Ranking the Portability of ASEAN Judgments within ASEAN

Written by Catherine Shen, ABLI

The Asian Business Law Institute (ABLI) has recently released a free publication titled Enforcement of Foreign Judgments in ASEAN: Ranking the Portability of ASEAN Judgments within ASEAN, a derivative publication under its Foreign Judgments Project.

The Association of Southeast Asian Nations (ASEAN) comprises of Brunei Darussalam, Cambodia, Indonesia, Lao, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. These jurisdictions are of different legal traditions of civil law (Cambodia, Indonesia, Lao, Thailand and Vietnam), common law (Brunei Darussalam, Malaysia, Myanmar and Singapore) and hybrid law (Philippines) tradition. There are two primary hurdles for increasing the portability of ASEAN judgments within the bloc. First, some ASEAN jurisdictions, such as Indonesia and Thailand, have no law that allows foreign judgments to be recognised and enforced. Second, most civil law jurisdictions in ASEAN still have rather rigid requirements on reciprocity. These two hurdles are the main influencers of the ranking.

Three key takeaways can be gleaned from the ranking.

First, Vietnamese judgments claim the crown of being the most portable of ASEAN judgments within ASEAN. They can be enforced in seven out of the other nine ASEAN countries, provided, of course, that the requirements for enforcement under the laws of those countries are satisfied. This is a portability rate of close to 78%. Compared to other ASEAN jurisdictions, Vietnam has the benefit of having bilateral agreements with Cambodia and Lao which allow its judgments to be enforced in the latter two jurisdictions. Cambodia requires a guarantee of reciprocity while Lao PDR requires a bilateral treaty with the relevant country covering the enforcement of each other's judgments before reciprocity is satisfied.

Second, judgments rendered by the other civil law countries of ASEAN come in second place. They can be enforced in six out of nine ASEAN countries.

Third, judgments from the common law countries of ASEAN and the hybrid law jurisdiction of the Philippines are jointly in third place. They can be enforced in five out of nine ASEAN countries, namely in the other common law and hybrid law jurisdictions, as well as Vietnam. Although Vietnam, being a civil law jurisdiction, imposes a condition of reciprocity, it appears relatively easy to satisfy this requirement.

This result may be surprising or even perverse since most civil law jurisdictions, i.e., Cambodia, Indonesia, Lao and Thailand, have comparatively illiberal regimes for the enforcement of foreign judgments (whether due to the rigid requirement of reciprocity or the lack of relevant laws), while the common law and hybrid law jurisdictions in ASEAN have comparatively liberal rules for foreign judgments enforcement. This "asymmetry" is mainly due to the inability of those civil law jurisdictions to return the favour of the more liberal rules of the common law and hybrid law jurisdictions in ASEAN given the state of their laws, namely, the requirement that there be reciprocity between the two countries.

The *Enforcement of Foreign Judgments in ASEAN: Ranking the Portability of ASEAN Judgments within* ASEAN is available for free and can be downloaded here. ABLI regularly publishes latest developments in the field of recognition and enforcement of foreign judgments in Asia on its website and LinkedIn.

A few thoughts on Golan v. Saada – this week at the US Supreme Court

Written by Mayela Celis, UNED

The oral arguments of the case Golan v. Saada (20-1034) will take place tomorrow (Tuesday 22 March 2022) at 10 am Washington DC time before the US Supreme Court. For the argument transcripts and audio, click here. The live audio will be available here.

We have previously reported on this case here and here.

> ***"QUESTION PRESENTED***
>
> *The Hague Convention on the Civil Aspects of International Child Abduction requires return of a child to his or her country of habitual residence unless, inter alia, there is a grave risk that his or her return would expose the child to physical or psychological harm. The question presented is:*
>
> *Whether, upon finding that return to the country of habitual residence places a child at grave risk, a district court is required to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding." (our emphasis)*

Please note that US courts often use the terms "ameliorative measures" and "undertakings" interchangeably (as stated in the petition). Also referred to as protective measures in other regions.

This case stems from the fact that there is a split in the US circuits (as well as state courts).

There were several amicus curiae briefs filed, three of which are worthy of note: the amicus brief of the United States, the amicus brief of Hague Conventions delegates Jamison Selby Borek & James Hergen and finally, the amicus brief filed by Linda J. Silberman, Robert G. Spector and Louise Ellen Teitz.

The amicus brief of the United States stated:

> *"Neither the Hague Convention on the Civil Aspects of International Child Abduction nor its implementing legislation requires a court to consider possible ameliorative measures upon finding under Article 13(b) that there is a grave risk that returning a child to his country of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Rather, the Convention and ICARA leave consideration of possible ameliorative measures to a court's discretion."*

The amicus brief of the Hague Delegates coincide with this statement of the United States, while the brief of professors Silberman, Spector and Teitz holds the opposite view.

As is well known, the US Executive Branch's interpretation of a treaty is entitled to great weight. See Abbott vs. Abbott 560 U. S. _ (2010); Sumitomo Shoji America, Inc. v. Avagliano, 457 U. S. 176.

In my personal opinion, the position taken by the United States is the correct one.

The fact is that the Hague Abduction Convention is silent on the adoption of ameliorative measures. Article 13 indicates: "the judicial or administrative authority of the requested State *is not bound to order* the return of the child if the person, institution or other body which opposes its return establishes that […]" (our emphasis). The discretion of the court is thus key. Besides, and as we all aware, the Child Abduction Convention is not a treaty on recognition and enforcement of protective measures.

In some legal systems, this void has been supplemented with additional legislative measures such as the Brussels II ter Regulation (2019/1111) in the European Union. Importantly, this instrument provides for the seamless enforcement of provisional – including protective – measures, which makes it a much more cogent system (see, for example, recitals 30, 45 and 46, and articles 2(1)(b), 15 – on jurisdiction-, 27(5), 35(2) and 36(1)). And not to mention the abolition of the declaration of enforceability or the registration for enforcement, which speeds up the process even more.

Furthermore, and particularly in the context of the United States, the onus that ameliorative measures exist or could be made available should be placed mainly on the parties requesting the return, and not on the court. See the amicus brief filed by former US judges where they stressed that "mandating judicial analysis of ameliorative measures forces US courts beyond their traditional jurisdiction and interactions with foreign law / civil law judges perform investigatory functions; common law judges do not."

Arguably, the 13(1)(b) Guide to Good Practice may be read as supporting both views. See in particular:

> ***See paragraph 36****: "The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence." (our emphasis).}*

> ***See paragraph 44****: "Protective measures may be available and readily accessible in the State of habitual residence of the child or, in some cases, may need to be put in place in advance of the return of the child. In the latter case, specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. They are not to be imposed as a matter of course and should be of a time-limited nature that ends when the State of habitual residence of the child is able to determine what, if any, protective measures are appropriate for the child. In certain circumstances, while available and accessible in the State of habitual residence, measures of protection may not be sufficient to address effectively the grave risk. An example may be where the left-behind parent has repeatedly violated protection orders." (our emphasis)*

But see in contrast paragraph 41 of the Guide, which was mentioned in the amicus brief of Child Abduction Lawyers Association (CALA).

Putting this legal argument aside, and in the context of the United States, there are several reasons why US courts should not be *required* to consider ameliorative measures (but may do so on a discretionary basis):

- The United States is not a Contracting Party to any global treaty that would allow the recognition and enforcement of protective measures (such as the 1996 Hague Protection of Children Convention – USA is only a signatory State);
- A great number of child abductions occur to and from the United States and Mexico. The Mexican legal system is not familiar with the recognition and enforcement of undertakings or with adopting mirror orders in the context of child abduction (or in any other context for that matter);
- Requiring courts to look into ameliorative measures in every single case would unduly delay abduction proceedings;
- Social studies have revealed that undertakings are very often breached once the child has been returned (usually with the primary carer, the mother), which has the direct result of leaving children and women in complete vulnerability. See Lindhorst, Taryn, and Jeffrey L Edleson. Battered Women, Their Children, and International Law : The Unintended Consequences of the Hague Child Abduction Convention. Northeastern Series on Gender, Crime, and Law. Boston, MA: Northeastern University

Press, 2012. See also amicus brief of domestic violence survivors.

In conclusion, I believe that we all agree that ameliorative measures (or undertakings) are important. But they must be adequate *and effective* and should not be adopted just for the sake of adopting them without any teeth, as this would not be in the best interests of the child (*in concreto*).

New York's Appellate Division Holds that Chinese Judgment Should Not Be Denied Enforcement on Systemic Due Process Grounds

Written by William S. Dodge (Professor, University of California, Davis, School of Law)

Should courts in the United States refuse to recognize and enforcement Chinese court judgments on the ground that China does not provide impartial tribunals or procedures compatible with the requirements of due process of law? Last April, a New York trial court said yes in *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*, relying on State Department Country Reports as conclusive evidence that Chinese courts lacked judicial independence and suffered from corruption. As Professor Wenliang Zhang and I pointed out on this blog, the implications of this decision were broad. Under the trial court's reasoning, no Chinese judgment would ever be entitled to recognition in New York or any of the other U.S. states that have adopted Uniform Acts governing foreign judgments. Moreover, U.S. judgments would become unenforceable in China because China enforces foreign judgments based on reciprocity. But on March 10, just three weeks after oral argument, New York's Appellate Division answered that question no, reversing the trial court's decision.

As background, it is important to note that the recognition and enforcement of foreign country judgments in the United States is generally governed by state law. Twenty-eight states and the District of Columbia have enacted the 2005 Uniform Foreign-Country Money Judgments Recognition Act. In nine additional states, its predecessor, the 1962 Uniform Foreign Money-Judgments Recognition Act, remains in effect. At the time of the trial court's decision, the 1962 Uniform Act governed in New York, but it was superseded by the 2005 Uniform Act on June 11, 2021. Both Uniform Acts provide for the nonrecognition of a foreign judgment if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law."

This systemic lack of due process ground for nonrecognition comes from the U.S. Supreme Court's 1895 decision in *Hilton v. Guyot*, issued at a time when lawyers routinely distinguished between civilized and uncivilized nations. It was incorporated in the 1962 Uniform Act at the height of the Cold War, and included in the 2005 Uniform Act without discussion, apparently to maintain continuity with the 1962 Act. Despite its codification for nearly sixty years, fewer than five cases have refused recognition on this ground. The leading case is *Bridgeway Corp. v. Citibank*, involving a Liberian judgment issued during its civil war, when the judicial system had almost completely broken down.

Shanghai Yongrun involved a business dispute between two Chinese parties, which was submitted to a court in Beijing under a choice-of-forum clause in the parties' agreement. The defendant was represented by counsel, presented its case, and appealed unsuccessfully. Nevertheless, the New York trial court held that the Chinese judgment was not enforceable because China lacks impartial tribunals and procedures compatible with due process. The court relied "conclusively" on China Country Reports prepared by the State Department identifying problems with judicial independence and corruption in China.

In a brief order, the Appellate Division reversed. It concluded that the trial court should not have dismissed the action based on the Country Reports. These Reports did not constitute "documentary evidence" under New York's Civil Practice Law and Rules. But more fundamentally, reliance on the Country Reports was inappropriate because they "primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters" and "do not utterly refute plaintiff's allegation that the civil law system governing this breach

of contract business dispute was fair."

On this, the Appellate Division was clearly correct. The State Department prepares Country Reports to administer provisions of the Foreign Assistance Act denying assistance to countries that consistently engage in gross violations of human rights, not to evaluate judicial systems for other purposes. See 22 U.S.C. §§ 2151n & 2304. The Reports themselves warn that they "they do not state or reach legal conclusions with respect to domestic or international law." Moreover, if these Reports were used to determine the enforceability of foreign judgments, China would not be the only country affected. An amicus brief that I wrote and fourteen other professors of transnational litigation joined noted that State Department Country Reports expressed similar concerns about judicial independence, corruption, or both with respect to 141 other countries, including Argentina, Brazil, Italy, Japan, Mexico, South Korea, and Spain.

The Appellate Division concluded that "[t]he allegations that defendants had an opportunity to be heard, were represented by counsel, and had a right to appeal in the underlying proceeding in the People's Republic of China (PRC) sufficiently pleaded that the basic requisites of due process were met." By focusing on the facts of the specific case, the Appellate Division appears to have taken a case-by-case, rather than a systemic, approach to due process. Such a case-by-case approach is expressly permitted under the 2005 Uniform Act, which adds as a new ground for nonrecognition that "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." Such a case-specific approach avoids the overinclusiveness of denying recognition on systemic grounds when there are no defects in the judgment before the court.

The Appellate Division's decision in *Shanghai Youngrun* continues the growing trend that Professor Zhang and I have noted of U.S. decisions recognizing and enforcing Chinese judgments. Just two months before this decision, in *Yancheng Shanda Yuanfeng Equity Investment Partnership v. Wan*, a U.S. district court in Illinois recognized and enforced a Chinese judgment in another business dispute. The court expressly rejected the New York trial court's holding in *Shanghai Yongrun*, noting "the multiple federal cases … where American courts enforced Chinese court judgments and/or acknowledged the adequacy of due process in the Chinese judicial system." One hopes that this trend will continue.

A few takeaways from the 2022 meeting of the HCCH governing body (CGAP): publications and future meetings

On 7 March 2022, the Conclusions & Decisions of the governing body of the Hague Conference on Private International Law (HCCH), *i.e.* the Council on General Affairs and Policy (CGAP), were released. Click here for the English version and here for the French version.

For official information on the ceremony of signatures and ratifications of instruments, click here (HCCH news item). For our previous post on the signature of the USA of the 2019 Judgments Convention, click here.

Although a wide range of topics was discussed, I would like to focus on two: publications and future meetings.

1) Publications

This meeting was very fruitful in getting the necessary approval for HCCH publications. There were three publications approved, ranging from family law to access to justice for international tourists.

Family law

The Council adopted the following decision: "12. CGAP approved the Practitioners' Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children, subject to editorial amendments, for publication."

The Report of the Experts' Group on Cross-Border Recognition and Enforcement of Agreements in Family Matters Involving Children (meetings of 14-15 September and 29-30 November 2021) is available here. The Chair of the Experts' Group is *Professor Paul Beaumont*. The work of this Expert's Group has ended.

The draft of the Practitioners' Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children has been made available. For French, click here.

As some of you may be aware, this tool is an alternative to the drafting of a binding instrument in this area. In 2017, the Experts' Group drafted the following Conclusion and Recommendation for the attention of the Council on General Affairs and Policy of March 2018:

> *"Therefore the Experts' Group recommends to the Council to develop a new Hague Convention that would build on, and add value to, the 1980, 1996 and 2007 Hague Conventions, and be developed with a view to attracting as many States as possible."*

The reasoning of the Experts' Group was the following:

> *While the existing Hague Family Conventions encourage the amicable resolution of disputes involving children, they do not contemplate the use of "package agreements" (i.e., family agreements related to custody, access, relocation and/or child support and which may include spousal support and other financial matters, such as property issues) and do not provide a simple, certain or efficient means for their enforcement. From the Group's experience it is recognised that such agreements are increasingly frequently used. Very often the matters covered require the simultaneous application of more than one Hague Family Convention while some elements of those package agreements are not within the scope of any of the existing Hague Family Conventions. This creates difficulties for the enforcement of package agreements.*

Unfortunately (or fortunately depending on how people may view this), this initiative was not taken on board by Council in 2018. See here.

Apostille

The Council adopted the following decision: “31. CGAP approved the second edition of the Practical Handbook on the Operation of the Apostille Convention, subject to editorial amendments, for publication.” This draft is not yet publically available.

The first edition of the Apostille Handbook is available here.

Access to Justice for international tourists and visitors

The Council adopted the following decision: “3. CGAP approved the Practical Guide to Access to Justice for International Tourists and Visitors, subject to editorial amendments, for publication on the HCCH website.”

The draft of the Practical Guide to Access to Justice for International Tourists and Visitors is available here.

As with the recognition and enforcement of agreements reached in the course of family matters, the initial proposal was the developing of a new instrument.

At its meeting in 2013, the CGAP took note of the suggestion by Brazil to undertake work on co-operation in respect of protection of tourists and visitors abroad. See in particular Prel. Doc. No 3 of February 2018 – Final report concerning a possible future Convention on Co-operation and Access to Justice for International Tourists drafted by *Professor Emmanuelle Guinchard*.

2) Meetings

With regard to future meetings, there are a few meetings in the pipeline:

Special Commission meetings (SC) in 2022 (basically, a global meeting of experts):

- Special Commission on the practical operation of the 2007 Child Support Convention and its Protocol – to be held from 17 to 19 May (in-person meeting) – This will be the first meeting ever of the SC on this topic
- Special Commission on the practical operation of the 1993 Adoption Convention – to be held from 4 to 8 July (online meeting)
- Special Commission on the practical operation of the 2000 Protecion of Adults Convention – to be held from 9 to 11 November – Tnis will be the

first meeting ever of the SC on this topic

And finally, the Working Group on matters related to jurisdiction in transnational civil or commercial litigation – to hold "two further meetings before the 2023 meeting of CGAP, with intersessional work as required".

Declaration of the Institute of International Law on aggression in Ukraine

Yesterday (1 March 2022) the Institute of International Law approved a declaration on the aggression in Ukraine. The declaration is available by clicking the following links:

Declaration of the Institute of International Law on Aggression in Ukraine – 1 March 2022 (EN)-1

Déclaration de l'Institut de Droit international sur l'agression en Ukraine – 1 mars 2022 (FR)

The current developments in Ukraine and the measures and sanctions currently in place have undoubtedly an impact across all areas, including private international law. See for example the measures adopted by the European Union here.

I include an excerpt of the declaration below:

> *The Institute recalls that the ongoing military operations call ipso facto for the application of international humanitarian law, including the rules relating to occupation, as well as all the other rules applicable in times of armed conflict. It recalls also that persons responsible for international crimes as defined by international law may be prosecuted and sentenced in accordance with the law*

in force.

Faithful to its mission, the Institute remains convinced that, while international law alone cannot prevent the outbreak of violence, it must remain the compass by which States are guided, and it is more than ever determined to strengthen its work to promote "the progress of international law". The Institute adds its voice to that of other actors in the international community, including the learned societies acting in defense of the rule of law, who call for an end to the war in Ukraine and the settlement in good faith of disputes between the States concerned through all appropriate means of peaceful settlement.

The Characterization and Applicable Law of Cultural Objects in Conflicts of Laws: Is a Mummy a Person or a Property?

Willem 1, Buddhist mummy. Statue (L), CT scan (R). (Photos: Drents Museum)

by Zhen Chen, PhD researcher in the Department of Private International Law, University of Groningen, the Netherlands (ORCID ID: https://orcid.org/0000-0001-5323-4271)[1]

In *Buddha Mummy Statue* case, the Chinese village committees sued the Dutch defendants for the return of a stolen golden statue which contains a 1000-year old mummified buddhist. The parties had different opinions on the legal nature of the mummy contained in the statue. The Chinese court classified the statue as a cultural property and applied the choice of law over movable properties provided in Article 37 of Chinese Private International Law (*lex rei sitae)*. Based on a comparative study, this article argues that a mummy does not fall within the traditional dichotomy between a person and a property. Instead, a mummy should be classified as a transitional existence between a person and a property. If the classification of a mummy has to be confined to the traditional dichotomy, a mummy can be regarded as a quasi-person, or a special kind of property. Following this new classification, a new choice of law rule should be established. In this regard, the Belgian Private International Law Act, which adopts the *lex originis* rule supplement by the *lex rei sitae*, is a forerunner. This article advocates that the adoption of the *lex originis* rule may help to stop the vicious circle of illegal possession and to facilitate the return of stolen cultural objects,

especially those containing human remains, to their country of origin.

1. Gold or God?

As to the legal nature of the Buddha Mummy Statue in dispute, from the Chinese villagers' perspective, the mummy contained in the golden statute is a person or God, instead of a property. Specifically, the mummified buddhist Master Zhanggong was their ancestor, who used to live in their village and has been worshipped as their spiritual and religious God for over 1000 years. Master Zhanggong was preserved in a statue moulded with gold to prevent decomposition and to maintain his immortality. The villagers celebrated Master Zhanggong's birthday every year with feast, music and dance performance, which has become their collective memory and shared belief.

In contrast, from the Dutch art collector' perspective, the golden statute containing a mummy is a property not a person. It is merely a cultural property with great economic value and worthy of collection or investment. Thus, it is not surprising that the Dutch collector asked for a compensation of 20 million Euro, of which the Chinese villagers whose annual income was around 1000 Euro could not afford it.

The Chinese village committees sued the Dutch art collector both in China and in the Netherlands. The Chinese village committees asserted that the mummified Master Zhanggong contained in the statue was a corpse within the meaning of the Dutch Liability Decree, and the ownership thereof was excluded under the Dutch law.[2] The claimants as the trustees or the agents had the right of disposal.[3] The Dutch art collector argued that the mummified monk contained in the golden statue was not a corpse, as the organs of the monk were missing. The Dutch court did not touch upon the issue of classification of the Buddha Mummy Statue, as the case was dismissed on the basis that the Chinese village committees had no legal standing nor legal personality in the legal proceedings.[4]

2. The *lex situs* under Article 37 Chinese Private International Law Act

The Chinese court classified the Buddha Mummy Statue as a cultural property

and applied the law of the country where the theft occurred, namely Chinese law, by virtue of Article 37 Chinese Private International Law Act. Such classification is not satisfactory, as the mummy in dispute was essentially considered as a property. Chinese law was applied because the place of theft was in China and the *lex situs* was construed by the Chinese court as the *lex furti*. However, what if the mummy was stolen in a third country during the transportation or an exhibition? The *lex furti* does not necessarily happen to be the *lex originis* in all cases involving stolen cultural objects.

Moreover, cultural objects containing human remains are special in comparison with other cultural objects without, as human remains contain biological information of a person. The application of the traditional *lex rei sitae* rule to all cultural objects, including those containing human remains, is far from satisfactory. In general, the law on dead human bodies precedes over the sale of corpses, and no person, including a good faith purchaser can own somebody else's corpse both in civil law and common law systems.[5] A corpse must not be downgraded to the status of a property.[6] The characterization of human remains as properties objectifies human remains and thus may violate human dignity.[7] Therefore, it is necessary to distinguish cultural objects containing human remains from other types of cultural objects. The question is how to draw a distinction and what is the legal nature of a cultural object containing human remains, such as a mummy. If a mummy does not fall within the scope of traditional category of a person nor a property, does it mean a new category need to be created? In this regard, the classification of the legal nature of a fertilized embryo in *Shen v. Liu* may be relevant,[8] since the judge addressed the issue by thinking out of the box and provided a new solution.

3. Is a Fertilized Embryo a Property or a Person?

Shen v. Liu was the first case in China that involved the ownership of frozen embryos. Specifically, Shen and Liu, who got married in 2010 and died in 2013 in a car accident, left four frozen fertilized embryos in a local hospital. The parents of Shen (Mr and Mrs Shen), sued the parents of Liu (Mr and Mrs Liu), who also lost their only child, claiming the inheritance of the four frozen fertilized embryos

of the deceased young couple.[9] The local hospital where the embryos were preserved was a third party in this case.

3.1 A property, a special property, or 'a transitional existence between person and property'?

The third party Gulou Hospital argued that the frozen embryos do not have the nature of a property. Since Mr. and Mrs. Shen had passed away, the expired embryos should be discarded. Neither the plaintiffs nor the defendants should inherit the embryos.[10] The first-instance court held that fertilized embryos had the potential to develop into life, and thus are special properties that contain biological characteristics of a future life. Unlike normal properties, fertilized embryos can not be the subject of succession, nor be bought or sold.[11]

Nevertheless, the appellate court took the view that embryos were 'a transitional existence between people and properties'. Therefore, embryos have a higher moral status than non-living properties and deserve special respect and protection. The embryo ethically contains the genetic information of the two families and is closely related to the parents of the deceased couple. Emotionally speaking, the embryo carries personal rights and interests, such as the grief and spiritual comfort for the elderly. The court held that the supervision and disposal of the embryos by the parents from these two families was in line with human ethics and can also relieve the pain of bereavement for both parties.[12] Clearly, the court did not classify the fertilized embryos as people or properties. Instead, the embargo was considered as 'a transitional existence between a person and a property', since it is not biotic nor abiotic but a third type in-between.

3.2 A mummy as 'a continuum between a person and a property'

With regard to the distinction between a person and a property, the judgment of *Shen v. Liu* shows that the Chinese court was not confined to the traditional dichotomy between a person and a property. The same should be applicable to mummies. Embryos and mummies have something in common, as they are two different kinds of life forms. Whereas the embryo in *Shen v. Liu* is the form of life

which exists before the birth of a human being, the mummy in *Buddha Mummy Statue* case is another form of life which exists after the death of a human being.

Embryos and mummies, as the pre-birth transition and after-death extension of life forms of a human being, involve morality and 'human dignity'.[13] Such transitional existence or continuum of life forms contains personal rights and interests for related parties, which may justify the adoption of a new classification. As a special form of life, embryos and mummies should not be considered as merely a property nor a person. The strict distinction between people and properties does not apply well in embryos and mummies. Instead, they should be regarded as 'a transitional existence between a person and a property' or 'a continuum between a person and a property'. If it is not plausible to create a third type for the purpose of classification, they should be regarded, at least, as a quasi-person, or a special property with personal rights and interests. An embryo and a mummy cannot be owned by someone as a property. Rather, a person can be a custodian of an embryo and a mummy. This is also the reason why cultural objects containing human remains should be treated differently.

4. A New Classification Requires a New Choice of Law Rule

In order to distinguish cultural objects containing human remains from other cultural objects, or more generally to distinguish cultural properties from other properties in the field of private international law, a new choice of law rule needs to be established. In this regard, the 2004 Belgian Private International Law Act might be the forerunner and serve as a model for not only other EU countries but also non-EU countries.[14]

4.1 The *lex originis* overrides the *lex situs*

The traditional *lex situs* rule is based on the location of a property and does not take cultural property protection into consideration. Courts resolving cultural object disputes consistently fail to swiftly and fairly administer justice, and much of the blame can be put on the predominant *lex situs* rule.[15] The *lex situs* rule allows parties to choose more favorable countries and strongly weakens attempts

to protect cultural objects.[16]

In Belgium, as a general rule, the restitution of illicitly-exported cultural objects is subject to the *lex originis,* rather than the *lex rei sitae*. Article 90 of 2004 Belgian Private International Law Act stipulated that if one object that has been recorded in a national list of cultural heritage is delivered outside this country in a way that against its law, the lawsuit filed in this country for the return of that particular object shall apply the law of the requesting country. This provision designates the law of the country of origin, also known as the *lex originis* rule. In comparison with the *lex rei sitae* or the *lex furti* rule*,* the *lex originis* rule is more favorable to the original owners

4.2 Facilitating the return of human remains to their country of origin

The establishment of a new choice of law rule for cultural relics containing human remains or cultural objects in general is in line with the national and international efforts of facilitating the return of stolen or illicitly cultural objects to their country of origin. Mummies exist not only in China, but also in many other countries, such as as Japan, Egypt, Germany, Hungary, USA, Russia, and Italy. The adoption of the *lex originis* rule could facilitate the return of stolen or illicitly exported cultural objects which contain human remains to their country of origin or culturally-affiliated place. This objective is shared in many international conventions and national legislations.

5. Concluding remarks

The mummy Master Zhanggong has not been returned to the Chinese village committees yet, since the Dutch defendants have lodged an appeal. This article argues that, in the light of the classification of frozen embryos in *Shen v. Liu,* mummies should be classified as ‘a transitional existence between a person and a property’. A new classification calls for a new choice of law rule. In this regard, the 2004 Belgian Private International Law Act might serve as a model, according to which the *lex originis* rule prevails over the traditional *lex situs* rule, unless the original owner chooses the application of the traditional *lex situs* or the *lex originis* rule does not provide protection to the good faith purchaser. The Chinese

Private International Law should embrace such approach, since the application of the *lex originis* may facilitate the return of cultural relics, including but not limited to those containing human remains such as mummies, to their culturally affiliated community, ethnic or religious groups.

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[1] This is a shortened version of the article published in the Chinese Journal of Comparative Law with open access https://doi.org/10.1093/cjcl/cxac006. Related blogposts are Buddha Mummy Statue case and Conflict of Laws of Cultural Property.

[2] *Chinese Village Committees v. Oscar Van Overeem*, ECLI:NL:RBAMS:2018:8919, point 3.1.

[3] *Ibid.*

[4] *Ibid.*, point 4.2.5.

[5] J. Huang, 'Protecting Non-indigenous Human Remains under Cultural Heritage Law', 14 *Chinese Journal of International Law* 2015, p. 724.

[6] E.H. Ayau and H. Keeler, Injustice, Human Rights, and Intellectual Savagery, in Human Remains in Museums and Collections, DOI: https://doi.org/10.18452/19383, p. 91.

[7] Ibid.

[8] *Mr and Mrs Shen v. Mr and Mrs Liu*, Jiangsu Province Yixing Municipality People's Court, (2013) Yi Min Chu Zi No 2729; Jiangsu Province Wuxi Municipality Intermediate People's Court, (2014) Xi Min Zhong Zi No 01235.

[9] *Ibid*.

[10] *Ibid*. The third party also stated that after the embryos are taken out, the only way to keep the embryos alive is surrogacy, which is illegal in China, thus both parties have no right to dispose the embryos.

[11] *Ibid*. Since the first-instance court held that embryos cannot be transferred or inherited, the case was dismissed in accordance with Article 5 of the General Principle of Civil Law and Article 3 of the Inheritance Law of the PRC.

[12] *Ibid*. The appellate court analyzed that after the death of Shen and Liu, their parents were the only subjects and most-related parties that care about the fate of embryos. Thus, it was appropriate to rule that the parents of Shen and Liu have the right to supervise and dispose the embryos. However, such supervision and disposal should abide by the law, and must not violate public order and good morals nor infringe the interests of other people.

[13] While birth means a definite initiation into human society, death indicates a final termination of a natural person, which both involve the dignity of an individual human or even humankind. H.G. Koch, 'The Legal Status of the Human Embryo', in E. Hildt and D. Mieth (eds.), *Vitro Fertilisation in the 1990s,* Routledge 1998, p. 3.

[14] T. Szabados, 'In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications', 27 *International Journal of Cultural Property* 2020, p. 335.

[15] D. Fincham, 'How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property', 32 *Columbia Journal of Law & the Arts* 2008, p.116.

[16] Ibid, p.130.

Pilar Jiménez Blanco on Cross-

Border Matrimonial Property Regimes

Written by Pilar Jiménez Blanco about her book:

Pilar Jiménez Blanco, *Regímenes económicos matrimoniales transfronterizos [Un estudio del Reglamento (UE) nº 2016/1103]*, Tirant lo Blanch, 2021, 407 p., ISBN 978-84-1355-876-9

The Regulation (EU) No 2016/1103 is the reference Regulation in matters of cross-border matrimonial property regimes. This book carries out an exhaustive analysis of the Regulation, overcoming its complexity and technical difficulties.

The book is divided in two parts. The first is related to the applicable law, including the legal matrimonial regime and the matrimonial property agreement and the scope of the applicable law. The second part is related to litigation, including the rules of jurisdiction and the system for the recognition of decisions. The study of the jurisdiction rules is ordered according to the type of litigation and the moment in which it arises, depending on whether the marriage is in force or has been dissolved by divorce or death. **Three guiding principles** of the Regulation are identified: 1) The need of **coordination with the EU Regulations** on family matters (divorce and maintenance) and succession. This coordination can be achieved through the choice of law by the spouses to ensure the application of the same law to divorce, to the liquidation of the matrimonial regime, to maintenance and even to agreements as to succession. In addition, a broad interpretation of "maintenance" that includes figures such as compensatory pension (known, for example, in Spanish law) allows that one of the spouses objects to the application of the law of the habitual residence of the creditor and the law of another State has a closer connection with the marriage, based on art. 5 of the 2007 Hague Protocol. In such a case, the governing law of the matrimonial property regime could be considered as the closest law.

In the field of international jurisdiction, the coordination between EU Regulations is intended to be ensured with exclusive jurisdiction by ancillary linked to succession proceedings or linked to matrimonial proceedings pending before the courts of other Member States. Although the ancillary jurisdiction of the

proceedings on the matrimonial property regime with respect to maintenance claims is not foreseen, the possibility of accumulation of these claims is possible through a choice of court to the competent court to matrimonial matters.

2) The **unitary treatment of the matrimonial property regime**. The general rule is that only one law is applicable and only one court is competent to matrimonial property regimes, regardless of the location of the assets. The exceptions derived from the registry rules of the real estate situation and the effect to third parties are analysed.

3) The **legal certainty and predictability**. The general criterion is the immutability and stability of the matrimonial property regime, so that the connections are fixed at the beginning of married life and mobile conflict does not operate, as a rule. The changes allowed will always be without opposition from any spouse and safe from the rights of third parties. The commitment to legal certainty and predictability of the matrimonial property regime governing law prevails over the proximity current relationship of the spouses with another State law.

Related to **applicable law**, the following contents can be highlighted:

-The **importance of choosing the governing law** of the matrimonial property regime. The choice of law has undoubted advantages for the spouses to coordinate the law applicable to the matrimonial property regime with the competent courts and with the governing law of related issues related to divorce, maintenance and succession law. The choice of law is especially recommended if matrimonial property agreements are granted in case of spouses' different nationalities and different habitual residence, since it avoids uncertainty in determining the law of the closest connection established in art. 26.1.c). Of particular importance is the question of form and consent in the choice of law, given the ambiguity of the Regulation on the need for this consent to be express.

-The interest in conclude **matrimonial property agreements and, specially, the prenuptial agreements**. Its initial validity requires checking the content of each agreement to verify which is the applicable law and which is included within the scope of the Regulation (EU) No 2016/1103. The enforceability of these agreements poses problems when new unforeseeable circumstances have

appeared for the spouses, which will require an assessment of the effectiveness of the agreements in a global manner – not fragmented according to each agreement – to verify the minimum necessary protection of each spouse.

-The **singularities of the scope of application of the governing matrimonial property regime law**. The issues included in the governing law require prior consultation with said law to identify any specialty in the matrimonial property regime relations between the spouses or in relation to third parties. This has consequences related to special capacity rules to conclude matrimonial property agreements, limitations to dispose of certain assets, limitations for contracts between spouses or with respect to third parties or the relationship between the matrimonial property regimes and the civil liability of the spouses. Of particular importance is the regime of the family home, which is analysed from the perspective of the limitations for its disposal and from the perspective of the rules of assignment of use to one of the spouses.

-The **balance between the protection of spouses and the protection of third parties**. From art. 28 of the Regulation, derives the recommendation for the spouses to register their matrimonial property regime, whenever possible, in the registry of their residence and in the property registry of the real estate situation. The recommendation for third parties is to consult the matrimonial property regime in the registries of their residence and real estate. As an alternative, it is recommended to choose – as the governing law of the contract – the same law that governs the matrimonial property regime.

– **The effects on the registries law**. Although the registration of rights falls outside the scope of the Regulation, for the purposes of guaranteeing correct publicity in the registry of the matrimonial property regimes of foreign spouses, it would be advisable to eventually adapt the registry law of the Member States to the Regulation (EU) No 2016/1103. A solution consistent with the Regulation would be to allow the matrimonial property regime registry access when the first habitual residence of the couple is established in that State.

Related to **jurisdiction,** the following contents can be highlighted:

-The keys of the rules of jurisdiction. The rules of jurisdiction only regulate international jurisdiction, respecting the organization of jurisdiction among the

“courts” within each State. It will be the procedural rules of the Member States that determine the type of intervening authority (judicial or notarial), as well as the territorial and functional jurisdiction.

The rules of jurisdiction are classified into two groups: 1) litigation with a marriage in force, referred to in the general forums of arts. 6 et seq.); 2) litigation in case of dissolution of the marriage, due to death or marital crisis. These are subject to two types of rules: if the link (spatial, temporal and material) with the divorce or succession court is fulfilled, this court has exclusive jurisdiction, in accordance with arts. 4 and 5; failing that, it goes back to the general forums of the Regulation.

Jurisdiction related to succession proceedings (based on art. 4) poses a problem of lack of proximity of the court with the surviving spouse, especially when the criterion of jurisdiction for the succession established by Regulation (EU) No 650/2012 has little connection with that State. This will be the case especially when the jurisdiction for succession is based on the location of an asset in that State (art. 10.2) or on the *forum necessitatis* (art. 11).

Jurisdiction related to matrimonial proceedings (based on art. 5) poses some problems such as the one derived from a lack of temporary fixation of the incidental nature. The problem is to determine how long this court has jurisdiction.

-The interest of the choice of court. The choice of court is especially useful to reinforce the choice of law. Submission may also be convenient, especially to the State of the celebration, for marriages that are at risk of not being recognized in any Member State by virtue of art. 9 (for example, same-sex marriages).

The inclusion of a submission in a prenuptial agreement or in a matrimonial property agreement does not avoid the uncertainty of the competent court. There is a clear preference for the concentration of the jurisdiction of arts. 4 and 5 apart from the pact of submission made between the spouses. In any case, the choice of court can be operative if the proceedings on the matrimonial issue has been raised before courts with the minimum connection referred to in art. 5.2.

Problems arise due to the dependence of the jurisdiction on the applicable law established in art. 22 of the Regulation, since it requires anticipating the determination of the law applicable to the matrimonial property regime in order

to control international jurisdiction.

Related to **recognition,** the following contents can be highlighted:

-The **delimitation between court decision and authentic instrument** does not depend on the intervening authority – judicial or notarial –, but on the exercise of the jurisdictional function, which implies the exercise of a decision-making activity by the intervening authority. This allows notarial divorces to be included and notoriety acts of the matrimonial property regime to be excluded.

The recognition system follows the classic model of the European Regulations, taking as a reference the Regulation (EU) No 650/2012 on succession. Therefore, the need for exequatur to enforceability of court decisions is maintained.

The obligation to apply the grounds for refusal of recognition with **respect to the fundamental rights recognised in the EU Charter** and, in particular, in art. 21 thereof on the principle of non-discrimination. This supposes an express incorporation of the European public policy to the normative body of a Regulation. Specially, the prohibition of discrimination based on sexual orientation means the impossibility of using the public policy ground to deny recognition of a decision issued by the courts of another Member State relative to the matrimonial property regime of a marriage between spouses of the same sex.

The study merges the rigorous interpretation of EU rules with practical reality and includes case examples for each problem area. The book is completed with many references on comparative law, which show the different systems for dealing with matters of the matrimonial property regime applied in the Member States. It is, therefore, an essential reference book for judges, notaries, lawyers or any other professional who performs legal advice in matrimonial affairs.

Are the Chapter 2 General Protections in the Australian Consumer Law Mandatory Laws?

Neerav Srivastava, a Ph.D. candidate at Monash University offers an analysis on whether the Chapter 2 general protections in the Australia's Competition and Consumer Act 2010 are mandatory laws.

Online Australian consumer transactions on multinational platforms have grown rapidly. Online Australian consumers contract typically include exclusive jurisdiction clauses (EJC) and foreign choice of law clauses (FCL). The EJC and FCL, respectively, are often in favour of a US jurisdiction. Particularly when an Australian consumer is involved, the EJC might be void or an Australian court may refuse to enforce it.[1] And the 'consumer guarantees' in Chap 3 of the *Australian Consumer Law* ('*ACL*') are explicitly 'mandatory laws'[2] that the contract cannot exclude. It is less clear whether the general protections at Chap 2 of the *ACL* are non-excludable. Unlike the consumer guarantees, it is not stated that the Chap 2 protections are mandatory. As Davies et al and Douglas[3] rightly point out that *may* imply they are not mandatory. In 'Indie Law For Youtubers: Youtube And The Legality Of Demonetisation' (2021) 42 *Adelaide Law Review*503, I argue that the Chap 2 protections are mandatory laws.

The Chap 2 protections, which are not limited to consumers, are against:

- misleading or deceptive conduct under s 18
- unconscionable conduct under s 21
- unfair contract terms under s 23

I. PRACTICALLY SIGNIFICANT

If the Chap 2 protections are mandatory laws, that is practically significant. Australian consumers and others can rely on the protections, and multinational platforms need to calibrate their approach accordingly. Australia places a greater emphasis on consumer protection,[4] whereas the US gives primacy to freedom of contract.[5] Part 2 may give a different answer to US law. For example, the

YouTube business model is built on advertising revenue generated from content uploaded by YouTubers. Under the YouTube contract, advertising revenue is split between a YouTuber (55%) and YouTube (45%). When a YouTuber does not meet the minimum threshold hours, or YouTube deems content as inappropriate, a YouTuber cannot monetise that content. This is known as demonetisation. On the assumption that the Chap 2 protections apply, the article argues that

- not providing reasons to a Youtuber for demonetisation is unconscionable
- in the US, it has been held that clauses that allow YouTube to unilaterally vary its terms, eg changing its demonetisation policy, are enforceable. Under Chap 2 of the *ACL*, such a clause is probably void.

If that is correct, it is relevant to Australian YouTubers. It may also affect the tactical landscape globally regarding the demonetisation dispute.

II. WHETHER MANDATORY

As to why the Chap 2 protections are mandatory laws, first, the *ACL* does not state that they are not mandatory. The Chap 2 protections have been characterised as rights that cannot be excluded.[6]

The objects of the *ACL*, namely to enhance the welfare of Australians and consumer protection, suggest[7] that Chap 2 is mandatory. A FCL, sometimes combined with an EJC, may alienate Australian consumers, the weaker party, from legal remedies.[8] Allowing this to proliferate would be inconsistent with the *ACL*'s objects. If Chap 2 is not mandatory, all businesses — Australian and international — could start using FCLs to avoid Chap 2 and render it otiose.

Further there is a public dimension to the Chap 2 protections,[9] in that they are subject to regulatory enforcement. It can be ordered that pecuniary penalties be paid to the government and compensation be awarded to non-parties. In this respect, Chap 3 is similar to criminal laws, which are generally understood to have a strict territorial application.[10]

As for policy being 'particularly' important where there is an inequality of bargaining power, both ss 21[11] and 23 are specifically directed at redressing inequality.[12]

Regarding the specific provisions:

- Authority on, at least, s 18 suggests that it is mandatory.[13]
- Section 21 on unconscionable conduct has been held to be a mandatory law, although that conclusion was not a detailed judicial consideration.[14] In any event, it is arguable that 'conduct' is broader than a contract, and parties cannot exclude 'conduct' provisions.[15] Unconscionability is determined by reference to 'norms' of Australian society and is, therefore, not an issue exclusively between the parties.[16]
- Whether s 23 on unfair contract terms is a mandatory law is debatable.[17] At common law, the proper law governs all aspects of a contractual obligation, including its validity. The counterargument is that s 23 is a statutory regime that supersedes the common law. As a matter of policy, Australia is one of the few jurisdictions to extend unfair terms protection to small businesses expressly, for example, a YouTuber. An interpretation that s 23 can be disapplied by a FCL would be problematic. A FCL designed to evade the operation of ss 21 or 23 might itself be unconscionable or unfair.[18] If s 23 is not mandatory, Australian consumers may not have the benefit of an important protection. Section 23 also has a public interest element, in that under s 250 the regulator can apply to have a term declared unfair. On balance, it is more likely than not that s 21 is a mandatory law.

The Chap 2 protections are an integral part of the Australian legal landscape and the market culture. This piece argues that the Chap 2 protections *are* mandatory laws. Whether or not that is correct, as a matter of policy, they should be.

FOOTNOTES

[1] A possibility implicitly left open by *Epic Games Inc v Apple Inc* [2021] FCA 338, [17]. See too *Knight v Adventure Associates Pty Ltd* [1999] NSWSC 861, [32]–[36] (Master Malpass); *Quinlan v Safe International Försäkrings AB* [2005] FCA 1362, [46] (Nicholson J), *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[2] 'laws the respect for which is regarded by a country as so crucial for safeguarding public interests (political, social, or economic organization) that they are applicable to any contract falling within their scope, regardless of the law which might otherwise be applied'. See Adrian Briggs, *The Conflict of Laws*

(Oxford University Press, 3rd ed, 2013) 248.

[3] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 492 [19.48], Michael Douglas, 'Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation After *Valve*' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 201, 226-7.

[4] Richard Garnett, 'Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?' (2017) 39(4) *Sydney Law Review* 569, 570, 599.

[5] *Sweet v Google Inc* (ND Cal, Case No 17-cv-03953-EMC, 7 March 2018).

[6] *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[7] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10].

[8] See, eg, *Océano Grupo Editorial SA v Murciano Quintero* (C-240/98) [2000] ECR I-4963.

[9] *Epic Games Inc v Apple Inc* (2021) 392 ALR 66, 72 [23] (Middleton, Jagot and Moshinsky JJ).

[10] John Goldring, 'Globalisation and Consumer Protection Laws' (2008) 8(1) *Macquarie Law Journal* 79, 87-8

[11] Historically, the essence of unconscionability is the exploitation of a weaker party. *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 36 [81] (Gageler J) ('*ASIC v Kobelt*').

[12] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10], 492 [19.48].

[13] *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033, [19].

[14] *Epic Games Inc v Apple Inc* [2021] FCA 338, [19] (Perram J). On appeal, the Full Court of the Federal Court of Australia exercised its discretion afresh and refused the stay: *Epic Games Inc v Apple Inc* (2021) 392 ALR 66. That said,

Perram J's conclusion that s 21 was a mandatory law was not challenged on appeal.

[15] Analogical support for a 'conduct' analysis can be found from cases on s 18 like *Australian Competition and Consumer Commission v Valve Corporation [No 3]* (2016) 337 ALR 647 (Edelman J, at first instance). In *Valve* it was reiterated that the test for s 18 was objective. See 689 [212]–[213]. A contractual term might neutralise the misleading or deceptive conduct, but it cannot be contracted out of. See *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 17 [37] (Stone J, Moore J agreeing at 4 [1], Mansfield J agreeing at 11 [17]); *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, 29–30 [83] (Keane JA, Williams JA agreeing at [1], Atkinson J agreeing at [145]).

[16] *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) [No 2]* [2017] FCA 709, [60]–[62] (Beach J).

[17] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 463 [19.1], 492 [19.48].

[18] M Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2019) 470–2 [19.10]. While a consumer might be able to challenge a proper law of contract clause on the grounds of unconscionability, it would be harder for a commercial party to do so.

A Boost in the Number of European Small Claims Procedures before Spanish Courts: A Collateral Effect of the Massive

Number of Applications for European Payment Orders?

Carlos Santaló Goris, Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers an analysis of the Spanish statistics on the European Small Claims Procedure.

Until 2017, the annual number of European Small Claims Proceedings ("ESCP") in Spain was relatively small, with an average of 50 ESCPs per year. With some exceptions, this minimal use of the ESCP fits the general trend across Europe (Deloitte Report). However, from 2017 to 2018 the number of ESCPs in Spain increased 286,6%. Against the 60 ESCPs issued in 2017, 172 were issued in 2020. In 2019, the number of ESCPs continued climbing to 492 ESCPs. This trend reversed in 2020, when there were just 179 ESCPs.

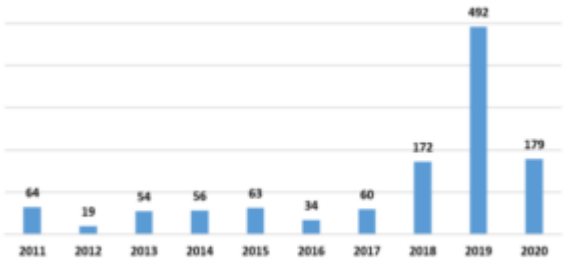

Chart no. 1. Number of ESCP filed before Spanish courts per year between 2011 and 2020

The use of the Regulation establishing the European Payment Order ("EPO Regulation") experienced a similar fluctuation between 2018 and 2020. Since its entry into force, the EPO Regulation was significantly more prevalent among Spanish creditors than the ESCP Regulation. Between 2011 to 2020, there were an average of 940 EPO applications per year. Nonetheless, from 2017 to 2019, the number of EPO applications increased 4.451%: just in 2019, 29,151 EPOs were issued in Spain. In 2020, the number of EPOs decreased to 21,636. the massive boost in EPO applications results from creditors' attempts to circumvent EU consumer protection standards under the Spanish domestic payment order.

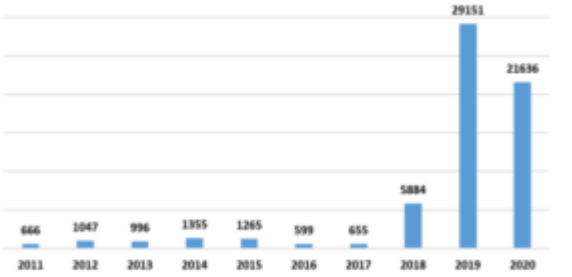

Chart no. 2. Number of EPO applications submitted before Spanish courts per year between 2011 and 2020

From *Banco Español de Crédito* to *Bondora*

After the CJEU judgment C-618/10, *Banco Español de Crédito*, the Spanish legislator amended the Spanish Code of Civil Procedure to impose on courts a mandatory review of the fairness of the contractual terms in a request for a domestic payment order. Creditors noticed that they could circumvent such control through the EPO. Unlike the Spanish payment order, the EPO is a non-documentary type payment order. For an EPO, standard form creditors only have to indicate "the cause of the action, including a description of the circumstances invoked as the basis of the claim" as well as "a description of evidence supporting the claim" (Article 7(2) EPO Regulation). Moreover, the Spanish legislation implementing the EPO states that courts have to reject any other documentation beyond the EPO application standard form. Creditors realized that in this manner there was no possible way for the court to examine the fairness of the contratual terms in EPOs against consumers. Consequently, the number of EPO applications between 2017 and 2019 increased remarkably.

In some cases, a claim's cross-border dimension was even fabricated to access the EPO Regulation. The EPO, like the ESCP, is only applicable in cross-border claims, which means that "at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised"(Article 3 EPO Regulation). Against this background, creditors assigned the debt to a creditor abroad (in many cases, vulture funds and companies specialized in debt recovery) in order to transform a purely internal claim into a cross-border one.

The abnormal increase in the number of EPOs did not go unnoticed among Spanish judges. Three Spanish courts decided to submit preliminary references to the CJEU, asking, precisely, whether it is possible to examine the fairness of the contractual terms in an EPO application requested against a consumer. Two of

these preliminary references led to the judgment Joined Cases C?453/18 and C?494/18, *Bondora*, where the CJEU replied positively, acknowledging that courts can examine the fairness of the contractual terms (on this judgment, see this previous post). The judgment was rendered in December 2019. In 2020, the number of EPOs started to decrease. It appears that after *Bondora* the EPO became less attractive to creditors.

The connection between the EPO and the ESCP Regulation

At this point one needs to ask how the increase in the use of the EPO Regulation has had an impact on the use of the ESCP Regulation. The answer is likely found in the 2015 joint reform of the EPO and ESCP Regulations (Regulation (EU) 2015/2421). Among other changes, this reform introduced an amendment in the EPO Regulation which allows, once the creditor lodges a statement of opposition against an EPO, for an automatic continuation of proceedings under the ESCP (Article 17(1)(a) EPO Regulation). For this to happen, creditors simply need to state their intention by making use of a code in the EPO application standard form. It appears that, in Spain, many of those creditors who applied for an EPO in order to circumvent consumer protection standards under the domestic payment order found in the ESCP a subsdiary proceeding if debtors opposed the EPO.

An isolated Spanish phenomenon?

Statistics in Spain show that, at least in this Member State, the connection between the EPO and ESCP Regulations functions and gives more visibility to the ESCP. The lack of awareness about the ESCP Regulation was one of the issues that the Commission aimed to tackle with the 2015 reform. One might wonder if a similar increase in the use of the ESCP could be appreciated in other Member States. Available public statistics in Portugal, Lithuania, and Luxembourg do not reveal any significant change in the use of the ESCP after 2017, the year the amendment entered into force. In Lithuania, the number of ESCPs even decreased from 2018 to 2019.

Chart no. 3. Number of ESCPs initiated in Germany, Lithuania, Luxembourg and Portugal per year between 2017 and 2020

Conversely, in Germany, statistics reveal a steady growth over those years. Against the 478 ESCPs issued in Germany in 2017, 2380 ESCP were issued in 2020, standing for an increase of 498%. Perhaps, after an unsuccessful start, the ESCP Regulation is finally bearing fruit.

ECJ, judgment of 10 February 2022, Case 522/20 – OE ./. VY, on the validity of the connecting factor „nationality“ in the Brussels IIbis Regulation (2201/2003) in light of Article 18 TFEU.

Today, in the case of OE ./. VY, C-522/20 (no Opinion was delivered in these proceedings), the ECJ decided on a fundamental point: whether nationality as a (supplemental) connecting factor for jurisdiction according to Article 3 lit. a indent 6 of the Brussels IIbis Regulation (2201/2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the

matters of parental responsibility is in conformity with the principal prohibition of discrimination against nationality in the primary law of the European Union (Art. 18 TFEU).

Article 18 TFEU reads: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. …”.

Art. 3 lit. a Brussels IIbis Regulation reads: “In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with with the courts of the Member State:”; indent 5 reads: “in whose territory the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or”, according to indent 6: “the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question …”.

The case emerged from a request in proceedings between OE and his wife, VY, concerning an application for dissolution of their marriage brought before the Austrian courts (paras. 9 et seq.):

“On 9 November 2011, OE, an Italian national, and VY, a German national, were married in Dublin (Ireland). According to the information provided by the referring court, OE left the habitual residence the couple shared in Ireland in May 2018 and has lived in Austria since August 2019. On 28 February 2020, that is, after residing in Austria for more than six months, OE applied to the Bezirksgericht Döbling (District Court, Döbling, Austria) for the dissolution of his marriage with VY. OE submits that a national of a Member State other than the State of the forum is entitled to invoke the jurisdiction of the courts of that latter State under the sixth indent of Article 3(1)(a) of Regulation No 2201/2003, on the basis of observance of the principle of non-discrimination on grounds of nationality, after having resided in the territory of that latter State for only six months immediately before making the application for divorce, which is tantamount to disregarding the application of the fifth indent of that provision, which requires a period of residence of at least a year immediately before the application for divorce is made. By order of 20 April 2020, the Bezirksgericht Döbling (District Court, Döbling) dismissed OE’s application, taking the view that it lacked jurisdiction to hear it. According to that court, the distinction made on the basis of nationality in the fifth and sixth indents of Article 3(1)(a) of

Regulation No 2201/2003 is intended to prevent the applicant from forum shopping. By order of 29 June 2020, the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria), hearing the case on appeal, upheld the order of the Bezirksgericht Döbling (District Court, Döbling). OE brought an appeal on a point of law against that order before the referring court, the Oberster Gerichtshof (Supreme Court, Austria)."

The Court reiterated, inter alia, that (paras. 18 et seq.) the principle of non-discrimination and equal treatment require that comparable situations must not be treated differently and different situations must not be treated in the same way, "unless such treatment is objectively justified", further that the comparability of different situations must be assessed having regard to all the elements which characterise them, and thirdly that the (EU) legislature has a broad discretion in this respect. "Thus, only if a measure adopted in this field is manifestly inappropriate in relation to the objectives which the competent institutions are seeking to pursue can the lawfulness of such a measure be affected".

Against this background the Court held (paras 25 et seq.) that, first, Article 3 meets "the need for rules that address the specific requirements of conflicts relating to the dissolution of matrimonial ties", secondly that while the first to fourth indents of Article 3(1)(a) of Regulation expressly refer to the habitual residence of the spouses and of the respondent as criteria, the fifth and sixth indents of Article 3(1)(a) permit the application of the jurisdiction rules of the *forum actoris*, and thirdly that "it is apparent from the Court's case-law that the rules on jurisdiction laid down in Article 3 of Regulation No 2201/2003, including those laid down in the fifth and sixth indents of paragraph 1(a) of that article, seek to ensure a balance between, on the one hand, the mobility of individuals within the European Union, in particular by protecting the rights of the spouse who, after the marriage has broken down, has left the Member State where the couple had their shared residence and, on the other hand, legal certainty, in particular that of the other spouse, by ensuring that there is a real link between the applicant and the Member State whose courts have jurisdiction to give a ruling on the dissolution of the matrimonial ties concerned (see, to that effect, judgments of 13 October 2016, *Mikolajczyk*, C-294/15, EU:C:2016:772, paragraphs 33, 49 and 50, and of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)*, C-289/20, EU:C:2021:955, paragraphs 35, 44 and 56)." And the

fact that typically there is such a real link if there is nationality sufficed to justify distinguishing between indent 5 and indent 6, all the more as this cannot be a surprise to the other spouse.

Therefore the Court came to the conclusion:

"The principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, must be interpreted as not precluding a situation in which the jurisdiction of the courts of the Member State in the territory of which the habitual residence of the applicant is located, as provided for in the sixth indent of Article 3(1)(a) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, is subject to the applicant being resident for a minimum period immediately before making his or her application which is six months shorter than that provided for in the fifth indent of Article 3(1)(a) of that regulation on the ground that the person concerned is a national of that Member State."

The most important take away seems to be that PIL legislation using nationality as a supplemental connnecting factor is still in conformity with Article 18 TFEU as long as it appears "not manifestly inappropriate" (para. 36). Therefore, and reconnecting to older case law (para. 39), legislation is still valid "with regard to a criterion based on the nationality of the person concerned, … although in borderline cases occasional problems must arise from the introduction of any general and abstract system of rules" so that "there are no grounds for taking exception to the fact that the EU legislature has resorted to categorisation, provided that it is not in essence discriminatory having regard to the objective which it pursues (see, by analogy, judgments of 16 October 1980, *Hochstrass* v *Court of Justice*, 147/79, EU:C:1980:238, paragraph 14, and of 15 April 2010, *Gualtieri* v *Commission*, C-485/08 P, EU:C:2010:188, paragraph 81)."