

Chinese Case Law Collection Adds to the CISG's Jurisconsultorium: Reflections on the United Nations Convention on Contracts for the International Sale of Goods and its Domestic Implementations

Dr Benjamin Hayward*

The *United Nations Convention on Contracts for the International Sale of Goods* ('CISG'), currently adopted by 95 States, is a treaty intended to harmonise the laws governing cross-border goods trade: and thereby promote trade itself. So much is made clear in its Preamble:

The States Parties to this Convention, ...

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows: ...

Art. 7(1) CISG's instruction for interpreters to have regard 'to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade' establishes a requirement of autonomous interpretation. This, in turn, facilitates the CISG's global jurisconsultorium: whereby courts, arbitrators, lawyers, academics, and other interested stakeholders can influence and receive influence in relation to the CISG's uniform interpretation. A recent publication edited by Peng Guo, Haicong Zuo and Shu Zhang, titled *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 1*, makes an important contribution to this interpretative framework: presenting abstracts and commentaries addressing 48 Chinese CISG cases

spanning 1993 to 2005, that may previously have been less accessible to wider international audiences.

A review of this case law collection discloses an interesting phenomenon affecting the *CISG's* Chinese application: at least, until very recently. Pursuant to Art. 142(2) *General Principles of the Civil Law* (which was effective in the People's Republic of China until repealed as of 1 January 2021):

[I]f any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.

(Translation via Jie Luo.)

Numerous contributions to Guo, Zuo and Zhang's volume - including by Wang, Guo and Zhang; Luo; Luo again; Wang; and Xu and Li - observe that some Chinese courts have interpreted this provision to require the *CISG's* application only where it is inconsistent with non-harmonised Chinese law. Whilst this approach to the *CISG's* application is noteworthy for its inconsistency with international understandings of the treaty, it is arguably more noteworthy for highlighting that national law itself is often 'where the relationship between the convention and national law is regulated'.^[1] Scholarship has given much attention to the success (or otherwise) of Art. 7(1) *CISG* in securing the treaty's autonomous interpretation. However, machinery provisions giving the *CISG* local effect in any given legal system (themselves being matters of 'local legislative judgment') have an apparently-underappreciated role to play, too.

Wang's contribution quotes Han as writing that the Chinese inconsistency concept's effective implementation of a reverse burden of proof in establishing the *CISG's* application is a situation that 'I am afraid ... is unique in the world'. On the contrary, and not unlike China's former Art. 142(2) *General Principles of the Civil Law*, Australia's *CISG* implementing Acts still ostensibly frame the treaty's local application in terms of inconsistency. The *Sale of Goods (Vienna Convention) Act 1986* (NSW) s 6 is representative of provisions found across the Australian state and territory jurisdictions: '[t]he provisions of the *Convention* prevail over any other law in force in New South Wales to the extent of any

inconsistency'. Case law from Victoria and from Western Australia has read those jurisdictions' equivalent inconsistency provisions as implying the *CISG's* piecemeal application, only where particular provisions are inconsistent with local law. Looking even further afield, Australia's own use of the *inconsistency* device is far from unique. Singaporean and Canadian legislation make use of the inconsistency concept, as does Hong Kong's recently-promulgated *CISG* Ordinance. In the latter case, the statutory interpretation risks associated with the adoption of an inconsistency provision were drawn to the Hong Kong Department of Justice's attention. However, Australia's statutory model prevailed, perhaps in part because it has previously been put forward as a model for Commonwealth jurisdictions looking to implement the *CISG*.

At the risk of being slightly controversial, at least some scholarship addressing the failings of national *CISG* interpretations may have been asking the wrong question: or at least, missing an important additional question. Instead of asking why any given court has failed to apply and respect Art. 7(1) *CISG's* interpretative directive, we might instead (or also) usefully ask whether that given State's *CISG* implementation legislation has been drafted so as to invite the local law comparisons that have then been made. Some responsibility for problematic *CISG* interpretations might lie with the legislature, in addition to the judiciary.

In Australia, the *Playcorp* decision - Victoria's inconsistency case referred to above - has been taken by subsequent cases in both the Federal Court and in the Full Federal Court of Australia as authority for the proposition that Art. 35 *CISG's* conformity requirements equate to the implied terms contained in the non-harmonised *Goods Act 1958* (Vic) s 19. The Federal Court's first-instance decision was itself then cited in New South Wales for that same proposition: leading to a problematic *CISG* interpretation that is now entrenched under multiple layers of precedent. Whilst the equation being made here is rightly criticised in itself, it has Australia's inconsistency provisions - *in addition to* our courts' failures to apply Art. 7(1) *CISG* - resting at its core.

Guo, Zuo and Zhang's *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 1* thereby makes a valuable contribution to the *Convention's* jurisconsultorium: first, by virtue of its very existence, but secondly, by its additional disclosure of China's former inconsistency struggles to the wider scholarly community.

[1] Bruno Zeller, 'The CISG in Australasia: An Overview' in Franco Ferrari (ed), *Quo Vadis CISG? Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods* (Bruylant, 2005) 293, 299.

* Senior Lecturer, Department of Business Law and Taxation, Monash Business School

Twitter: @LawGuyPI

International Trade and International Commercial Law research group:
@MonashITICL

Disclosure: The author is a confirmed contributor to the forthcoming *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 3*.

Special Commission on the Hague Adults Convention: Five Takeaways from its First Meeting

This post was written by Pietro Franzina and Thalia Kruger, and is being published simultaneously on [Conflictflaws.net](https://www.conflictoflaws.net) and on the [EAPIL](https://www.eapil.org) blog.

The delegations of more than thirty Member States of the Hague Conference on Private International Law attended the first meeting of the Special Commission charged with reviewing the operation of the Hague Convention of 13 January 2000 on the international protection of adults of 13 January 2000 on the international protection of adults. The meeting took place in The Hague and online from 9 to 11 November 2022 (for a presentation of the meeting, see this post on [Conflictsoflaw.net](https://www.conflictoflaws.net) and this one on

the EAPIL blog). A dozen organisations, governmental and non-governmental (including the Council of the Notariats of the European Union, the Groupe Européen de Droit International Privé and the European Association of Private International Law), were also in attendance.

The discussion covered a broad range of topics, leading to the conclusions and recommendations that can be found on the website of the Hague Conference. The main takeaways from the meeting, as the authors of this post see them, are as follows.

The Hague Adults Convention Works Well in Practice

To begin with, the Special Commission affirmed that the Convention works well in practice. No major difficulties have been reported either by central authorities instituted under the Convention itself or by practitioners.

Doubts occasionally appear with respect to some provisions. Article 22 for example provides that measures of protection taken by the authorities of a Contracting State “shall be recognised by operation of law in all other Contracting States”, unless a ground for refusal among those listed in the same provisions arises. A declaration of enforceability, as stipulated in Article 25, is only necessary where measures “require enforcement” in a Contracting State other than the State of origin.

Apparently, some authorities and private entities (e.g., banks) are reluctant to give effect to measures of protection that clearly do not require enforcement, such as a judicial measure under which a person is appointed to assist and represent the adult, unless that measure has been declared enforceable in the State where the powers of the appointed person are relied upon. The Special Commission’s conclusions and recommendations address some of these hesitations, so that they should now prove easier to overcome. Regarding *exequatur*, see para. 33, noting that “measures for the protection of an adult only exceptionally require enforcement under Article 25”, adding that this may occur, for instance, “where a decision is taken by a competent authority to place the adult in an establishment or to authorise a specific intervention by health care practitioners or medical staff”, such as tests or treatments. Other doubts are dealt with in the practical handbook prepared by the Working Group created within the Hague Conference in view of the meeting of the Special

Commission. The draft handbook (first version publicly available), which the Special Commission has approved “in principle”, will be reviewed in the coming weeks in light of the exchanges that occurred at the meeting, and submitted to the Council on the General Affairs and Policy of the Conference for endorsement in March 2023).

Situations Exist in the Field of Adults’ Protection that Are Not (Fully) Regulated by the Convention

The Convention deals with measures of protection taken by judicial and administrative authorities, and with powers of representation conferred by an adult, either by contract or by a unilateral act, in contemplation of incapacity. By contrast, nothing is said in the Convention concerning *ex lege* powers of representation. These are powers of representation that the law of some States (Germany, Austria and Switzerland, for example) confers on the spouse of the adult or a close relative or family member, for the purpose of protecting the adult. Their operation is generally confined to situations for which no measures have been taken and no powers of representation have been conferred by the adult.

The Special Commission acknowledged that *ex lege* powers of representation fall under the general scope of the Convention, but noted that no provision is found in the Convention that deals specifically with such powers. In practice, *ex lege* powers of representation may be the subject of cooperation between the authorities of Contracting Parties (notably as provided for under Chapter V), but, where the issue arises of the existence, the extent and the exercise of such powers, the courts and other authorities of Contracting States will rely on their own law, including, where appropriate, their conflict-of-laws rules.

There is yet another gap that the Special Commission discussed. The Commission observed that instructions given and wishes made by an adult in anticipation of a future impairment of their personal faculties (e.g., in the form of advance directives), similarly fall within the general scope of the Convention and are subject, as such, to the cooperation provisions in Chapter V. Whether or not a particular anticipatory act constitutes a power of representation for the purposes of Articles 15 and 16, on powers of representation conferred by the adult, is to be determined on a case-by-case basis. Some unilateral acts plainly come within the purview of Articles 15 and 16, as they actually include a conferral of powers on other persons. Others do not, and may accordingly be dealt with by each

Contracting State in conformity with their own law.

States Do Not Currently See an Interest in Modifying the Convention

The question has been raised in preparation of the Special Commission whether the Convention ought to be amended, namely by a protocol to be negotiated and adopted in the framework of the Hague Conference on Private International Law. In principle, a protocol would have provided the States with the opportunity to fill the gaps described above, and address other concerns. However, under international law only those Contracting States that ratify the protocol would be bound by the modifications.

The Special Commission witnessed that, at this stage, no State appears to see an amendment as necessary.

Only one issue remains to be decided in this respect, namely whether the Convention should be modified in such a way as to include a REIO clause, that is, a clause aimed at enabling organisations of regional economic integration, such as the European Union, to join the Convention in their own right. The matter will be discussed at the Council on the General Affairs and Policy of the Conference of March 2023.

The decision lies, in fact, in the hands of the Union and its Member States, as this is currently the only Regional Economic Integration Organisation concerned by such a clause. Their decision will likely be affected by the approach that should be taken in the coming weeks concerning the proposal for a regulation on the protection of adults that the Commission is expected to present in the first half of 2023.

Efforts Should Now Be Deployed Towards Increasing the Number of Contracting Parties

The main problem with the Convention lies in the fact that only relatively few States (fourteen, to be precise) have joined it, so far. Several States stressed the importance of further promoting ratification of, or accession to, the Convention.

It is worth emphasising in this respect that the Hague Adults Convention builds, to a very large extent, on cooperation between Contracting States. This means that a State cannot fully benefit from the advantages of the Convention by simply

copying the rules of the Convention into its own legislation, or by relying on such rules on grounds of judicial discretion (as it occurs in the Netherlands and to a large extent in England and Wales), but should rather become a party to it.

Various States expressed an interest in the Convention. The responses to the questionnaires circulated in preparation of the meeting of the Special Commission suggest that at least five States are actively contemplating ratification (Hungary, Italy, Luxembourg, Mexico and Sweden), and that others have considered ratification (Slovakia) or are considering it (Argentina). For its part, Malta signed the Convention on the occasion of the meeting of the Special Commission, and will likely ratify it in the not too distant future.

Tools to Enhance the Successful Operation of the Convention

Some of the practitioners present drew the participants' attention to practical difficulties in the cross-border protection of adults. To minimise practical difficulties, the Permanent Bureau, in some instances together with the Working Group on the Adults Convention, developed a number of tools.

The first is an extensive country profile, to be completed by Contracting States and made available on the website of the Hague Conference. This profile includes various matters of national law, such as names and content of measures of protection, jurisdiction of courts or other authorities to issue these measures, transfer of jurisdiction, and names, forms and extent of powers of representation.

The second is a toolkit on powers of representation, which contains detailed information about the national laws of States that provided responses, on for instance who can be granted powers of representation, how this granting must take place, and the permitted extent of the representation.

Concluding remarks

All in all, the issue of the cross-border protection of Adults has rightly gained attention over the past ten years. While States amend their domestic legislation to be in conformity with the UN Convention on the Rights of Persons with Disabilities, they seem to be increasingly aware of the importance of ensuring cross-border continuity. This includes continuity of measures of protection issued by authorities such as courts, as well as the powers of representation granted by adults themselves. These matters of private international law require dialogue on

the international and European Union level, more States to join the Convention, and tools to assist practice.

Report from the 2022 Hague Academy Summer Course in PIL



Written by Martina Ticic, University of Rijeka, Faculty of Law; Croatian Science Foundation (HRZZ) doctoral student

For anyone interested in the area of private international law, the Hague Academy of International Law and its Summer Courses on Private International Law have been one of the must-do's ever since the Academy opened its doors in 1923. Each year, hundreds of students, academics and practitioners attend the courses given by renowned lecturers, while the Academy also offers multiple social and embassy visits, an access to the famous Peace Palace Library, as well as ample opportunities for discussion between the attendees who all come from different backgrounds. It seems that this report comes in quite timely as the programme for the 2023 Summer Course has just been announced.

The 2022 edition once again proved the immense value that the Summer Courses offer. From 1 to 19 August, the Academy hosted the attendees of over 60 different nationalities, providing them with lectures and seminars on various relevant topics, some time for research and visits to many of the Hague's international organisations, but also an opportunity for exchange of ideas, networking and creating friendships. As such, the Academy was truly a place to be this summer for everyone wanting to learn more on the matters of private international law, as well as to connect with others who share the same or similar interests.

After the welcome speech by prof. **Jean-Marc Thouvenin**, Secretary-General of

the Academy, this year's inaugural lecture was given by Dominique Hascher, judge at the Supreme Judicial Court of France. Judge Hascher opened the Summer Courses with the lecture on 'The Role of International Law in the Review of Awards'.

The General Course was given by **Louis d'Avout**, a professor of private international law at the Université Paris II Panthéon-Assas. Titled 'Towards Worldwide Law Consistency', the course provided the attendees with an overview of the core idea on which the discipline of conflict of laws was built upon: the coherence of rules of individual conduct on the global level. By analysing the sole definition of private international law, coordination mechanisms, the concept of legal relativity, connecting rules and factors, transnational cooperation and vertical disciplines in the regional context, prof. d'Avout offered a holistic view on the discipline of private international law itself, making the course a necessity for anyone wishing to excel in this area of law, either as a practitioner or as an academic. Through his lecture, prof. d'Avout invited all of the participants, particularly the younger generation of lawyers, to work towards the global coherence of law, as the desirable state of the system of law in general is that of a 'social construction' which guarantees predictability and security for its subjects that are faced with various sources of law and modes of conflict resolution. The course lasted for two weeks, which meant that there was plenty of time for participants to acquaint themselves with the matter at hand. Two of the seminars on the chosen topics were also held in the course of the two weeks.

Prof. **Arnaud Nuyts**, from the Université Libre de Bruxelles, held a Special Course on 'The Forum for Cyber-Torts', which is an excellent topic in today's day and age. He highlighted the diversity of civil cyber-torts, as well as the challenges of locating the torts that are committed on-line. The course also touched particularly upon European legal framework and the guiding principles of its case law, while also analysing the 'trichotomy' of the forum for cyber-torts: the forum for the place of the causal event, the forum for the place of accessibility of the website and the forum for the centre of interests of the victim.

Prof. **Ulla Liukkunen**, from the University of Helsinki, presented her Special Course on 'Mandatory Rules in International Labour Law', another important topic considering the rising number of cross-border workers. As labour law is often connected to domestic rules, it is interesting to observe more closely the relationship between labour law and private international law. Throughout the

course, the special nature of cross-border employment was acknowledged and the participants were acquainted with the concepts of triangular contracts, weaker-party protection, International Labour Organisation, the 'decent work' objective, etc. Prof. Liukkunen particularly highlighted the pluralism of regulatory sources in international labour law, and pointed to the fact that labour rights-based approach to decent work in developing regulatory private international law would advance the necessary protection for workers and ensure decent work for all.

Prof. **Tiong Min Yeo**, from the Singapore Management University, held a Special Course titled 'Common Law, Equity, and Statute: Effect of Juridical Sources on Choice of Law Methodology'. The course offered insight into the topic of choice of law methodology and the analysis that must be done in order to select the applicable law rules. It presented three juridical sources in hierarchy: statute, equity and common law. The analysis of various case law served to explain the effects that these sources have on the choice of law methodology.

Prof. **Kermit Roosevelt III**, from the University of Pennsylvania Carey Law School, presented the topic of 'The Third Restatement of Conflict of Laws'. Throughout this Special Course, the history of American choice of law was examined so as to better understand the context of the Third Restatement of Conflict of Laws, a current project of the American Law Institute. From the beginnings of American choice of law characterised by territorialist approach in the First Restatement and the Second Restatement as a 'transitional document', to the goals and framework of the Third Restatement, the course portrayed the full picture of the American choice of law rules. One of the core ideas that prof. Roosevelt developed throughout the course is that there are two different sets of values that a choice of law system should promote: so-called 'right answer' values and 'systemic' values. While the former one relates to selecting the law of the state with the best claim to regulatory authority, the latter relates to the certainty, predictability, uniformity and ease of application of the system.

Prof. **João Bosco Lee**, from the Universidade Positivo Brazil, presented an arbitration-related topic titled 'The Application of International Conventions by Arbitrators in International Trade Disputes'. On the one hand, this Special Course examined the application of international conventions pertaining to the law applicable to the merits of the dispute in international commercial arbitration, either according to the choice of the parties or by the effect of determination of the lex cause by the arbitrator(s). On the other hand, the participants got the

chance to study the cases in which international conventions could intervene in the resolution of international commercial arbitration without being the applicable law on the merits.

Prof. **Marco Frigessi di Rattalma**, from the Brescia University, held a Special Course on the 'New Trends in the Private International Law of Insurance Contracts'. By focusing on the specific cases that emerged in the recent years in the field of private insurance, the attendees of the course were immersed in diversity of topics relating to jurisdiction and applicable law in the matters of insurance contracts, the specific types of insurance contracts, compulsory insurance against civil liability in respect of the use of motor vehicles, as well as the impact of fundamental rights on such matters. Prof. Frigessi di Rattalma posed various important questions during his analysis of the relevant issues, e.g. what can characterise as an insurance contract; whether EU law may permit derogation from the equal treatment of men and women provided by insurance contracts in accordance with the applicable national law to persist indefinitely; what exactly falls under the notion of 'use of vehicles' in regards to Directive 2009/103 on the insurance against civil liability in respect of the use of motor vehicles; etc.

Additionally, *special lectures were given in tribute to the late Professor Emmanuel Gaillard* who was originally meant to hold the General Course at the 2022 Summer Courses. These lectures were held by **Yas Banifatemi, Diego P. Fernandez Arroyo, Dominique Hascher, Horatia Muir Watt** and **Luca Radicati di Brozolo** respectively, each of them focusing on a particular issue related to arbitration, the topic most dear to prof. Gaillard, as well as familiarising the attendees with the persona of Emmanuel Gaillard.

In the afternoons, participants could attend seminars and some of the lectures on specific topics which were organised each week, e.g. Lecture on the Permanent Court of Arbitration by Brooks Daly, Lecture on the use of the Library by Candice Alihusain, Lecture on the International Court of Justice by Florence Zaoui, Lecture on 'Fighting Human Trafficking: the Dutch Approach' by Warner ten Kate, Lecture on the Hague Conference on Private International Law by Philippe Lortie, and 'International Commercial Arbitration: the Role of Private International Law in the Lifespan of an Arbitral Procedure' by Gerard Meijer and Camilla Perera-de Wit. For those eager to learn more, two extra short courses were held in addition: one on the law of the European Union held in the span of

the first week and given by dr. Thomas Vandamme, and the other on the matters of Comparative Law, held on Saturday of the first week and given by dr. Brooke Marshall.

The participants were also given an opportunity of visiting some of the international organisations that are stationed in the Hague. For this year's session, the Academy planned visits to the Hague Conference on Private International Law, the International Criminal Court, the Kosovo Specialist Chambers, the Organisation for the Prohibition of Chemical Weapons and the Residual Special Court for Sierra Leone. By visiting various organisations that deal with such variety of matters, the attendees got a truly immersive experience. Besides the international organisations, visits to multiple embassies were organised, so the participants also got the feel of diplomacy. Various other activities were also held, e.g. a reception at the City Hall, Beach Party, Grotius Peace Palace Library Tour and a visit of the extraordinary Peace Palace itself.

During the Courses, the most advanced attendees had the opportunity to attend the Directed Studies sessions which delved deep into many intricate questions of private international law. An even smaller fraction of those students in the end got the chance to participate in the prestigious Diploma Exam of the Academy. In this year's Private International Law session, one Diploma by the Academy was awarded to Ms. Madeleine Elisabeth Petersen Weiner.

As it is obvious from the overview presented above, the 2022 Summer Courses on Private International Law were, as always, a huge success. Over 200 participants from all over the world and from various professional backgrounds got the experience of a lifetime thanks to the Academy, its Summer Courses and all the additional benefits that come with it. For anyone still doubting whether the Summer Courses, or perhaps the newer addition of the Winter Courses, are worth to attend, this post can serve as a clear answer and affirmative one at that.

More on the Validity of the PDVSA 2020 Bonds

Written by Mark Weidemaier, the Ralph M. Stockton, Jr. Distinguished Professor at the University of North Carolina School of Law, and Mitu Gulati, the Perre Bowen Professor of Law at the University of Virginia School of Law.

Governments with no realistic prospect of paying their debts often gamble for redemption, trying desperately to avoid default. Political leaders, with good reason, fear that a debt default will get them thrown out of office. But in trying to hold power, sometimes by borrowing even more, they often make matters worse for the country and its people. A prime example involves the collateralized bonds issued by Venezuelan state oil company, PDVSA.

Venezuela's Gamble

In 2016, PDVSA was about to default on its debt, as was the Venezuelan state itself. At that stage, it was already well beyond the point where the debt should have been restructured, given worsening domestic conditions. Instead, the Maduro government gambled. It conducted a debt swap in which investors exchanged unsecured PDVSA bonds for new ones due in 2020. To sweeten the deal, the PDVSA 2020s were backed by collateral in the form of a 50.1% interest in CITGO Holding, the parent company of U.S. oil refiner CITGO Petroleum. The deal bought a few extra years but put at risk the country's primary asset in the United States.

Even at the time, it was uncertain whether Venezuelan law authorized the transaction. The Venezuelan Constitution requires legislative approval for contracts in the national public interest. Maduro did not seek approval because opposition lawmakers controlled the National Assembly and had made clear they would not grant it. The deal went ahead anyway.

Times have changed. The United States recognizes Juan Guaidó as Venezuela's interim president (for now). The PDVSA 2020 bonds are in default. The bondholders want their collateral. PDVSA has challenged the validity of the bonds. But the bonds include a choice-of-law clause designating the law of New

York. Does this mean that validity is to be determined under New York law? John Coyle recently wrote a terrific post about the case and its significance on this blog. We write to provide some broader context, drawing from our article, *Unlawfully Issued Sovereign Debt*.

Sovereign Debt and Choice-of-Law Clauses

The story of the PDVSA 2020 bonds is a common one in government debt markets. A government borrows money in dodgy ways or at a time of financial distress. Arguably, the debt contravenes domestic law, although the government may obtain legal opinions affirming its validity. The debt also includes a choice of law clause providing for the application of foreign law, typically that of New York or England. Later, a new government comes to power and disputes the validity of the debt. We have seen this pattern in Venezuela, Mozambique, Ukraine, Zambia, Liberia, Puerto Rico, and in other sovereign and sub-sovereign borrowers. (The pattern goes back even further - for a delightful treatment of the hundreds of such cases from the 1800s involving municipal debt, see [here](#)).

These cases raise what seems like a simple question: Does an international bond—i.e., one expressly made subject to foreign law—protect investors against the risk that the bond will later be deemed in violation of the issuer’s domestic law? Despite seeming simple, and how frequently the question arises, there is little clarity about the answer. New York law governs a big part of the sovereign debt markets, and the choice-of-law question in the PDVSA 2020 case has been certified to the New York Court of Appeals. Will that court’s decision offer clarity?

Variations in Clause Language

Count us skeptical. The problem is not just the unpredictability of choice of law rules. It is that many choice-of-law clauses are drafted in perplexing ways, which leave unclear the extent of protection they offer to investors. Consider three examples. The first is from the PDVSA 2020 bond itself where the relevant language is capitalized (as if capitalization has some magic effect):

THIS INDENTURE AND THE NOTES SHALL BE CONSTRUED IN ACCORDANCE WITH, AND THIS INDENTURE AND THE NOTES AND ALL MATTERS ARISING OUT OF OR RELATING IN ANY WAY WHATSOEVER TO THIS INDENTURE AND THE NOTES (WHETHER IN CONTRACT, TORT OR

OTHERWISE) SHALL BE GOVERNED BY, THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO THE CONFLICTS OF LAW PROVISIONS THEREOF (OTHER THAN SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW)

This clause apparently seeks to extend New York law to the widest possible range of questions. Whether that includes the question of whether the bonds were validly issued is, as John's post puts it, the "billion-dollar question." And the answer is not clear. The decision by the New York Court of Appeals might provide some clarity on it . . . maybe.

But now consider this clause, from a Brazilian bond (emphasis ours):

*The indenture and the debt securities will be governed by, and interpreted in accordance with, the laws of the State of New York without regard to those principles of conflicts of laws that would require the application of the laws of a jurisdiction other than the State of New York . . . ; **provided, further, that the laws of Brazil will govern all matters governing authorization and execution of the indenture and the debt securities by Brazil.***

Does the bold text mean that investors cannot enforce a loan issued in violation of Brazilian law? We aren't sure. As we discuss in the paper, it can be hard to identify questions of "authorization" and "execution," especially in the context of sovereign borrowing. Consider the question whether a loan violates a constitutional or statutory debt limit. Does the debt limit negate the sovereign's capacity to borrow, limit the authority of government officials to bind the sovereign, or make the loan illegal or contrary to policy? How one categorizes the issue will affect the answer to the choice-of-law question. Carve outs like this—which reserve questions of authorization and execution for resolution under local law—appear in around half the New York-law sovereign bonds we examined.

Finally, consider this clause from a Turkish bond (again, emphasis ours):

*[The] securities will be governed by and interpreted in accordance with the laws of the State of New York, except with respect to the authorization and execution of the debt securities on behalf of Turkey **and any other matters required to be governed by the laws of Turkey, which will be governed***

by the laws of Turkey

What now? This “other matters” carve out is even odder than the one for questions of authorization and execution. It hints that additional, unspecified matters might be governed by the sovereign’s local law. Indeed, it implies that the sovereign’s own law might determine which issues fall within the “other matters” exception. If so, the clause potentially allows the government to create new exceptions to the governing law clause.

Conclusion

Our discussions with senior sovereign debt lawyers have done little to dispel our uncertainty about the meaning of these clauses. They seem just as confused as we are. All we can say with confidence is that many choice of law clauses include traps for unwary investors. Until drafting practices converge on a consistent and coherent model, the choice-of-law question is likely to remain fodder for litigation.

[This post is cross-posted at Transnational Litigation Blog.]

The Billion-Dollar Choice-of-Law Question

Choice-of-law rules can be complex, confusing, and difficult to apply. Nevertheless, they are vitally important. The application of choice-of-law rules can turn a winning case into a losing case (and vice versa). A recent decision in the U.S. Court of Appeals for the Second Circuit, *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, is a case in point. The Second Circuit was called upon to decide whether to apply the law of New York or the law of Venezuela to determine the validity of certain notes issued by a state-owned oil company in Venezuela. Billions of dollars were riding on the answer.

In this post, I first review the facts of the case. I then provide an overview of the

relevant New York choice-of-law rules. Finally, I discuss the choice-of-law question that lies at the heart of the case.

The Bonds

In 2016, Venezuela's state-owned oil company, *Petróleos de Venezuela, S.A.* ("PDVSA") approved a bond exchange whereby holders of notes with principal due in 2017 (the "2017 Notes") could exchange them for notes with principal due in 2020 (the "2020 Notes"). Unlike the 2017 Notes, the 2020 Notes were secured by a pledge of a 50.1% equity interest in *CITGO Holding, Inc.* ("CITGO"). CITGO is owned by PDVSA through a series of subsidiaries and is considered by many to be the "crown jewel" of Venezuela's strategic assets abroad.

The PDVSA board formally approved the exchange of notes in 2016. The exchange was also approved by the company's sole shareholder and by the boards of the PDVSA's subsidiaries with oversight and control of CITGO.

The National Assembly of Venezuela refused to support the exchange. It passed two resolutions - one in May 2016 and one in September 2016 - challenging the power of the executive branch to proceed with the transaction and expressly rejecting the pledge of CITGO assets in the 2020 Notes. The National Assembly took the position that these notes were "contracts of public interest" which required legislative approval pursuant to Article 150 of the Venezuelan Constitution. These legislative objections notwithstanding, PDVSA followed through with the exchange. Creditors holding roughly \$2.8 billion in 2017 Notes decided to participate and exchanged their notes for 2020 Notes.

In 2019, the United States recognized Venezuela's Interim President Juan Guaidó as the lawful head of state. Guaidó appointed a new PDVSA board of directors, which was recognized as the legitimate board by the United States even though it does not control the company's operations inside Venezuela. The new board of directors filed a lawsuit in the Southern District of New York against the trustee and the collateral agent for the 2020 Notes. It sought a declaration that the entire bond transaction is void and unenforceable because it was never approved by the National Assembly. It also sought a declaration that the creditors were prohibited from executing on the CITGO collateral.

Choice of Law

If the 2020 Notes were validly issued, they are binding on PDVSA, and the CITGO assets may be seized by the noteholders in the event of default. If the notes were not validly issued, they are not binding on PDVSA, and the CITGO assets may not be seized by the noteholders in the event of default. Whether the Notes were validly issued depends, in turn, on whether the court applies New York law or Venezuelan law. This is the billion-dollar choice-of-law question. If New York law applies, then the notes will almost certainly be deemed valid and the noteholders can seize the pledged collateral. If Venezuelan law is applied, then the notes may well be deemed invalid and the noteholders will be stymied. With the stakes in mind, let us now turn to the applicable choice-of-law rules.

A federal court sitting in diversity must look to the choice-of-law rules of the state in which it sits—here, New York—to decide which jurisdiction’s law to apply. N.Y. General Obligations Law 5-1401 states that a New York choice-of-law clause should be enforced whenever it appears in a business contract worth more than \$250,000 in the aggregate. The 2020 Notes contain New York choice-of-law clauses. Since the aggregate value of the 2020 Notes is far greater than \$250,000, and since the 2020 Notes have no relation to personal, family or household services, it may seem that the court should simply apply New York law and call it a day.

There is, however, another New York choice-of-law rule that may trump Section 5-1401. Section 5-1401 states that it shall not apply to any contract “to the extent provided to the contrary in . . . section 1-301 of the Uniform Commercial Code.” Section 1-301(c) states that if N.Y. Commercial Code Section 8-110 “specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified.” Section 8-110(a), in turn, states that “[t]he local law of the issuer’s jurisdiction . . . governs . . . the validity of a security.”

All of this suggests that the applicable choice-of-law rule may not be the one laid down in Section 5-1401. Section 8-110 directs courts to apply the local law of the issuer’s jurisdiction—here, Venezuela—to resolve issues relating to the “validity” of the security. The billion-dollar question is what exactly the word “validity” means in this context.

On the one hand, the term may be interpreted broadly to refer to *both* the corporate law of Venezuela *and* to Venezuelan law more broadly. Under this interpretation, the 2020 Notes may not be validly issued because they were never approved by the National Assembly as required under Article 150. On the other hand, the term “validity” may be interpreted to refer only to the corporate law of Venezuela. Under this narrower interpretation, it is irrelevant whether the National Assembly approved the 2020 Bonds because all of the corporate formalities needed to validly issue a security—approval by the board of directors, approval by the shareholders, etc.—appear to have been followed.

Interpretation in the District Court

In a lengthy decision decided on October 16, 2020, the U.S. District Court for the Southern District of New York (Judge Katherine Polk Failla) concluded that the term “validity” should be given a narrow interpretation and that New York contract law governed the issue of validity.

The court began its analysis by observing that the strongest argument in support of a broad interpretation is based on plain language. This term “validity” is not generally understood to refer solely to corporate formalities. It is understood to encompass the many reasons why a contract may not be enforceable as a matter of contract law. While this plain language reading is compelling at first glance, the court ultimately concluded that it did not mandate the application of general rules of Venezuelan law given the broader context of Article 8.

The court first quoted the following language from the Prefatory Note to Article 8:

[Article 8] deals with the mechanisms by which interests in securities are transferred, and the rights and duties of those who are involved in the transfer process. It does not deal with the process of entering into contracts for the transfer of securities or regulate the rights and duties of those involved in the contracting process (emphasis added).

The court observed that if the term “validity” were given a broad scope, it would “swallow whole any choice of law analysis involving the formation of a contract for securities.” The court cited state legislative history indicating that the term “validity” in Article 8 referred merely to whether a security “ha[d] been issued pursuant to appropriate corporate or similar action.” The court also quoted the

authors of a leading treatise on Article 8 as saying that:

Obviously, the concept of “invalidity” as used in this section must have a narrower scope than one might encounter in other legal contexts, e.g., in a dispute about whether the obligation represented by the security is “enforceable” or “legal, valid, and binding.”

Finally, the district court noted the virtual absence of any New York case law supporting the broad interpretation of the validity favored by the plaintiffs. If the term was as sweeping as the plaintiff claimed, the court reasoned, there would be more cases where the courts had applied Section 8-110. The lack of any such cases cut against giving the term a broad interpretation. The district court’s analysis of this issue has attracted support from some commentators and criticism from others.

After concluding that the term “validity” in Section 8-110 should be interpreted narrowly to select only Venezuelan corporate law, the district court applied New York contract law. It held that the 2020 Notes were valid and enforceable and that the defendant trustee was entitled to judgment in the amount of \$1.68 billion. The plaintiffs appealed.

Interpretation in the Second Circuit

On October 13, 2022, the U.S. Court of Appeals for the Second Circuit declined to provide a definitive answer as to the interpretive question discussed above. After reviewing the various arguments for and against a broad interpretation of “validity,” the court certified the question to the New York Court of Appeals. In so doing, the court commented on the issue’s importance to “the State’s choice-of-law regime and status as a commercial center.” It also noted the importance of the choice-of-law issue to the ultimate outcome in the case:

If the court concludes New York choice-of-law principles require the application of New York law on the issue of the validity of the 2020 Notes, and that Article 150 and the resolutions have no effect on the validity of the contract under New York law, then we would affirm the district court’s decision to apply New York law and uphold the validity of the bonds. On the other hand, if the court concludes Venezuelan law applies to the particular issue of PDVSA’s legal authority to execute the Exchange Offer, then we would likely remand for an

assessment of Venezuelan law on that question and, if necessary, for consideration of the Creditors' equitable and warranty claims.

The fate of the 2020 Notes—and the billions of dollars those notes represent—is now in the hands of the New York Court of Appeals.

Conclusion

There will be additional updates and commentary on *Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A.* at Transnational Litigation Blog in the weeks and months ahead. In the meantime, please feel free to mention this case the next time a student or a colleague questions the importance of choice-of-law rules. These rules matter. A lot.

[This post is cross-posted at Transnational Litigation Blog.]

What is an international contract within the meaning of Article 3(3) Rome I? - Dexia Crediop SpA v Provincia di Pesaro e Urbino [2022] EWHC 2410 (Comm)

The following comment has been kindly provided by Sarah Ott, a doctoral student and research assistant at the University of Freiburg (Germany), Institute for Comparative and Private International Law, Dept. III.

On 27 September 2022, the English High Court granted summary judgment and declaratory relief in favour of the Italian bank Dexia Crediop SpA (“Dexia”) in its lawsuit against the Province of Pesaro and Urbino (“Pesaro”), a municipal authority in the Marche region of Italy. This judgement marks the latest

development in a long-running dispute involving derivative transactions used by Italian municipalities to hedge their interest rate risk. Reportedly, hundreds of Italian communities entered into interest rate swaps between 2001 and 2008 having billions of Euros in aggregate notional amount. It is also a continuation of the English courts' case law on contractual choice of law clauses. Although the judgments discussed in this article were, for intertemporal reasons, founded still on Art. 3(3) of the Rome Convention, their central statements remain noteworthy. The Rome Convention was replaced in almost all EU member states, which at the time included the United Kingdom, by Regulation (EC) No 593/2008 ("Rome I"), which came into effect on 17 December 2009. Article 3 Rome I Regulation contains only editorial changes compared to Article 3 of the Rome Convention. As a matter of fact, Recital 15 of the Rome 1 Regulation explicitly states that despite the difference in wording, no substantive change was intended compared to Article 3(3) of the Rome Convention.

In the case at hand, Pesaro and Dexia entered into two interest rate swap transactions in 2003 and 2005. Each of the transactions was subject to the 1992 International Swap Dealers Association ("ISDA") Master Agreement, Multicurrency - Cross Border and a Schedule thereto. During the 2008 financial crisis, the swaps led to significant financial burdens for Pesaro. In June 2021, Pesaro commenced legal proceedings in Italy seeking to unwind or set aside these transactions. Dexia then brought an action in England to establish the transactions were valid, lawful and binding on the parties.

A central question of the dispute was the law applicable to the contract. Pesaro claimed breaches of Italian civil law in its proceedings, while Dexia argued that only English law applies. As correctly stated by the court, the applicable law is determined by the Rome Convention, as the transactions between the parties took place in 2003 and 2005. According to Article 3(1) Rome Convention, a contract is governed by the law chosen by the parties. The ISDA Master Agreement in conjunction with the Schedule contained an express choice of law clause stating that the contract is to be governed by and construed in accordance with English law. Of particular importance therefore was whether mandatory provisions of Italian law could nevertheless be applied via Article 3(3) Rome Convention. This is the case if "*all the [other] elements relevant to the situation at the time of the choice are connected with one country only [...]*". In order to establish whether Article 3(3) applied, the court referred to two decisions of the English Court of

Appeal. Both cases also concerned similar interest rate swap transactions made pursuant to an ISDA Master Agreement with an expressed choice of English law.

In *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, the Court of Appeal extensively discussed the scope of this provision in connection with the principle of free choice of law, more precisely, which factors are to be considered as “*elements relevant to the situation*”. This was a legal dispute between the Portuguese Santander Bank and various public transport companies in Portugal. First, the Court of Appeal emphasised that Article 3(3) Rome Convention is an exception to the fundamental principle of party autonomy and therefore is to be construed narrowly. Therefore, “*elements relevant to the situation*” should not be confined to factors of a kind which connect the contract to a particular country in a conflict of laws sense. Instead, the Court stated that it is sufficient if a matter is not purely domestic but rather contains international elements. Subsequently the court assessed the individual factors of the specific case. In so far, the Court of Appeal confirmed all factors the previous instance had taken into account. Relevant in the case was the use of the “Multi-Cross Border” form of the 1992 ISDA Master Agreement instead of the “Local Currency-Single Jurisdiction” form, that the contract included the right to assign to a foreign bank and the practical necessity for a foreign credit institution to be involved, as well as the foreseeability of the conclusion of hedging arrangements with foreign counterparties and the international nature of the swap market. These factors were found sufficient to establish an international situation.

In *Dexia Crediop S.P.A. v. Comune di Prato* [2017] EWCA Civ 428, the Court of Appeal addressed the issue again and concluded that already the fact that the parties had used the “Multi-Cross Border” form of the 1992 ISDA Master Agreement in English, although this was not the native language of either party, and the conclusion of back-to-back hedging contracts in connection with the international nature of the derivatives market was sufficient.

In the present case, Dexia again relied on the use of the ISDA Master Agreement, Multicurrency - Cross Border and on the fact that Dexia hedged its risk from the transactions through back-to-back swaps with market participants outside Italy. But as the relevant documents were not available, the second circumstance could not be taken into account by the court. Nevertheless, the court considered that the international element was sufficient and Article 3(3) of the Rome Convention

was not engaged.

Thus, this new decision not only continues the very broad interpretation of the Court of Appeal as to which elements are relevant to the situation, but also lowers the requirements even further. This British approach appears to be unique. By contrast, according to the hitherto prevailing opinion in other Member States, using a foreign model contract form and English as the contract language alone was not sufficient to establish an international element (see, e.g., *Ostendorf* IPRax 2018, p. 630; *Thorn/Thon* in Festschrift Kronke, 2020, p. 569; *von Hein* in Festschrift Hopt, 2020, p. 1405). Relying solely on the Master Agreement in order to affirm an international element seems unconvincing, especially when taking Recital 15 of the Rome I Regulation into account. Recital 15 Rome I states that, even if a choice of law clause is accompanied by a choice of court or tribunal, Article 3(3) of the Rome I Regulation is still engaged. This shows that it is the purpose of this provision to remove the applicability of mandatory law in domestic matters from the party's disposition. The international element must rather be determined according to objective criteria. With this interpretation, Article 3(3) of the Rome I Regulation also loses its *effet utile* to a large extent.

Unfortunately, the Court of Appeal considered its interpretation to be an *acte clair* and therefore refrained from referring the case to the CJEU. Since Brexit became effective, the Rome I Regulation continues to apply in the United Kingdom in an "anglicised" form as part of national law, but the English courts are no longer bound by CJEU rulings. As a result, a divergence between the English and the Continental European assessment of a choice of law in domestic situations is exacerbated.

This also becomes relevant in the context of jurisdiction agreements. In the United Kingdom, these are now governed by the HCCH 2005 Choice of Court Convention which is also not applicable according to article 1(2) if, "*the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*". As there is a great interest in maintaining the attractiveness of London as a the "jurisdiction of choice", it is very likely that the Court of Appeal will also apply the standards that it has developed for Article 3(3) Rome I to the interpretation of the Choice of Court Convention as well.

One can only hope that in order to achieve legal certainty, at least within the European Union, the opportunity for a request for referral to the CJEU will present itself to a Member State court as soon as possible. This would allow the Court of Justice to establish more differentiated standards for determining under which circumstances a relevant foreign connection applies.

CJEU ruling in *FNV v. Van Den Bosch*: follow-up in Dutch courts

As previously reported on [conflictoflaws](#) (inter alia), on 1 December 2020, the Grand Chamber of the CJEU ruled in the *FNV v. Van Den Bosch* case. It ruled that the highly mobile labour activities in the road transport sector fall within the scope of the Posting of Workers Directive (C-815/18; see also the conclusion of AG Bobek). As regards to the specific circumstances to which the directive applies, the CJEU sees merit in the principle of the ‘sufficient connection’. To establish sufficient connection between the place of performance of the work and a Member State’s territory, ‘an overall assessment of all the factors that characterise the activity of the worker concerned is carried out.’ (*FNV v. Van Den Bosch*, at [43]).

Following the preliminary ruling, on 14 October 2022, the Supreme Court of the Netherlands has ruled in cassation on the claims, which had led to the questions for preliminary rulings (see also the conclusion of AG Drijber). The Dutch Supreme Court referred the assessment of the ‘sufficient connection’ on the facts of the case back to the lower courts.

Although the Dutch Supreme Court’s ruling is not surprising, the eventual application of the CJEU’s preliminary ruling to the facts of this dispute (and its further follow-up in lower courts) might still provide food for thought for companies in the transnational transport sector, which use similar business models.

Limitation Period for Enforcement of Foreign Judgments: Australian Court Recognized and Enforced Chinese Judgment Again

Written by Zilin Hao*

On 15 July 2022, the Supreme Court of New South Wales (“NSW”) recognized and enforced a Chinese judgment issued by the Shanghai Pudong New Area People’s Court 12 years ago in *Tianjin Yingtong Materials Co Ltd v Young* [2022] NSWSC 943.[1] It ruled that the defendant Katherine Young (“Ms. Y”) pay the plaintiff Tianjin Yingtong Materials Co Ltd (“TYM”) outstanding payment, interest and costs. This marks the second time that the court of NSW in Australia enforces Chinese judgment after *Bao v Qu; Tian (No 2)* [2020] NSWSC 588.[2]

I. The Fact

On 7 April 2009, the original plaintiff, TYM, sued Shanghai Runteyi Industrial Co., Ltd (“first original defendant”), Shanghai Runheng International Trading Co., Ltd (“second original defendant”) and Ms. Y (named as “Hong Yang” in Chinese Judgment) before Shanghai Pudong New Area People’s Court (“the Chinese Court”). According to the Chinese judgment, TYM had acted as agent for the first original defendant and the second original defendant based on seven Import Agent Agreements signed by three of them. Subsequently, TYM and each original defendant, including Ms. Y entered into a Supplementary Agreement confirming and specifying the guarantee under the seven Import Agent Agreements, pursuant to which Ms. Y was a guarantor in favour of the plaintiff. However, the two original defendants failed to fulfill their liability for repayment as agreed while the Plaintiff has performed the contract obligations.

On 29 March 2010, the Chinese Court rendered a judgment and supported the TYM's claims that the two original defendants shall pay the debt and overdue fine, Ms. Y shall assume joint and several liability for the payment obligation of the two original defendants. The Chinese judgment came into effect and finality when an appeal was dismissed on 1 June 2010. Due to the lack of sufficient assets of the two original defendants and the disappearance of Ms. Y, the Chinese Court only executed more than 4 million yuan in place for three years, and finally ended the enforcement procedure in 2014. The recovery of the relevant funds has subsequently reached an impasse.[3]

On 9 August 2021, after discovering the defendant's property clues, TYM filed an application for recognition and enforcement of the Chinese judgment with the Supreme Court of NSW pursuant to Australia's common law principles. The NSW court upheld the plaintiff's claim after examining four conditions accordingly of Chinese judgment with: (1) the Chinese court has international jurisdiction where Ms. Y submitted to by arguing or appearing to argue the merits of the case; (2) the Chinese judgment is conclusive and final; (3) the identity of parties in recognition proceeding consisted with Chinese proceeding; (4) the Chinese judgment was for a fixed sum. The plaintiff has established the prima facie enforceability of the Chinese judgment and there are no refusal grounds exist.

The most important issue at the NSW proceeding is the limitation period for enforcement.[4] The plaintiff noted that it has been over 11 years since Chinese judgment came into conclusive and effective, which means it may not be enforced at the same time by Chinese court, if there is enforceable property in China, because the application will exceed the two-year enforcement limitation period stipulated by Chinese law.[5] However, according to section 17 "Judgment" of the Limitation Act 1969 (NSW)[6], the limitation period for action upon a foreign judgment is 12 years from the date on which the judgment becomes enforceable in the place where judgment was given. Therefore, the judge of Supreme Court of NSW held that relevant limitation period has not yet expired. Hence there is no time bar to the current proceeding for enforcement of the Chinese Judgment.[7]

II. Comments

1. Applicable Law to Limitation Period for Enforcement

Limitation period is a controversial issue when classifying whether it is a

procedural or substantial matter under private international law, which decides the application of law concerning it. Generally, courts apply *lex fori* in matter with procedure issues, while choose *lex causae* by conflict rules dealing with substance issues. States distinguish limitation period as procedure or substantive issue differently, which represented by Germany and Japan who regard the limitation period as a substance issue and stipulates it in their civil codes, not specific legislation. Some common law countries, such as England, Australia and Singapore, made Limitation Acts to deal with the enforcement limitation issue in the domestic legislation.[8]

In China, the limitation of action is stipulated in Civil Code and is deduced as a substance issue.[9] While the statute of limitations for enforcement is a two-year period for creditors to apply to the court for execution based on a successful and legal effective document, which is provided in Civil Procedural Law of China and deemed as a procedure issue. In terms of recognition and enforcement of foreign judgments, conflicts of classification on the legal nature of enforcement limitation period between the State of requested and the State of origin will arise in the first place. When a judgment complies with the law of the requested State regarding the statute of limitations for applying an enforcement, but it has exceeded the limitations period of enforcement under the law of the State of origin, how does the court of requested State ascertain legal rules to decide? In *TYM v Ms. Y* above, the judge of Supreme Court of NSW applied Australian law to hold that there was no time bar to enforce the Chinese judgment even though the relevant limitation period has expired in China, which illustrates that enforcement limitation period of judgments is a substance issue for Australia.

2. Expiration of Limitation Period and Grounds for Refusal

Except the list of conditions to be used by the court requested or addressed to ascertain whether the judgment is eligible for recognition and enforcement, there are grounds for refusal as well. Under the common law principles for recognizing a foreign judgment in Australia, where the four conditions for recognition and enforcement, referred to Overview part, have been established, the recognition of the foreign judgment can then only be challenged on limited grounds including a) where granting enforcement of the foreign judgment would be contrary to Australian public policy; b) where the foreign judgment was obtained by fraud; c) where the foreign judgment is penal or a judgment for a revenue debt; and d) where enforcement of the decision would amount to a denial of natural justice.

However, exceeding the limitation period for an application for enforcement under the law of the original State does not constitute any of the grounds above for refusal of recognition and enforcement by the court of the requested State. In the case of *TYM v Ms. Y*, the Australian court did not consider the expiration of enforcement limitation of Chinese judgment under Chinese law as a refusal ground to recognize and enforce it.

3. Expiration of Limitation Period and Lack of Enforceability

There are international standards to recognize and enforce a judgment, such as enforceability, provided by the 2005 Hague Convention on Choice of Court Agreements (“2005 Hague Convention”) and 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (“2019 Judgments Convention”, collectively as “Hague Conventions”). Article 8 (3) of the 2005 Hague Convention and article 4 (3) of the 2019 Judgments Convention stipulated in same way that “A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin”, which was believed that if the limitation period in the State of origin expires, the judgment will not be entitled to circulation under the Convention.[10] Pursuant to Civil Procedural Law of China, within the limitation period of enforcement, if the judgment creditor submits a request prescribed by law, the court will compel the debtor to perform the obligations undertaken. Otherwise, the court will still accept the applicant for enforcement, at the same time, however, the participant subject to enforcement may raise an objection to the limitation period for enforcement, and if the court finds that the objection is established upon review, it rules not to enforce it.[11] In *TYM v Ms. Y*, the plaintiff submitted a summon to recognize and enforce the Chinese judgment, which was rendered 11 years ago by Chinese court then, before the court of NSW Australia. Apparently, the limitation period of applying for enforcement of the Chinese judgment concerned in China has expired the maximum 2 years, which means the judgment may not be enforced compulsorily by courts upon application of winning party when the other party raise an objection.

At the same time, Article 14 of the 2005 Hague Convention and Article 13 of 2019 Judgments Convention stipulate that the enforcement procedures are governed by the law of the requested State unless these Conventions provide otherwise.[12] In referring to the procedure for enforcement, Article 13 of 2019 Judgments

Convention is intended to include the rules of the law of the requested State that provide a limitation period for enforcement of a judgment unless itself provides otherwise, which is stipulated in Article 4 (3) that enforcement in the requested State depends on the judgment being enforceable in the State of origin.[13] Therefore, a longer period of limitation for enforcement in the requested State will not extend the enforceability of a foreign judgment that is no longer enforceable in the State of origin. Conclusively, a foreign judgment whose limitation period expires under the law of the State of origin will not be enforced by the State of requested under the Hague Conventions. In *TYM v Ms. Y*, limitation for enforcing the Chinese judgment has expired in China though, the Australian court registered and enforced it, holding that Chinese judgment is not unenforceable because it was still within the 12-year limitation period from the date of the judgment issued according to Australian law.

China and Australia are neither contracting parties to Hague Conventions, it's reasonable for Australian court to recognize and enforce Chinese judgment even if the limitation period of it has expired, because the court regarded which as a procedural issue and applied *lex fori* to ascertain it. However, the outcome of *TYM v Ms. Y* will be negative if the Hague Conventions come into force between China and Australia. Furthermore, there is another problem about reciprocity. The limitation period for enforcement of judgments in China is much shorter than it in Australia, which means the situation is common where an Australian judgment sought to bring enforcement proceedings in China during the period of enforceability of the judgment under the law of Australia but after the limitation period for enforcement under the law of China has expired. Under the principle of reciprocity, Chinese court may enforce Australian judgments according to Article 288 of Civil Procedural Law of China.[14] However, pursuant to Article 545 of Supreme People's Court Interpretation of Civil Procedural Law of China, the provisions of Article 246 of the Civil Procedure Law shall apply to the period during which a party applies for recognition and enforcement of a legally effective judgment or ruling rendered by a foreign court, which means the period for applying for enforcement of foreign judgments is two years. Therefore, a Chinese court will probably not enforce an Australian judgment when the application expires two-year limitation period and there is an objection from the judgment debtor.

* Ph.D Candidate, Institute of International Law, Wuhan University.

[1] File number: 2021/226856, available at <https://www.caselaw.nsw.gov.au/decision/181ff033dcea3902d40b24ea>, accessed 10 October 2022.

[2] Jeanne Huang, 'The first Mainland China monetary judgment enforced in NSW Australia: Bao v Qu; Tian (No 2) [2020] NSWSC 588' (*conflict of laws.net*, 20 May 2020); Meng Yu, 'Court of NSW Australia Recognizes Chinese Judgment for the First Time' (*China Justice Observer*, 26 September 2021).

[3] Li Zhang, Shuting Chen, 'Lao Lai Hides Abroad for More Than a Decade Still Can't Escape the Law, The Australian court has once again recognized and enforced the Chinese court judgment' (*Legal Insights*, 17 September 2022).

[4] The limitation period in this article referred to only relates to the enforcement of a foreign judgment and should not be conceptually confused with the limitation period governing the original substantive right or claim at stake, i.e., the limitation period to bring a legal action on the merits before a court.

[5] Article 246 of Civil Procedural Law of China provides "the period of application for enforcement is two years".

[6] Available at <https://jade.io/article/276236/section/54>, accessed 10 October 2022.

[7] Para 42, (n 1).

[8] Guiqiang Liu, 'Study on the Limitation Period in the Enforcement of Foreign Judgments' (2020)4 *China Journal of Applied Jurisprudence* 109.

[9] Yongping Xiao, *Principles of Private International Law* (2003) Law Press China, p.4.

[10] Permanent Bureau, Limitation period on the Enforcement of Foreign Judgments in the Context of the 2018 Draft Convention, No 11 of May 2019.

[11] Lina Guo, 'How much is known about implementation period' (jszx.court.gov.cn, 14 July 2019), available at <https://jszx.court.gov.cn/main/ExecuteCase/227653.jhtml>, access 10 October

2022.

[12] “The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.”

[13] Francisco Garcimartín, Geneviève Saumier, ‘Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters’ HCCH Permanent Bureau, para 310.

[14] Article 288 of Civil Procedural Law of China provides “If a legally effective judgment or ruling made by a foreign court requires recognition and enforcement by a people’s court of the People’s Republic of China, the party concerned may directly apply for recognition and enforcement to the intermediate people’s court with jurisdiction of the People’s Republic of China. Alternatively, the foreign court may, pursuant to the provisions of an international treaty concluded between or acceded to by the foreign state and the People’s Republic of China, or in accordance with the principle of reciprocity, request the people’s court to recognize and execute the judgment or ruling.”

Just released: EFFORTS Report on EU Policy Guidelines

A new Report on EU Policy Guidelines was just posted on the website of **EFFORTS (Towards more Effective enFORcemEnt of claimS in civil and commercial matters within the EU)**, an EU-funded Project conducted by the University of Milan (coord.), the Max Planck Institute Luxembourg for Procedural Law, the University of Heidelberg, the Free University of Brussels, the University of Zagreb, and the University of Vilnius.

The Report was authored by Marco Buzzoni, Cristina M. Mariottini, Michele Casi, and Carlos Santaló Goris.

Building upon the outcomes of the national and international exchange seminars and the Project's analytical reports, this Report formulates policy guidelines addressed to EU policymakers and puts forth suggestions to improve the current legal framework provided under the EFFORTS Regulations (namely: the Brussels I-bis Regulation and the Regulations on the European Enforcement Order, the European Small Claims Procedure, the European Payment Order, and the European Account Preservation Order) with regard to the enforcement of claims.

This Report was among the outputs and findings discussed at the Project's Final Conference, hosted by the University of Milan on 30 September 2022, which provided an international forum where academics, policymakers, and practitioners discussed the Project's key findings and exchanged their views on the national implementation of - and the path forward for - the EFFORTS Regulations. The content of the Final Conference will enrich the Final Study, which is forthcoming on the Project's website.

Regular updates on the EFFORTS Project are available via the Project's website, as well as LinkedIn and Facebook pages.



Project JUST-JCOO-
AG-2019-881802

With financial support from
the Civil Justice Programme of
the European Union

Now or Then? The Temporal Aspects of Choice-of-Law Clauses

Several years ago, I published a paper that examined how U.S. courts interpret choice-of-law clauses. That paper contains a detailed discussion of the most common interpretive issues—whether the clause selects the tort laws of the chosen jurisdiction in addition to its contract laws, for example—that arise in litigation. There was, however, one important omission. The paper did not consider the question of whether the word “laws” in a choice-of-law clause should be interpreted to select the laws of the chosen jurisdiction (1) at the time the contract was signed, or (2) at the time of litigation.

In declining to address this issue, the paper was in good company. Neither the *Restatement (Second) of Conflict of Laws* (§ 2) nor the draft *Restatement (Third) of Conflict of Laws* (§ 1.02) discuss the relationship between choice-of-law and time. Nevertheless, the omission bothered me.

In the spring of 2021, I saw that Jeff Rensberger at the South Texas College of Law had posted a paper to SSRN entitled *Choice of Law and Time*. After downloading and reading the paper, I discovered that it contained no discussion of choice-of-law clauses. It was devoted solely to the question of how courts should address the issue of temporality in cases where the parties had declined to select a law in advance. After reading the paper, I wrote to Jeff to propose that we collaborate on a second paper that specifically addressed the temporal question in the context of choice-of-law clauses. When we spoke on the phone to discuss the project, however, we did not agree on the answer. Jeff argued for the laws at the time of signing. I argued for the laws at the time of litigation.

In early 2022, Jeff sent me a draft of his new paper, *Choice of Law and Time Part II: Choice of Law Clauses and Changing Law*, which makes the case for interpreting choice-of-law clauses to select the law at the time of signing. In response, I drafted an essay arguing that they should be interpreted to select the law at the time of litigation. A draft of my essay, *The Canon of Evolving Law*, is now available for download on SSRN.

If you happen to be one of the small number of people in the world interested in

this fascinating (though obscure) interpretive issue, I would encourage you to download both papers and decide for yourself who has the better of the argument.

[This post is cross-posted at Transnational Litigation Blog.]