under Australian law with respect to enforcement of ICSID Convention awards. This Judgement, however, casts a shadow of doubt on the enforceability of Convention Awards in Australia by leaving the door open for other Contracting States that have made a commercial reservation to the Convention to invoke jurisdictional immunity in enforcement proceedings for such awards.

Given its likely implications, it is no surprise that the Judgement has come in for criticism by some commentators[17] who have highlighted the following issues: (1) the Full Court's approach to commerciality of Investment Awards is inconsistent with that of courts in comparable jurisdictions such as the US and Canada, which have enforced Convention Awards despite these States having made a commercial reservation to the Convention, and (2) the characterisation of the Quantum Award as 'non-commercial' is contrary to the wide interpretation of term "commercial" envisaged in the UNCITRAL Model Law[18], which has the force of law in Australia.[19]

All stakeholders will now have to wait and watch how the High Court, if and when it takes up the appeal, deals with the Full Court's findings.

[1] *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2 ("**Judgement**").

[2] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. the Republic of India*, PCA Case No. 2013-09, UNCITRAL ("**CC/Devas Arbitration**"), Award on Jurisdiction and Merits (25 July 2016).

[3] CC/Devas Arbitration, Award on Quantum (13 October 2020).

[4] Jeanne Huang, *The Indian Satellite Saga and Retaliation: Recognizing the Supreme Court of India's Judgment Abroad?*, Coonflictoflaws.net, https://conflictoflaws.net/2024/the-indian-satellite-saga-and-retaliation-recognizing-the-supreme-court-of-indias-judgment-abroad/#_edn1.

[5] *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11.

[6] *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266, ¶ 51 ("**Primary Judgement**").

[7] Primary Judgement, ¶43.

[8] Primary Judgement, ¶58.

[9] Judgement, ¶54.

[10] Judgement, ¶67.

[11] Judgement, ¶68.

[12] Judgement, ¶72.

[13] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54.

[14] Judgement,¶82.

[15] *Union of India v. Vodafone Group,* 2018 SCC OnLine Del 8842, ¶¶ 90-91; *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors*, SCC OnLine Del 6755, ¶¶ 29-30.

[16]Model Text for the Indian Bilateral Investment Treaty (2016), Article 27.5, https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf.

[17] Micheal Lee, *Check for NYC Reservations: Federal Court of Australia Affirms India's Sovereign Immunity Against Recognition and Enforcement of Non-ICSID Arbitral Award*, Steptoe Clients Alerts (26 March 2025), https://www.steptoe.com/en/news-publications/check-for-nyc-reservations-federal-court-of-australia-affirms-indias-sovereign-immunity-against-recognition-and-enforcement-of-non-icsid-arbitral-award.html?tab=overview.

[18] UNCITRAL Model Law on International Commercial Arbitration (1985), Article I(1), footnote 2 states as follows: "*The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. [. . .].*"

[19] International Arbitration Act 1974, Section 16(1).

Finder on the Supreme People's

Court’s Notice on Foreign State Immunity Procedures



The news about the Supreme People’s Court of the People’s Republic of China issuing the Notice on Procedural Matters Related to Civil Cases Involving Foreign State Immunity has been previously reported on this blog.

Following this significant development, Professor Susan Finder, a distinguished Scholar in Residence at Peking University School of Transnational Law, has kindly shared her insights on the matter. Her post was originally published on the Supreme People’s Court Monitor. Given its valuable contribution, we decided to repost it here.

Our sincerest thanks to Professor Susan Finder for her thoughtful analysis and generosity in sharing her thoughts.

At the end of March, the Supreme People’s Court (SPC) issued procedures to

implement China's Foreign State Immunity Law (the Law) in the form of a "Notice on Procedural Matters in Civil Cases Involving Foreign State Immunity" (关于涉外国国家豁免民事案件相关程序事项的通知 – *Guanyu she waiguo guojia huomian minshi anjian xiangguan chengxu shixiang de tongzhi*) (Notice). That law has been in force since the beginning of 2024. Consistent with its practice, the SPC published a press release along with the text of the notice. The press release, in the form of the head of the SPC's #4 Civil Division's answers to reporters' questions, provides useful background*. I surmise that the press release is an edited version of materials submitted to SPC leadership for approval (as described in my 2024 article)*. I had anticipated that the SPC would do so, after additional research and soliciting comments *from both inside and outside the court system* but had guessed that a notice would be issued in 2024. Although the notice does not so state, I surmise that foreign state immunity cases will be considered "important and difficult" and therefore subject to special internal procedures. See Professor William Dodge's article for comparisons to US law and comments on the Law. Professor Huo Zhengxin provides another perspective. This post summarizes the major points of the notice, *with my comments.*

1. The general rule is that foreign governments and their property have immunity, with exceptions as set out in the Foreign State Immunity Law. The press release usefully makes clear that Article 1 of the Notice requires that a plaintiff filing a civil lawsuits against a foreign state as a defendant or third party, must list in the complaint the specific provisions of the Law the lawsuit is based on, and explain which exception it falls into for the court to review. The court also has the responsibility to clarify (释明 – *Shiming*) the complaint in the process of receiving the complaint. *"Clarify/clarification" here is a term in Chinese Civil Procedure Law, analogous to a judge's right in other civil legal systems–the "right to ask, suggest to or require the parties to clarify or supplement their ambiguous, insufficient or improper claims, submissions or evidence."* If the plaintiff still fails to set out the legal basis after the court's clarifications, the plaintiff should be deemed to not have met the court's requirements, and the court should reject the case.
2. For those first instance civil cases that fall into the exceptions to the Foreign State Immunity Law, certain intermediate courts in provincial capitals (or their equivalent in directly administered cities, etc) have

jurisdiction, as well as financial and intellectual property courts. The notice limits the number of courts that can hear foreign state immunity cases *(as I had surmised)*, through centralizing jurisdiction (集中管辖 – *Jizhong guanxia*), but permits financial courts and intellectual courts to hear them and requires other courts to transfer cases that they have accepted to ones with jurisdiction.

3. Article 3 concerns service of process, which must be according to relevant treaties or conventions, or other means not prohibited by the law of the foreign country, or alternatively by diplomatic note (via the Ministry of Foreign Affairs) (Article 17 of the Law). Service by announcement is prohibited.
4. The court must serve the complaint and other documents with a translation accompanying the original Chinese. The foreign government has three months to file a defense. The court has the discretion to permit an extension of time.
5. If the foreign state objects to the jurisdiction of the Chinese court, the court shall engage in a comprehensive review ex officio and may hear the views of the parties. Participation in an objection procedure is not deemed acceptance of Chinese jurisdiction (also Article 6 of the Law). If the foreign state does not respond or participate in the Chinese proceedings, the Chinese court must proactively review whether the foreign state has immunity and can hear the views of the parties. (Article 18 of the Law). *The press release provides guidance to lower courts on the review: first, the people's court should examine whether the reasons put forward by the foreign country for enjoying jurisdictional immunity are valid; second, if the reasons put forward by the foreign country are not valid, the people's court should also conduct a comprehensive review on its own initiative, that is, in addition to the reasons, examine whether the foreign country really enjoys jurisdictional immunity and does not fall into the exception to jurisdictional immunity.*
6. If a court requires a certificate on factual issues of state behavior from the Ministry of Foreign Affairs (further to Article 19 of the Law), it shall report to the Supreme People's Court level by level (逐级报 – *Zhuji bao*) to consult and request (商请 – *Shangqing*) the Ministry of Foreign Affairs to issue a certificate. *This one sentence conveys the bureaucratic*

operation of the Chinese court system and the nuances of inter-bureaucracy relations.

An attachment to the notice lists the authorized courts. The SPC has approved some of these courts to establish international commercial tribunals (courts). It is likely that those tribunals will hear sovereign immunity cases:

1. Beijing Fourth Intermediate People's Court (with an international commercial tribunal)
2. Tianjin No.3 Intermediate People's Court
3. Shijiazhuang Intermediate People's Court of Hebei Province
4. Taiyuan Intermediate People's Court of Shanxi Province
5. Hohhot Intermediate People's Court of Inner Mongolia Autonomous Region
6. Shenyang Intermediate People's Court, Liaoning Province
7. Changchun Intermediate People's Court of Jilin Province
8. Harbin Intermediate People's Court of Heilongjiang Province
9. Shanghai No.1 Intermediate People's Court (with an international commercial tribunal)
10. Nanjing Intermediate People's Court of Jiangsu Province (with an international commercial tribunal)
11. Hangzhou Intermediate People's Court, Zhejiang Province (with an international commercial tribunal)
12. Hefei Intermediate People's Court, Anhui Province
13. Fuzhou Intermediate People's Court of Fujian Province
14. Nanchang Intermediate People's Court of Jiangxi Province
15. Jinan Intermediate People's Court, Shandong Province
16. Zhengzhou Intermediate People's Court of Henan Province
17. Wuhan Intermediate People's Court, Hubei Province
18. Changsha Intermediate People's Court of Hunan Province
19. Guangzhou Intermediate People's Court, Guangdong Province
20. Guangxi Zhuang Autonomous Region Nanning Intermediate People's Court
21. Hainan Provincial First Intermediate People's Court
22. Chongqing First Intermediate People's Court
23. Chengdu Intermediate People's Court of Sichuan Province
24. Guiyang Intermediate People's Court, Guizhou Province

25. Kunming Intermediate People’s Court, Yunnan Province
26. Lhasa Intermediate People’s Court of Tibet Autonomous Region
27. Xi’an Intermediate People’s Court of Shaanxi Province
28. Lanzhou Intermediate People’s Court of Gansu Province
29. Xining Intermediate People’s Court of Qinghai Province
30. Yinchuan Intermediate People’s Court of Ningxia Hui Autonomous Region
31. Urumqi Intermediate People’s Court, Xinjiang Uygur Autonomous Region

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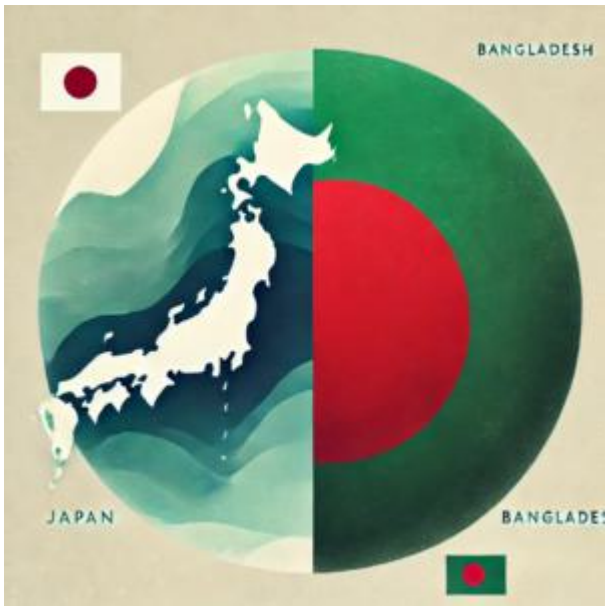
Caught Between Legal Boundaries: Child Custody Disputes Across Japan and Bangladesh

I would like to express my sincere gratitude to MD Sanwar HOSSAIN, *LLB (Hons) Wolverhampton University, MSS (Dhaka University), PgDiP (Northumbria University), Barrister at law (Hon’ble Society of Lincoln’s Inn),* Advocate (Appellate Division) Supreme Court of Bangladesh and Managing Partner, S Hossain & Associates law office, for bringing the Bangladesh courts’ decisions to my attention.



I. Introduction

The breakdown of an international marriage often leads to complex cross-border disputes, especially when children are involved. Tensions can intensify if one parent decides to take the children to their home country, often without the consent of the other parent.

In such cases, when the countries involved are signatories to the HCCH 1980 Child Abduction Convention, the Convention's mechanisms are designed to facilitate the prompt return of children to their country of habitual residence. This framework aims to prevent unilateral relocations that could have lasting impacts on the child's stability. However, when one or both countries are not parties to the Convention, resolving such cases becomes significantly more challenging. In such cases, national courts are compelled to address competing custody claims, assess allegations of wrongful removal, and determine whether they have jurisdiction to hear the case, all while balancing, often quite differently, the best interests of the children involved.

The case presented here is just one of many unreported cases where a romance relationship turns sour, leading to lengthy and contentious legal battles across jurisdictions. This note will focus on the Bangladeshi court's treatment of the case, as it offers useful insights into the court's approach to handling such complex cross-border disputes.

II. The Case

1. Underlying Facts

X, a Bangladeshi citizen who also appears to have also a US citizenship, and Y, a Japanese citizen, met each other in Japan where they got married in 2008 according to the forms prescribed under Japanese law. Their marriage resulted in the birth of three daughters. From 2020, tensions between X and Y began to intensify, mainly due to financial disagreements. By late December 2020, a family dispute arose, after which (on 18 January 2021) Y informed X of her intention to divorce and ask him to leave their home.

On 21 January 2021, while the two elder daughters were on their way home from school, X intercepted them and took them to live with him at a separate residence. On 28 January 2021, Y initiated legal proceedings against X in the Tokyo Family Court, seeking custody of the children and an order to hand over the two daughters. On 18 February 2021, while Japanese courts were addressing the custody claim, X left Japan with the two children, after obtaining new passports for them. Since then, the daughters have been living and studying in Bangladesh.

2. Legal Battle

a) In Japan

As noted earlier, on January 28, 2021, Y initiated legal proceedings regarding custody of the children and sought an order for their handover. On 31 May 2021, the Tokyo Family Court issued a decree in favor of Y (*Hanrei Taimuzu*, No. 1496 (2022) p. 247, *Hanrei Jiho* No. 2519 (2022) p.60). The court reached its conclusion after assuming international jurisdiction on the grounds that the children’s domicile was in Japan (Article 3-15, Article 3-8 of the Domestic Relations Case Procedure Act), and designating Japanese law as the applicable law to the case under the relevant choice of law rules (Article 32 of the Act on General Rules for Application of Laws). The court also refused to take into account an interim custody order issued by Bangladeshi courts (see below), given its non-final and conclusive nature.

b) In Bangladesh

i) Custody dispute before the Family Court

On 28 February 2021, shortly after arrived in Bangladesh, X filed a lawsuit seeking sole custody before the competent family court in Bangladesh. On the same day, X obtained from that court an interim order on custody and restrained the taking of the children out of Bangladesh.

ii) *Habeas Corpus* Petition

In July 2021, Y travelled to Bangladesh, leaving her youngest daughter with the custody of her family members. Encountering difficulties in accessing her daughters, Y filed a *habeas corpus* petition, seeking a determination on whether the children were being unlawfully held in custody. Y argued, *inter alia*, that Japanese courts have proper jurisdiction over the custody claim and that their decision should be given effect.

The High Court Division of the Supreme Court of Bangladesh (hereafter, 'the High Court') considered that, the children welfare and well-being should be paramount and must be assessed independently by Bangladeshi courts, regardless of any foreign judgment. After reviewing the overall circumstances of the case, and hearing the children, the High Court ruled that daughters remain in X's custody, while granting Y visitation rights (Writ Petition No. 6592 of 2021 of 21 November 2021. A summary of the decision is provided by S Khair and M Ekramul Haque, "State Practice of Asian Countries in International Law – Bangladesh" (2021) 27 *Asian Yearbook of International Law* 146).

Dissatisfied with the order, Y appealed to the Appellate Division of the Supreme Court of Bangladesh (hereafter 'The Appellate Division'). After examining relevant international and domestic laws and precedents, The Appellate Division reiterated that the children's best interest should be given primary consideration. It concluded that the appropriate forum to resolve the custody dispute is the Family Court, where proceedings were already pending. The Appellate Division ultimately decided to overturn the High Court's decision, placing the children in Y's custody, while granting X visitation rights until the Family Court issued its final verdict (Civil Petition for Leave to Appeal No. 233 of 2022 of 13 February

2022. A summary of the case is provided by S Khair and M Ekramul Haque, "State Practice of Asian Countries in International Law – Bangladesh" (2022) 28 *Asian Yearbook of International Law* 195).

iii) Continuation of the Proceedings before the Family Court

The proceedings resumed before the Family Court. On 29 January 2023, the first-instance court dismissed X's claim on the ground that the Bangladeshi courts lacked jurisdiction since the custody issue had already been decided in Japan, country of the family's last residence. The court also emphasized that children's welfare would be better ensured with the mother (Dhaka in Family Suit No. 247 of 2021 dated 29 January 2023). The decision was confirmed in appeal on similar terms (Family Appeal No. 22 of 2023 dated 12 July 2023). Dissatisfied, X appealed to the High Court.

iv) Ruling of the High Court

Before the High Court, X challenged the lower courts' conclusions. X's key arguments included the following:

(i) The parties had been litigating in Bangladesh for a long time, thus justifying the jurisdiction of the Bangladeshi courts over the dispute

(ii) The lower courts actively engaged in discussing the merits of the case, including the welfare of the children, and parental suitability, therefore, dismissing the claim on jurisdictional ground was illogical,

(iii) The decision rendered in Japan was not binding on the Bangladeshi courts

(iv) The Japanese decree cannot be given effect as it did not grant X any visitation right

In her response, Y argued that the lower courts correctly dismissed the case. Y's arguments include – among others – the following point:

(i) The cause of action *in casu* arose in Japan, where the children were born and raised. In addition, they had never visited Bangladesh before

(ii) All the parties resided in Japan before the dispute arose

(iii) Since Japanese court had already decided the custody issue, Bangladeshi courts lacked jurisdiction.

(iv) The lower courts thoroughly examined the case, placing emphasis on the children's welfare and well-being. In addition, all questions of welfare and custody should be addressed at the child's habitual residence

In its decision (Civil Revision No. 3298 of 2023 dated 13 February 2024), the High Court ruled that Bangladeshi courts have jurisdiction over the matter on the ground that:

(i) Although the children were born and primarily raised in Japan, the custody dispute partially arose in Bangladesh where X and the children were residing, at the time when the suit was filed, and continue to reside since then.

(ii) the jurisdiction of the Bangladeshi courts could not be ousted by the decision of Japanese court, given that – as an independent country – the courts are empowered to exercise jurisdiction under domestic law. Such an issue should have been seriously considered with due regard to Bangladesh's sovereignty, rule of law and the legal aspects of the country.

Regarding the custody determination, the High Court emphasized the importance of carefully considering and balancing various aspects of the case, with a particular focus on the welfare and well-being of the children as the paramount principle. The Court considered that, as a matter of law in Bangladesh, custody should always be granted to the mother, as this is in line with the welfare of the children. The Court also stressed the importance of placing particular emphasis on the opinion of the children and giving precedence to their mental state and intention. Based on such considerations, the Court decided to divide the custody between the parents: custody of the child who wished to stay with the father was granted to X, while custody of the child who wished to return to Japan was granted to Y. The Court also urged the parties to ensure full visitation rights

through amicable arrangement based on the principle of reciprocity.

III. Comments

The case, along with the manner in which it was handled by Japanese and Bangladeshi courts raise several important legal and practical questions. Among these, the following can be highlighted.

1. Relevance of the 1980 HCCH Convention

First, the case highlights the significance of the 1980 HCCH Convention in addressing cross-border unlawful relocation of children. Had Bangladesh been a contracting state, the resolution of the case would have been more straightforward, potentially avoiding the prolonged and conflicting litigation that ensued in both jurisdictions. In this respect, one particularly noteworthy aspect deserves to be mentioned. When submitting the writ petition before the High Court, Y argued that, despite the fact Bangladesh not being not a contracting state, the 1980 HCCH Convention could still be applicable. In support of her argument, Y relied on an earlier High Court decision, in which the 1980 HCCH Convention was recognized as being "part of international customary law" (*RMMRU v Bangladesh and others* (2020) 72 DLR 420). The High Court, however, did not address this issue.

2. Treatment of the Case in Japan and Bangladesh

Second, the contrasting approaches taken by the Japanese courts and the Bangladeshi courts in addressing the custody dispute are striking. In Japan, the courts followed a more classical, structured approach, beginning first by determining whether Japanese courts had international jurisdiction, then determining the applicable law before proceeding to assess the merits of the case. This methodical manner to approach the case was facilitated by the fact that Japan has comprehensively codified its private international law. The existence of a clear applicable legal framework with renders the resolution of such cases a matter of straightforward interpretation and application of the relevant legal

provisions (for a brief overview, see my previous post here).

The situation in Bangladesh presents notable differences, as rules of private international law in the country remains fragmented and only partially codified (for an overview, see Mohammed Abdur Razzak, 'Conflict of Laws – State Practice of Bangladesh' *in* S. R. Garimella and S. Jolly (eds.), *Private International Law – South Asian States's Practice* (Springer, 2017) 265). An appropriate approach would have been for the High Court to consider whether the Japanese decree could be recognized and enforced in Bangladesh in accordance with the relevant legal provisions (for an overview, see Sanwar Hossain, 'Cross-Border Divorce Regime in Bangladesh' *in* Garimella and Jolly *op cit.* 102, Abdur Razzak, *op. cit.*, 281). The Court's approach in the first and second decision appears to conflate the principle of "comity of nations" with the children's welfare as a paramount consideration that need to be independently assessed by Bangladeshi courts, and the issue of recognition with that of jurisdiction

3. Absence of Islamic law influence

Finally, one of the remarkable aspects of the Bangladeshi court's decisions is the absence of any discernable influence of Islamic law on the assessment of custody, despite the repeated references in the decisions to the religion of the parties. X, for instance, is described as a 'religious' person and 'a pious Muslim'. The decisions also mention that X and Y's marriage was celebrated according to Islamic tradition at a local mosque in Japan, following an earlier ceremony at a Shinto Shrine, and only after Y converted to Islam took a Muslim name.

In the High Court 2024 decision, Y is portrayed as an atheist who left Islam and who allegedly threatened X to raise the children in a '*Japanese culture where drinking alcohol, live together* (sic)*, eating pork are common*'. Before Bangladeshi Court, X did raise several Islamic principles related to child custody (notably the fact that, under Islamic law, custody should transfer to the father once the children reach a certain age), and emphasizing on his disagreement with Y who, according to him, '*refused to follow and respect the Islami life style* (sic)'.

Given the significant role of the Islamic principles play in the Bangladeshi legal system, especially in family law matters (for a general overview, see Ahmad Nasir Mohad Yusoff and AHM Shafiqul Islam, 'The Legal System of Bangladesh: The

Duality of Secular and Islamic Laws' (2024) *International Journal of Academic Research in Business & Social Sciences* 14(11) 1965), one might expect that the considerations mentioned above would influence the courts' decisions. For example, as a matter of general principle, the custody of children should not granted to someone who left Islam, particularly, when that person lives in a non-Muslim country (see e.g. the decision of the UAE Federal Supreme court of 10 April 2004 cited in Béligh Elbalti, 'The Recognition and Enforcement of Foreign Filiation Judgments in Arab Countries' *in* N. Yassari et al. (eds.), *Filiation and the Protection of Parentless Children* (T.M.C. Asser Press, 2019) 397).

Nonetheless, it is remarkable that none of these considerations were raised or taken into account by the judges, who addressed the case in an entirely objective manner. Even more striking, the High Court not only affirmed Y's suitability as a custodian, but also reiterated its longstanding principle that child custody should generally be granted to mothers. This principle was applied in the present case without any apparent consideration of Y's change of religion, giving no weight to her religious background or to the fact that she identifies as a non-Muslim who has left Islam.

Anti-Suit Injunctions and Dispute Resolution Clauses

By Adeline Chong, Singapore Management University

1. Introduction

In two decisions decided within a fortnight of each other, the Singapore Court of Appeal considered anti-suit injunctions pursued to restrain proceedings allegedly brought in breach of arbitration agreements. The first case, *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* ('*Asiana Airlines*')[1] dealt with whether A could rely on an arbitration agreement between A and B to restrain B's proceedings against C, a third party. The second case, *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* ('*COSCO Shipping*')[2] considered whether an

arbitration agreement covered a tortious claim. To put it in another way, *Asiana Airlines* mainly concerned the 'party scope' of an arbitration agreement while *COSCO Shipping* concerned the 'subject matter' scope of an arbitration agreement.[3] Where the anti-suit application is to restrain foreign proceedings brought in breach of an arbitration or choice of court agreement, ordinarily it would be granted unless 'strong cause' is shown by the respondent.[4] This provides an easier path for the anti-suit claimant compared to the alternative requirement of establishing that the foreign proceedings are vexatious or oppressive in nature.

In both judgments, the Court emphasised that forum fragmentation was sometimes inevitable and that the crux was to ascertain parties' intentions as to the ambit of the arbitration agreement. While both decisions canvassed other private international law issues, the primary focus of this comment is the Court's approach to construing the scope of dispute resolution clauses. Although both decisions involved arbitration agreements, the same reasoning applies to choice of court agreements.[5] Further, the principles apply equally whether the application concerns a stay of proceedings or an anti-suit injunction.[6]

2. *Asiana Airlines*

Asiana Airlines (a Korean company) entered into a joint venture agreement with Gate Gourmet Switzerland GmbH (GGS). This joint venture resulted in the establishment of Gate Gourmet Korea (GGK). Asiana entered into a catering agreement with GGK. Both the joint venture and catering agreements contained arbitration agreements. It transpired that the chairman of Asiana had arranged for the two agreements to benefit his own personal interests, in breach of his obligations to Asiana. The chairman was later convicted in Korean proceedings.

Asiana commenced proceedings in Korea against GGK for a declaration that the catering agreement was null and void under Korean law due to its chairman's breach of trust, and consequently, the arbitration agreement was similarly null and void. It also advanced an argument that the dispute was non-arbitrable due to Korean public policy; all relevant stakeholders were members of the Korean public and the outcome of the proceedings would have an impact in Korea. Subsequently, Asiana also pursued actions against GGS and the directors of the Gate Gourmet Group. It alleged that the directors were actively involved in the chairman's unlawful conduct and therefore liable in tort under Korean law, and

GGS was vicariously liable for their actions. The same points on nullity and public policy were raised.

Gate Gourmet applied for anti-suit injunctions in Singapore to restrain the Korean proceedings. Central to the anti-suit applications was the arbitration agreements in the joint venture and catering agreements. The Court of Appeal, hearing the appeal from a decision of the Singapore International Commercial Court (SICC), held that it was an abuse of process for Asiana to argue that the arbitration agreements were null and void given that it had not pursued previous opportunities to raise this point. Not surprisingly, Asiana's public policy argument received short shrift; it was too broadly framed as it was inevitable that proceedings involving big companies would have an impact on their home countries. Thus, the Court held that the Korean proceedings against GGK was in breach of the arbitration agreement in the catering agreement and the anti-suit injunction restraining the Korean proceedings against GGK was upheld.

More interesting was the anti-suit injunction restraining the Korean proceedings against the directors. Asiana argued that the directors were non-parties to the joint venture agreement and the arbitration agreement contained therein and as GGS were sued on the basis of vicarious liability, the proceedings were not related to the agreement. The Court applied Korean law, the proper law of the agreement, to construe the arbitration agreement. It observed that under Korean law, arbitration agreements could cover non-contractual claims and that the tortious claims pursued were closely connected with the joint venture agreement. The anti-suit injunction restraining the Korean proceedings against GGS was affirmed. The question which then arose was whether the anti-suit injunction restraining the proceedings against the directors could be maintained on the same basis of breach of the arbitration agreement or could only be maintained if the Korean proceedings against the directors were shown to be vexatious or oppressive in nature. As the Court observed, an anti-suit injunction based on the first ground meant that 'GGS as the anti-suit claimant would have to show that if Asiana pursued the claim against the [directors], it would breach *GGS's* rights under the JVA Arbitration Agreement.'[7]

This question involved the situation where A and B are parties to the dispute resolution clause and B commences proceedings against C in a different forum from that named in the clause. Can A pursue an anti-suit injunction restraining B's action against C on the ground that that action is in breach of the clause?[8]

Another variant of this situation is where C applies for an anti-suit injunction restraining B's action against C as being in breach of the jurisdiction clause. In a prior decision *VKC v VJZ*,[9] the Court of Appeal held that section 2(1)(b) of the Contracts (Rights of Third Parties) Act 2001 did not cover exclusive jurisdiction clauses.[10] In contrast, the New South Wales Court of Appeal in *Global Partners Fund v Babcock & Brown*[11] took the view that C could rely on the benefit of the jurisdiction clause under the common law provided C was a 'non-party' who was intimately involved in the transaction between A and B.[12]

The UK House of Lords in *Donohue v Armco Inc*[13] held that where an exclusive English choice of court agreement bound some, but not all, of the parties in the foreign proceedings, the avoidance of forum fragmentation amounted to strong reasons not to uphold the choice of court agreement. The requested anti-suit injunction in *Donohue*, however, involved those who were parties to it: A sought an anti-suit injunction restraining B's action against A. Nevertheless, Lord Scott of Foscote had commented in *obiter* that A could in certain circumstances obtain an anti-suit injunction restraining not only proceedings against itself but also proceedings against C if there was a possibility that A and C would be jointly and severally liable. This is provided the wording of the clause was sufficiently wide to cover the proceedings against C and A had a sufficient interest in obtaining the anti-suit injunction, namely, to avoid incurring liability as a joint tortfeasor. The Singapore Court of Appeal rejected Lord Scott's comments, as it thought that it would be overinclusive and prohibit legitimate claims against third parties.[14] Instead it cited with approval the decision in *Team Y&R Holdings Hong Kong v Ghoussoub; Cavendish Square Holding BV v Ghossoub*[15] to the effect that the *Fiona Trust*[16] principle that the intentions of rational businessmen would be to have a 'one-stop shop' for litigation cannot apply with the same force when considering claims involving third parties. Clear language is required before an exclusive jurisdiction clause covers claims brought by or against third parties.[17] The risk of forum fragmentation, which underscored Lord Scott's suggestion in *Donohue*, should not be 'overstated'.[18]

This more narrow construction of the party scope of dispute resolution clauses raises the risk of B manipulating the situation and evading the dispute resolution clause by pursuing claims against C. However, as the Court pointed out, it would be open for A to apply for an anti-suit injunction on the basis that B's proceedings against C rendered the proceedings between A and B vexatious or oppressive.

Additionally, C could also independently seek an anti-suit injunction restraining the proceedings against it on the vexation or oppression ground.[19]

On the facts, the Court held that while the directors had signed the joint venture agreement, they had done so in their capacity as representatives of GGS. There was nothing in the wording of the arbitration agreement to indicate that Asiana and GGS intended the clause to apply to claims against the directors. The anti-suit injunction restraining the action against the directors could not succeed on the basis of breach of the arbitration agreement; it could only succeed on the vexation or oppression ground. However, Gate Gourmet failed to show any bad faith on Asiana's part in suing the directors. Therefore, the anti-suit injunction was upheld in relation to the action against GGS as being in breach of the arbitration agreement while the anti-suit injunction restraining the action against the directors was discharged.

3. *COSCO Shipping*

PT OKI (an Indonesian company) had sub-chartered a vessel which belonged to COSCO Shipping (a Chinese company). The head charter and sub-charter contracts each contained a law and arbitration clause for English law and arbitration in Singapore. Further to that, contracts of carriage were entered into between the two companies. These contracts, which were evidenced by or contained in bills of lading, incorporated the law and arbitration clause in the charter contracts. While loading PT OKI's cargo at the port of Palembang, Indonesia, COSCO Shipping's vessel allided with the trestle bridge of the jetty, causing damage which allegedly amounted to US$269m. The bridge and port were owned and operated by PT OKI. Various proceedings were pursued by both parties, the most relevant of which were: PT OKI commenced proceedings against COSCO in Indonesia in tort for the damage to the trestle bridge; COSCO applied for an anti-suit injunction in Singapore to restrain PT OKI from continuing with the Indonesian action; and COSCO commenced arbitration against PT OKI before the Singapore International Arbitration Centre (SIAC) in Singapore seeking declarations of non-liability and various reliefs arising out of the allision. COSCO alleged that PT OKI had breached the safe port warranty under the head charter agreement as incorporated into the bills of lading and raised contractual defences also found in the head charter agreement and incorporated into the bills of lading.

The anti-suit application was based on PT OKI's alleged breach of the arbitration

agreement. The Court of Appeal considered the meaning of the phrase 'arising out of or in connection with this contract', used in the arbitration agreement and which is standard language in dispute resolution clauses. At first instance, the judge had referred to various tests-such as the 'parallel claims test',[20] 'causative connection test' and the 'closely knitted test'[21] to ascertain if the tort claim fell within the scope of the arbitration agreement. The Court of Appeal emphasised that the various tests were 'simply labels and tools developed to assist the courts'[22] and pushed back against any presumption that parties must always have intended for all their claims to be decided in the same forum. The crux was the parties' intentions as encapsulated by the wording of the agreement; thus '[i]f upon examining the text of the agreement and the nature of the competing claims, a claim is not within its ambit, then forum fragmentation is inevitable and the courts should not steer away from that outcome …'[23]

The Court adopted a two-stage test when ascertaining the scope of an agreement: first, the court should identify the matter or dispute which parties have raised or foreseeably will raise in the foreign proceedings; and secondly, the court must then ascertain whether such matter or dispute falls within the scope and ambit of the agreement. At the first stage, the court is trying to identify the substance of the dispute between the parties. It should not consider only the claimant's pleaded cause of action but should also take into account defences or reasonably foreseeable defences and cross-claims that may arise. The Court held that it was not necessary for the claims or defences to be connected to the contractual relationship. This is significant because the tort action in Indonesia was not based on the contract between the parties.[24] It concluded that the tort action fell within the scope of the arbitration agreement. The parties must have contemplated that a pure tort claim for damage to the trestle bridge caused during the performance of the contracts of carriage between the parties and where it was foreseeable that defences based on the contract would be raised would fall within the scope of the arbitration agreement. Thus, the anti-suit injunction could properly be founded on breach of the arbitration agreement. There was no consideration if 'strong cause' was shown by PT OKI to justify the breach of the arbitration agreement; it did not appear that arguments had been made on this point.

4. Conclusion

The decisions in *Asiana Airlines* and *COSCO Shipping* should not be read as the

Singapore courts resiling from the *Fiona Trust* principle, which has been cited and applied in a number of other decisions.[25] The core idea that one should adopt a common-sense approach when construing dispute resolution clauses, bearing in mind that the parties are rational businessmen, still underlines the two judgments. The clarification added by the Court of Appeal was the starting point must always be the wording of the dispute resolution clause and the context in which it was entered into.[26] This is in contrast with the prior approach where sometimes the court tended to start with the presumption that parties intended for 'one-stop shopping' and to apply the presumption in the absence of any contrary evidence.[27] There is now an important shift in focus. The court should not go to great lengths to achieve a construction which supports 'one-stop shopping' where this is not borne out by the wording of the clause and the circumstances of the case. If this means that there would be parallel litigation across a few jurisdictions, the courts should not shy away from that conclusion.[28] In particular, where third parties are concerned, clear language must be used to bring third parties within the scope of a dispute resolution clause. Ultimately, *Asiana Airlines* and *COSCO Shipping* underscore the importance of clear and precise drafting of dispute resolution clauses.

[1] [2024] SGCA(I) 8; [2024] 2 SLR 279.

[2] [2024] SGCA 50; [2024] 2 SLR 516.

[3] The phrases 'party scope' and 'subject-matter scope' was coined by the New South Wales Court of Appeal in *Global Partners Fund Limited v Babcock & Brown Limited (in liq)* [2010] NSWCA 196.

[4] *Sun Travels v Hilton* [2019] 1 SLR 732 (Singapore CA) [68], [78], [81]-[87].

[5] *Asiana* [80]-[83].

[6] *COSCO* [73].

[7] *Asiana* [58].

[8] See Thomas Raphael, *The Anti-Suit Injunction* (2nd edn, OUP 2019) para 7.31.

[9] [2021] 2 SLR 753.

[10] This provision allows C to enforce a term of the contract if the term purports to confer a benefit on C.

[11] [2010] NSWCA 196 (noted A Chong, 'The "Party Scope" of Exclusive Jurisdiction Clauses' [2011] LMCLQ 470).

[12] Cf *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61 [90] (President Bell) (in the context of a stay application).

[13] [2002] 1 All ER 749 (HL).

[14] *Asiana* [85]-[88].

[15] [2017] All ER(D) 81 (Nov) [82].

[16] *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254 (UKHL).

[17] *Asiana* [72]-[73].

[18] *Asiana* [88].

[19] *Asiana* [84].

[20] *Eastern Pacific Chartering Inc v Pola Maritime Ltd* [2021] 1 WLR 5475 ("*The Pola Devora*") [37].

[21] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 (English CA) 89. The Court disagreed with the judge that the 'closely knitted test' applies only where the non-contractual claim may be recast as a contractual claim: *COSCO* [78]-[79].

[22] *COSCO* [3]

[23] *COSCO* [5].

[24] The court below had been troubled by the fact that the tort claim could not be recast as a contractual claim. It did not grant the anti-suit injunction: [2024] SGHC 92.

[25] Eg, *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (Singapore CA), *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 (Singapore HC(A)).

[26] See also *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 [34].

[27] Eg, *Vinmar Overseas* [79].

[28] See to similar effect, *Australian Health* [90].

[29] Eg, *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (Singapore CA), *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 (Singapore HC(A)).

[30] Eg, *Vinmar Overseas* [79].

[31] See to similar effect, *Australian Health* [90].

Trending Topics in German PIL 2024 (Part 2 – Online Marriages, Gender Afiliation and Name Law)

As already mentioned in my previous post, at the end of each year I publish an article (in German) about the Conflict of Laws developments in Germany of the last twelve months, covering more or less the year 2024 and the last months of 2023. This post is the second with an overview over those topics that seem to be most trending.

The two parts focus on the following topics (part 1 contained 1. and 2.):

1. Restitution of Money lost in Illegal Gambling
2. Applicable Law in the Dieselgate litigation

3. **The (Non-)Valitidy of Online Marriages**
4. **New German conflict-of-law rules regarding gender afiliation / identity**
5. **Reforms in international name law**

I will now give attention to the last three topics that focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

This is not a resumen of the original article as it contains a very detailed analysis of sometimes very specific questions of German PIL. I do not want to bore the readers of this blog with those specificities. Those interested in knowing those details can find the article here (no free access).

I would be really curious to hear whether these or similar cases are also moving courts in other jurisdictions and how courts deal with them. So, please write me via mail or in the comments to the post if you have similar or very different experiences on those cases.

Part 2 – Online Marriages, Gender Afiliation and Name Law

1. **The (Non-)Validity of Online Marriages**
   One highly discussed topic of the last few years was the treatment of Online Marriages. Online Marriage refers to a marriage ceremony where the declarations of intent to marry are declared virtually by digital means. In the relevant cases, at least one of the (future) spouses was located in Germany when this intent was declared via Zoom, Whatsapp or similar means, while the rest of the ceremony, esp. the registration or the other acts of a registrar, was located in another State, esp. in Utah or Afghanistan. The case which the BGH (Supreme Court) decided in September 2024 was about two Nigerians that were in Germany while their declaration was registered in Utah, USA.

   In German law, the validity of such a marriage is determined in two steps: The substantial law of marriage follows the law of the nationality of each spouse (Article 13 EGBGB). The formal validity, in general, follows the classical alternative connecting factors of either the law of the main

question (*lex causae*) or the law of the place of the relevant (*lex locus*), Article 11 EGBGB. Nevertheless, regarding marriages, a special rule applies regarding the formal validity: Article 13 para. 4 EGBGB provides that a marriage concluded in Germany necessarily follows German law regarding the form.

As the requirements of each nationality's laws where fulfilled, main question of the case was: **Where does the celebration of a marriage actually take place if it is celebrated online**?

Before this question came up, the prevailing opinion and case law referred to the law of the place where the state authority or the religious authority were located (*Coester-Waltjen/Coester* Liber Amicorum Verschraegen (2023), 1 (6); vgl. auch *Gössl* NJW 2022, 3751; BGH 19. 12. 1958 – IV ZR 87/58), which in my opinion makes sense as these authorities make the crucial difference between a mere contract and a marriage conclusion from the point of view of German law. Nevertheless, the Supreme Court (BGH 25.9.2024 – XII ZB 244/22) and other courts (VG Karlsruhe 28.9.2023 – 1 K 3074/23*;* VG Düsseldorf 5.7.2024 – 7 K 2728/22) decided that the place of the marriage is located at the place where the spouses declare their intents to marry – with the consequence that Art. 13 para. 4 EGBGB applied in all cases where at least one spouse was located in Germany at the moment of the declaration.

I am personally not convinced of the case. The Supreme Court distinguishes the decision from so-called proxy marriages where the declaration is made by the proxy and, therefore, not where the spouses are located but where the proxy is communicating. Nevertheless, this comparison is not convincing: German courts characterize the declaration of a proxy as a (merely) formal requirement in cases where the "proxy" has no power to decide but merely communicates the will of the spouse. Thus, in my opinion, the "proxy" is more a messenger than a real proxy and then the location of the declaration again is where the spouses (not the proxies) are in the moment they send the messenger. Furthermore, I am skeptical because the cases decided yet happened in migration contexts and might have been regarded differently with different parties.

What are your thought? Do you have similar questions in your

jurisdictions**?**

2. **New German conflict-of-law rules regarding gender afiliation and "Mirin"**
   Since November 2024 the German EGBGB has an explicit conflict of laws rule on gender affiliation / gender identity. It was introduced by the Gender Self-Determination Act. According to Art. 7a para. 1 EGBGB (here you find the provision in German), a person's nationality's law must be applied. That was more or less the unwritten rule, courts followed in Germany. The second paragraph introduces a very **limited form of party autonomy**: According to Art. 7a para. 2 EGBGB , a (foreign) person with **habitual residence in Germany can choose German la**w for the change of gender or a related change of name.

   While this rule opens non-nationals to change their legal gender in Germany, **it does not comply with the case law of the CJEU**. In the decision **Mirin** (ECLI:EU:C:2024:845 – Mirin) the CJEU extended her case law regarding the recognition of names to gender changes that took place in another Member State. It establishes the obligation to recognise the change of gender validly made in another Member State.

   If a person changes the gender in another Member State without being a national of that State but (e.g.) living there, in Germany that gender reallocation cannot be accepted by Art. 7a EGBGB. An extension of Art. 7a para. EGBGB, i.e. a choice of law in favour of every habitual residence (not limited to a German one), might help, even though it probably will not include all situations possible where the obligation to recognize a gender afiliation can exist. This development again shows that the classical "recognition via conflict of laws" method is not able to implement the case law of the CJEU.

   What are your thoughts to those developments (Mirin and the new rule)?

3. **Reforms in International Name Law**
   Finally, there was a general reform of German name law and – in a last minute move my the legislator – in **International Name Law as well**. The new rules will enter info force in May 2025.

   At the moment, the law of the person follows her **nationality** (Article 10

para. 1 EGBGB – version until the end of April 2025). Furthermore, there is a very **limited** possibility of a **choice of law** for **spouses** regarding a common name (each spouses nationalities and German law if one has the habitual residence in Germany) and for **children** and their **family names** (nationality of each parent or other person with parental responsibility or German law, if one parent has the habitual residence in Germany).

The new Article 10 para. 1 EGBGB changes the connecting factor: instead of nationality, **habitual residence of the person determines her name, renvoi excluded**. According to Art. 10 para. 4 EGBGB, instead, **the person can choose the law of the nationality**. The futher choice of law for spouses and children family names remains, but allows spouses to choose the law of the habitual residence of one of them, no matter whether it is the German one or not. A child's name now can be chosen by the parents' and the child's nationality (new). In all those cases, persons with double nationality can choose both nationalities.

Finally, Article 48 EGBGB contains a provision that implements the **CJEU case law regarding the recognition of names**. Until now, it provides that a person can choose to change the name into the name acquired during a habitual residence in another Member State of the European Union and entered in a civil status register there, unless this is manifestly incompatible with fundamental principles of German law.

The new provision is almost identical, but some subtle but important changes were made: **First,** a person **does not have to have their habitual residence in the Member State** in which they acquired the name. **Nationality is sufficient.** This implements "Freitag". **Second,** it no longer depends on whether the name was **'lawfully' acquired in another Member State**, but only on the (possibly incorrect) entry of the name in a foreign register. This last requirement (in my opinion, see Gössl, IPRax 2018, 376) goes further that the CJEU requires, as the name has to be "validly acquired" in another Member State to create the obligation to "recognize" or accept that name. Nevertheless, the CJEU most probably will not object to a Member State that is more recognition/acceptance-friendly than necessary.

I hope you found this overview interesting. Next year, I am planing to provide similar articles, so any feedback is very welcome.

The FSIA's Direct Effects Problem

Post authored by Lance Huckabee, JD candidate and Global Legal Scholar at the University of Pittsburgh School of Law

When a foreign sovereign breaches a commercial contract with a private entity, what recourse does the wronged party have? In the United States, the Foreign Sovereign Immunities Act (FSIA) governs such disputes, providing an exception for commercial activity that causes a "direct effect" in the U.S. Yet, the definition of "direct effect" has remained elusive, leading to decades of judicial inconsistency and a deepening circuit split.

At the heart of this legal uncertainty is the Supreme Court's decision in Republic of *Argentina v. Weltover* (1992), which sought to clarify the issue but instead left room for widely divergent interpretations. Some circuits have adopted a flexible, causation-based approach, analyzing whether a foreign state's breach had an immediate consequence in the U.S. Others, like the recent D.C. Circuit decision in *Wye Oak Tech., Inc. v. Republic of Iraq*, have imposed rigid bright-line rules—specifically requiring that the contract contemplate the U.S. as a place of performance. This formalistic approach creates a dangerous loophole, allowing foreign states to structure agreements in a way that insulates them from jurisdiction. As a result, a U.S. business may suffer substantial financial harm from a foreign sovereign's breach but find itself without legal recourse simply because the contract was silent on where payments were to be made.

This restrictive interpretation undermines the FSIA's core purpose: to hold

foreign sovereigns accountable when their commercial activities impact U.S. businesses. By prioritizing contractual language over economic reality, decisions like *Wye Oak* erode the ability of American companies to seek redress, making sovereign breaches effectively consequence-free. A proper interpretation of the FSIA should align with Weltover's focus on causation, ensuring that foreign states cannot exploit technicalities to evade liability. If left uncorrected, the current trend risks turning the FSIA into little more than a paper shield—one that protects sovereigns rather than those they harm.

The *Wye Oak* decision exacerbates both intra- and inter-circuit inconsistencies, further complicating the FSIA's application and weakening the commercial activity exception in breach-of-contract cases. By imposing a rigid bright-line rule, it unduly narrows the scope of what qualifies as a "direct effect," creating uncertainty for U.S. businesses engaged in international commerce. With *Wye Oak*'s attorneys petitioning for certiorari in January 2025, the case presents a critical opportunity for the Supreme Court to resolve the longstanding circuit split on the FSIA's direct effects clause.

The Explosion of Private International Law in Asian Scholarship

The 21st century has witnessed a remarkable surge in academic scholarship on private international law in Asia. This is not to say that significant studies on the subject were absent before this period. However, in recent decades, Asian scholars have brought renewed vigour and depth to the field, establishing private international law as a critical area of legal inquiry on the continent.

A testament to this intellectual flourishing is Hart Publishing's extensive series on private international law in Asia, featuring no fewer than 16 volumes with

Professors Anselmo Reyes and Paul Beaumont as Series Editors. These works serve as a rich repository of comparative legal thought, offering valuable insights that extend far beyond Asia's borders. Scholars and practitioners seeking inspiration from diverse jurisdictions will find these books to be an essential resource. Moreover, other publishers have also contributed to this growing body of literature, further amplifying Asia's voice in the global discourse on private international law.

Having read and reviewed many of these works on the blog, I am continually struck by the depth of scholarship they offer. Each new book reveals fresh perspectives, reinforcing the notion that private international law is not merely a regional concern but a truly global conversation.

As someone deeply engaged with African private international law, I have found immense value in these Asian publications. The parallels between Asia and Africa—particularly in terms of legal pluralism and cultural diversity—make these studies both relevant and instructive. The cross-pollination of ideas between these regions has the potential to strengthen the development of private international law in both continents.

What is most striking about this surge in Asian scholarship is its outward-looking nature. No longer confined to internal discussions, private international law in Asia is now exporting ideas, influencing legal developments worldwide. This is a phenomenon that deserves both recognition and emulation. The rise of Asian scholarship in private international law is not just an academic trend—it is a pivotal force shaping the future of global legal thought.

The $24 Billion Judgment Against China in Missouri's COVID Suit

This article was written by Prof. William S. Dodge (George Washington University Law School) and first published on Transnational Litigation Blog. The original version can be found at Transnational Litigation Blog. Reposted with permission.

On March 7, 2025, Judge Stephen N. Limbaugh, Jr. (Eastern District of Missouri) entered a default judgment for more than $24 billion against the People's Republic of China and eight other Chinese defendants for hoarding personal protective equipment (PPE) during the early days of the COVID pandemic in violation of federal and state antitrust laws. The Eighth Circuit had previously held that the Foreign Sovereign Immunities Act (FSIA) barred most of Missouri's claims but that the hoarding claim fell within the act's commercial activity exception.

Missouri now has the judgment against China that it wanted. But Missouri may find that judgment hard to enforce. As discussed below, there appear to be significant procedural problems with the judgment that at least some defendants might raise. More broadly, the properties of foreign states and their agencies or instrumentalities are entitled to immunity from execution under the FSIA. Immunity from execution is broader than immunity from suit, and it is not clear that any of the defendants have property in the United States that can be used to satisfy the judgment.

The Defendants and the Claims

On April 21, 2020, Missouri brought four COVID-related claims against nine Chinese defendants: the People's Republic of China, the Chinese Communist Party, the National Health Commission, the Ministry of Emergency Management, the Ministry of Civil Affairs, the People's Government of Hubei Province, the People's Government of Wuhan City, the Wuhan Institute of Virology, and the Chinese Academy of Sciences. The original complaint asserted four claims under Missouri tort law: (1) public nuisance, (2) abnormally dangerous activity, (3) breach of duty by allowing the transmission of COVID, and (4) breach of duty by hoarding PPE. The district court initially held that all the claims were barred by the FSIA, but the Eighth Circuit reversed on the hoarding claim.

The FSIA governs the immunity of foreign states and their agencies and instrumentalities from suit in federal and state courts, as well as the immunity of their properties from execution to satisfy judgments. Some of the FSIA's provisions distinguish between foreign states and their political subdivisions on the one hand and their "agencies or instrumentalities" (including "organs" and majority state-owned companies) on the other. Other provisions extend the same

immunities to both categories.

Of the nine defendants, the Eighth Circuit held that seven of them were part of the Chinese state. China itself is clearly a foreign state, and its National Health Commission, Ministry of Emergency Management, and Ministry of Civil Affairs are part of the state. The People's Government of Hubei Province and the People's Government of Wuhan City fall into the same category because they are political subdivisions. "The Chinese Communist Party may look like a nongovernmental body at first glance," the court of appeals wrote, but it is "in substance" the same body that governs China and therefore properly considered part of the state. The remaining two defendants, the Wuhan Institute of Virology and the Chinese Academy of Sciences, are legally separate from the Chinese government "but still closely enough connected" to qualify as "organs" and thus as "agencies or instrumentalities" of a foreign state covered by the FSIA.

Under the FSIA, all nine defendants are immune from suit in the United States unless an exception to immunity applies. The Eighth Circuit found that only one exception applies—the commercial activity exception in 28 U.S.C. § 1605(a)(2)—and that it applies only to Missouri's claim for hoarding PPE. The court reasoned that hoarding was the kind of activity that private parties can engage in and that the complaint sufficiently alleged that the hoarding had a direct effect in the United States.

After the Eighth Circuit's decision, I pointed out some of the difficulties that Missouri would face on remand trying to prove its tort claims, including whether Missouri law applied under Missouri choice-of-law rules, whether Missouri law established a duty of care for these defendants, whether the defendants breached any such duty of care, and whether any such breach was the actual and proximate cause of Missouri's damages. I don't know whether Missouri's attorney general reads TLB, but on the eve of trial Missouri changed the legal basis for its hoarding claim from common-law tort to federal and state antitrust law. Antitrust claims are not subject to state choice-of-law rules.

The District Court's Judgment

The Chinese defendants decided not to appear and defend against Missouri's claims. Section 1608(e) of the FSIA provides: "No judgment by default shall be

entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This provision is supposed to ensure that the U.S. court does not simply accept the plaintiff's allegations and instead tests the evidence to make sure that judgment is warranted. Some courts have held, however, that they may accept as true a plaintiff's "uncontroverted evidence." That is what Judge Limbaugh did here.

Relying on the plaintiff's evidence, the district court concluded that "China engaged in a deliberate campaign to suppress information about the COVID-19 pandemic in order to support its campaign to hoard PPE from Missouri and an unsuspecting world." The court noted that local officials closed schools and quarantined doctors and patients in December 2019, while at the same time other officials were denying that COVID could be spread between human beings. The district court further concluded that "Defendants engaged in monopolistic actions to hoard PPE through both the nationalization of U.S. factories [in China] and the direct hoarding of PPE manufactured or for sale in the United States." The court pointed to evidence that China stopped exporting PPE and started importing a lot of it.

The court found the evidence sufficient to establish liability for monopolization under federal antitrust law. Pursuant to 15 U.S.C. § 15c, Missouri's attorney general was also permitted to bring a federal antitrust claim *parens patriae* on behalf of the citizens of Missouri. The court also found the evidence sufficient to establish liability for monopolization under Missouri antitrust law, which the court noted is to be construed "in harmony with" federal antitrust law.

Relying on an expert report on damages submitted by Missouri, the court found that between 2020 and 2051 Missouri either had lost or would lose $8.04 billion in tax revenue because of the impact of China's hoarding of PPE on economic activity. The court further found that hoarding caused Missouri to spend an additional $122,941,819 on PPE during the pandemic. The court added these amounts and multiplied by three—because federal and state antitrust laws permitted treble damages—for a total damages award of $24,488,825,457.

Problems with the District Court's Analysis

I see a number of problems with the district court's analysis. First, the court treated the defendants as an undifferentiated group, seemingly following Missouri's supplemental brief, which refers simply to the nine defendants collectively as "China." But the individual defendants in this case knew different things and did different things (and Missouri does not appear to have argued that there was a conspiracy allowing the acts of one defendant to be attributed to the others). The fact that local officials seem to have been aware that COVID could be transmitted from human to human, for example, does not establish that the central government knew this. Indeed, a U.S. intelligence report in 2020 found that local officials hid information about the virus from Beijing. Similarly, the fact that the central government was nationalizing PPE factories, limiting exports, and buying PPE abroad does not show that the Wuhan Institute of Virology or the Chinese Academy of Sciences was doing so.

Second, the damages calculations seem fanciful. The opinion contains no discussion of causation. How can one disentangle the impact of China's hoarding PPE on Missouri from other factors that contributed to the spread of the pandemic there, for example the fact that Missouri was among the last states to adopt a stay-at-home order? Establishing hoarding's impact on Missouri's economy and derivatively its impact on Missouri's tax revenues is fraught with complications, especially when estimates are projected to the year 2051.

Third, the court failed to consider whether trebling damages is allowed under the FSIA. Section 1606 provides that "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." In other words, while the FSIA allows the trebling of damages against the Wuhan Institute of Virology and the Chinese Academy of Sciences, it may not allow the same against China itself or the other governmental defendants.

But China did not make any of these points, or others that it would undoubtedly have thought of, because it decided not to appear. The China Society of Private International Law did file two amicus briefs, but the district court did not mention them. I can understand China's reluctance to submit to the authority of a U.S. court (including to the discovery of evidence) in a case that it no doubt feels is

politically motivated. But the decision not to appear gave Missouri an enormous advantage.

What Happens Now?

So, what happens now? There are probably many possibilities, but I will discuss just three: (1) the possibility that some of the defendants might seek to set the judgment aside for improper service; (2) the possibility of enforcing the judgments against the defendants' property in the United States; and (3) the possibility of similar suits in other states.

A Rule 60(b) Motion Addressing Service of Process?

China could move to set aside the judgment under Rule 60(b)(4) on the ground that the judgment is void for lack of subject matter jurisdiction. The factors that made China decide not to appear in the first place would likely dissuade it from raising all the issues that it could raise in a 60(b) motion. But it might make sense for some of the defendants to raise service of process in such a motion, particularly the Wuhan Institute of Virology and the Chinese Academy of Sciences, which, as explained below, are likely to be the most vulnerable to enforcement of the judgment.

The FSIA has rules for serving foreign states and their agencies or instrumentalities. For foreign state and their subdivisions, Section 1608(a) lists four means of service that must be tried in order. In this case, the first three were not available. (China refused to execute a request for service under the Hague Service Convention on the ground that doing so would infringe its sovereignty, as Article 13 of the Convention allows it to do.) So, the district court ordered service through diplomatic channels, which was then made on all the defendants except the Chinese Communist Party, the Wuhan Institute of Virology, and the Chinese Academy of Sciences. I see no defects in service here.

With respect to the remaining three defendants, the district court authorized service by email pursuant to Rule 4(f)(3). There are three problems with this. First, the district court treated the Chinese Communist Party as a non-governmental defendant for purposes of service, but the Eighth Circuit later held

that it is instead a foreign state for purposes of the FSIA. After the Eighth Circuit's decision, Missouri argued that its service on China through diplomatic channels should count as service on the Chinese Communist Party as China's alter ego. Judge Limbaugh seems to have accepted this assertion without discussion, but the Communist Party could certainly raise the issue in a Rule 60(b) motion.

The second problem is that Rule 4(f)(3) allows a district court to order alternative means of service only if those means are "not prohibited by international agreement." As Maggie Gardner and I have explained repeatedly, the Hague Service Convention prohibits service by email, at least when the receiving state has objected to service through "postal channels" as China has done. District courts are divided on this, however, and Judge Limbaugh cited a number of district court cases holding (wrongly) that email service is permitted. A Rule 60(b) motion raising this point would be unlikely to convince him, but it might succeed on appeal to the Eighth Circuit.

The third problem is that service by email in this case is inconsistent with the FSIA. For agencies and instrumentalities, like the Wuhan Institute of Virology and the Chinese Academy of Sciences, Section 1608(b)sets forth the permitted means of service. It appears that the first two were not available and that the district court relied on Section 1608(b)(3)(C), which allows service "as directed by order of the court *consistent with the law of the place where service is to be made*" (emphasis added). But Chinese law does not permit private parties to serve process by email.

When this issue arose after the Eighth Circuit's decision, Missouri argued that the language of Section 1608(b)(3)(C) "is nearly identical to Federal Rule of Civil Procedure 4(f)(3), which Missouri previously invoked in its request to serve WIV and CAS by email." This was misleading. Rule 4(f)(3) refers to means of service that are "not prohibited by international agreement," whereas Section 1608(b)(3)(C) refers to means of service that are "consistent with the law of the place where service is to be made," that is Chinese law. Even if service by email were permitted by the Hague Convention—which, as discussed above, it is not—that would not establish that service by email is consistent with Chinese law. Judge Limbaugh did not address this issue in his judgment and might be open to persuasion on a Rule 60(b) motion.

A Rule 60(b) motion limited to service of process issues might have some appeal for China. Although it would require becoming involved in the U.S. litigation, it would not involve arguing the merits of China's actions during the pandemic or submitting to U.S. discovery. China would be able to make purely legal arguments that the Chinese Community Party was not properly served under Section 1608(a) and that the Wuhan Institute of Virology and the Chinese Academy of Sciences were not properly served under Section 1608(b) because email service is prohibited by both the Hague Service Convention and by Chinese law.

Alternatively, defendants could raise the service of process issues, and perhaps other procedural defects, at the enforcement stage if and when Missouri attempts to execute the judgment against any of their properties in the United States. One advantage of waiting for enforcement is that the arguments would be heard by a different judge with no psychological commitment to past decisions. Also, if defendants were to file a Rule 60(b) motion before Judge Limbaugh and lose, they might be precluded from raising the same issues again at the enforcement stage. On the other hand, a successful Rule 60(b) motion could void the judgment once and for all for some of the defendants, whereas saving these arguments for the enforcement stage could require the defendants to raise them anew in multiple enforcement proceedings.

Immunity from Execution

Defendants also have the option of asserting that any property Missouri attempts to seize is immune from execution. As a general matter, federal court judgments are enforceable against a judgment debtor's assets anywhere in the United States. But judgments against foreign states and their agencies or instrumentalities are subject to the FSIA's rules on immunity from execution.

Specifically, Section 1610(a)(2) provides that "[t]he property in the United States of a foreign state … used for a commercial activity in the United States, shall not be immune … from execution, upon a judgment entered by a court of the United States or of a State … if … (2) the property is or was used for the commercial activity upon which the claim is based." This means that the properties in the United States of China, its ministries and subdivisions, and the Chinese Communist Party are immune from execution unless those properties were used to hoard PPE. I find it hard to imagine a situation in which that would be true.

The immunity for properties owned by agencies or instrumentalities is not as broad. Section 1610(b)(2) permits execution against "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States" if the judgment was rendered under the FSIA's commercial activities exception (as this judgment was) "regardless of whether the property is or was involved in the act upon which the claim is based." This means that the properties in the United States of the Wuhan Institute of Virology and the Chinese Academy of Sciences would be subject to execution if those defendants are engaged in commercial activities in the United States even if the properties themselves were not used to hoard PPE. Thus, these two defendants, unless they can get the judgment set aside for improper service as discussed above, are potentially more exposed to execution than the others.

It is worth emphasizing the district court's judgment against these nine defendants is enforceable *only against properties owned by these nine defendants*. Missouri cannot execute its judgment against property in the United States simply because the property is Chinese owned. This is clear from the Second Circuit's decision in *Walters v. Industrial & Commercial Bank of China* (2011), another case involving a default judgment against China under the FSIA, in which the court of appeals held that plaintiffs could not use assets belonging to agencies or instrumentalities of China to satisfy a judgment against China itself.

Walters relied on the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*) (1983). As Ingrid Brunk has explained, *Bancec* stands for the proposition that U.S. courts must generally respect the corporate separateness of foreign states and their agencies or instrumentalities. Indeed, the Supreme Court in *Bancec* quoted the FSIA's legislative history, which says specifically that the FSIA "will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality."

If a judgment against an agency or instrumentality of a foreign state cannot be executed against the property of another agency or instrumentality of that foreign state, it necessarily follows that the judgment cannot be executed against property *not* belonging to any agency or instrumentality of that foreign state. For example, Smithfield Foods is a major pork producer operating in Missouri. Its property cannot be seized to satisfy this judgment. Smithfield Foods is owned by a

private Chinese conglomerate, but Smithfield Foods was not a defendant in this action, and so its property is not subject to execution.

Copycat Cases

In addition to Missouri's efforts to enforce this judgment, it is likely that the defendants will face copycat cases in other states. Mississippi filed a similar complaint against the same defendants in May 2020. Again, the defendants chose not to appear. On February 10, 2025, Judge Taylor B. McNeel (Southern District of Mississippi) held an evidentiary hearing. It remains to be seen whether Judge McNeel will scrutinize Mississippi's arguments more carefully than Judge Limbaugh did.

Conclusion

$24 billion is a big number. But it seems highly unlikely that Missouri will ever see a penny of it, given the FSIA's rules on immunity from execution. Missouri may, nevertheless, be able to harass these defendants—and potentially other Chinese parties holding property in the United States—by filing actions to execute the judgment even if those actions ultimately prove unsuccessful.

Last week, friend-of-TLB Ted Folkman had this to say about the Missouri judgment over at Letters Blogatory:

> *When we think about these cases, we have to think about what it would be like if the shoe were on the other foot. In 2021, the US and other western countries were accused of hoarding the COVID vaccine. Should the United States have been amenable to suit in China or elsewhere because it prioritized the public health needs of its own people? The technical term for taking seriously the question, "what if the shoe were on the other foot?" is comity. We need more of it.*

Trending Topics in German PIL 2024 (Part 1 – Illegal Gambling and “Volkswagen”)

At the end of each year I publish an article (in German) about the Conflict of Laws developments in Germany of the last twelve months, covering more or less the year 2024 and the last months of 2023. I thought it would be interesting for the readers of this blog to get an overview over those topics that seem to be most trending.

The article focuses on the following topics:

1. Restitution of Money lost in Illegal Gambling
2. Applicable Law in the Dieselgate litigation
3. The (Non-)Valitidy of Online Marriages
4. New German conflict-of-law rules regarding gender afiliation / identity
5. Reforms in international name law

I will start in this post with the two first areas that are mainly dealing with questions of Rome I and Rome II while in my follow-up post I will focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

This is not a resumen of the original article as it contains a very detailed analysis of sometimes very specific questions of German PIL. I do not want to bore the readers of this blog with those specificities. Those interested in knowing those details can find the article here (no free access).

I would be really curious to hear whether these or similar cases are also moving courts in other jurisdictions and how courts deal with them. So, please write me via mail or in the comments to the post if you have similar or very different experiences on those cases.

Part 1 – Illegal Gambling and "Volkswagen"

I will start with the two areas that are mainly questions of Rome I and Rome II while in my follow-up post I will focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

1. Restitution of Money lost in Illegal Gambling

Cases involving the recovery of money lost to illegal online gambling are being heard in courts across Germany and probably across Europe. Usually the cases are as follows: A German consumer visits a website offering online gambling. These websites are in German and offer German support by phone or email with German phone numbers etc. However, the provider is based in Malta or – mainly before Brexit – Gibraltar. After becoming a member, the consumer has to open a bank account with the provider. He transfers money from his (German) account to the account in Malta and uses money from the latter account to buy coins to gamble. In Germany, in order to offer online gambling, you need a licence under German law. The operators in these cases are usually licensed under Maltese law but not under German law.

- In terms of **applicable law**, Rome I and Rome II are fairly straightforward. Since the question in this case is whether the plaintiff can claim the return of money lost on the basis of an illegal and therefore void contract, Rome I is applicable as it also governs claims arising from contracts that are ineffective or of doubtful validity. It is therefore irrelevant that German law would provide for restitution on the basis of unjust enrichment (*Leistungskondiktion*), which generally is a non-contractual obligation that falls within the scope of Rome II. As we have a consumer and a professional, **Article 6 Rome I** has to be applied. As I described the case above, there are also little doubts that the website is (also) directed to Germany and therefore German law as the country of the habitual residence of the consumer applies. To this conclusion came, e.g. the German BGH, but also the Austrian OGH.
- The application of German law leads to the invalidity of the contract

pursuant to sec. 134 BGB, which **declares a contract null and void if it violates a law that prohibits that contract**. In order to determine whether the law prohibits this concrete gaming contract, the question arises as to the **geographical scope of the prohibition on offering gambling/casino contracts without a German licence**. As this prohibition is based on German public law, it is limited to gambling/casino games that take place on German territory. So far, German courts have applied the German prohibition in cases where the consumer was in Germany when playing. One court (LG Stuttgart, 11.9.2024 – 27 O 137/23, 18.09.2024 – 27 O 176/23) even considered it sufficient if the consumer was in Germany when opening the bank account with the gaming provider from which the money was then transferred to the games. The court ruled that it did not matter whether the consumer played from Germany, whether the provider was located abroad or whether the bank account from which the money was finally transferred to the game was located in another country. It appears that Austrian courts have similar cases to decide, but see this point differently, the Austrian OGH decided that the Austrian rules prohibiting unlicensed gambling are limited to providers based in Austria.

- As you probably know, the Austrian OGH made a request to the CJEU to determine the place of the damage (**Article 4 para. 1 Rome II**) in a case where the consumer/player transfers the money from the local bank account to the account of the Bank in Malta and then makes payments from this second bank account. So far, German courts were hesitant to take this road. The way over unjust enrichment resulting from a invalid contract has the charming effect that you do not have to apply Rome II's general tort rule (Article 4 para. 1 Rome II) and dive into the discussion how to determine the place of economic damages. Under German law, however, Rome II may be relevant in cases where the claim is not based on unjust enrichment but on **intentional damage inflicted in a manner offending common decency** (*vorsätzliche sittenwidrige Schädigung*), a special offence which is more difficult to prove (sec. 826 BGB). In some few cases, where sec. 826 was in question, courts still did try to avoid the discussion how to locate this economic loss. One simply applied the law of the place of the habitual residence of the consumer/gamer as the play from which the transfer from the first bank account was effected (OLG Karlsruhe 22.12.2023 – 19 U 7/23; 19.12.2023 – 19 U 14/23). Other courts

avoided the discussion altogether by applying Article 4 para. 3 Rome II directly – leading to an accessory connection to the law applied to the gambling contract (LG Hagen, 5.10.2023).

One footnote to the whole scenario: There is a case pending at the CJEU that might make the whole discussion superfluous (Case C-440/23). The German practice of distributing gambling licences might be classified as unlawful under EU law at least for some older cases. The question by the CJEU to be decided is whether this results in a ban on reclaiming losses from this gambling.

2. Place of Damage in Volkswagen Cases

The Volkswagen emission scandal cases, in German dubbed "Dieselgate", are about claims for damages that end customers are asserting against Volkswagen (or other vehicle manufacturers). The damage is that they bought a car with a manipulated defeat device which, under certain conditions of the type-approval test, resulted in lower emissions than in normal operation. As a result, vehicles with higher emissions than permitted were registered and marketed. Volkswagen is currently being sued throughout Europe. Most cases are initiated by consumers who did not buy directly from the manufacturer but through a local dealer, so there is no direct contractual link. As German law is in some respects restrictive in awarding damages to final consumers, it seems to be a strategy of Volkswagen to come to German law.

- **Rome I**: As far as Volkswagen argued that there is an implicit contract between Volkswagen and the end consumer resulting from a warranty contract in case with a Spanish end buyer, a German court did not follow that argument or at least came to the conclusion that this is a question of Spanish law as such a warranty contract would have to be characterized as a consumer contract in the sense of Article 6 para. 1 Rome I Regulation (LG Ingolstadt 27.10.2023 – 81 O 3625/19)
- In general German courts apply Article 4 para. 1 Rome II and determine the law of the damage following the CJEU decision in VKI and MA v FCA Italy SpA: The place of damage is where the damaging contract is concluded or, in case the places are different, where the vehicle in question is handed over. The BGH (and lower instance courts, e.g. OLG Dresden, 07.11.2023 – 4 U 1712/22 – not free available online) followed

that reasoning. One court had to consider whether, instead, Article 7 Rome II Regulation (**environmental damages**) would be applicable, as the increased emissions would also damage the environment. The LG Ingolstadt did not follow that line of argument, as the damage claimed in the concrete case was a pure economic loss, not an environmental damage.

What are your thoughts? How do courts treat these cases in your jurisdictions (I guess there are many cases as well)? Do you have different or similar issues in discussion?

Stay tuned for the second part of this article which will move to trending topics in family law…