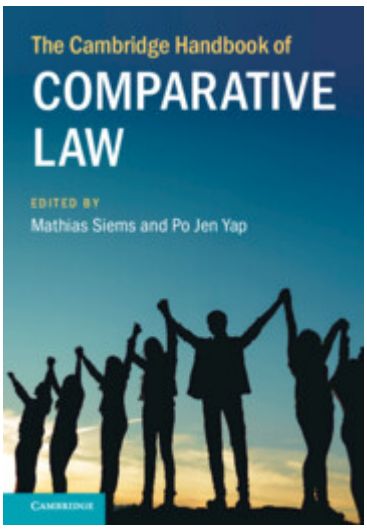
Out now: The Cambridge Handbook of Comparative Law (by Siems and Jen Yap)

There is no doubt that private international law works in close cooperation with comparative law. Horatia Muir Watt, for example, characterises the relationship between the two disciplines as "complementary" (H M Watt, "Private International Law", *in* J M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (2nd ed., Edward Elgar Publishing, 2012) p. 701). Similarly, Mathias Reimann describes it as "intimate" (M Reimann, "Comparative Law and Private International Law", *in* M Reimann and R Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2nd ed., OUP, 2019) p. 1340). Meanwhile, Ralf Michaels, another distinguished scholar of comparative and private international law, considers that "in private international law scholarship, comparison has always been prominent" (Ralf Michaels, "Comparative Law and Private International Law", *in* J Basedow *et al.* (eds.), *Encyclopedia of Private International law –Volume I* (Edward Elgar Publishing, 2017) p. 416).

Understanding foreign legal systems and the diversity of the solutions dealing with common problems and issues has always been crucial for private international law scholars and researchers. This enables them to refine the techniques and theories of private international law, and ultimately serves one of the most important goals of private international law: the coordination of different legal systems.

This elaborate introduction serves to justify the announcement on this blog regarding the recently published *Cambridge Handbook of Comparative Law (CUP, 2024)*, edited by Mathias Siems (European University Institute, Florence) and Po Jen Yap (The University of Hong Kong).



The book's description reads as follows:

Comparative law is a common subject-matter of research and teaching in many universities around the world, and the twenty-first century has aptly been termed 'the era of comparative law'. This Cambridge Handbook of Comparative Law presents a truly global perspective of comparative law today. The contributors are drawn from all parts of the world to provide different perspectives on how we understand the 'law' and how it operates in practice. In substance, the Handbook contains 36 chapters covering a broad range of topics, divided under the following headings: 'Methods of Comparative Law' (Part I), 'Legal Families and Geographical Comparisons' (Part II), 'Central Themes in Comparative Law' (Part III); and 'Comparative Law beyond the State' (Part IV).

The book's table of content is accessible here.

One can read with a lot of interest the contribution of Yuko Nishitani (Kyoto University) in this book on "Comparative Conflict of Laws" (pp. 674-692). The chapter's summary is as follows:

Conflict of laws (or private international law) deals with cross-border legal relationships involving private parties. Methods of modern conflict of laws originate in Europe and largely remained intact until today despite modifications brought about by the US Conflicts Revolution. Other parts of the world, that is, Latin America, Asia and Africa, have not been on the centre stage. Even the recent globalisation discourse on legal pluralism and conflict of laws has principally focused on Western, developed countries, although the wave of

globalisation affects the entire world. Countries in the Global South have been invisible presumably because, as former colonies, they are not readily accessible, are presumed not to have sophisticated conflicts rules, or are deselected by the choice of forum/arbitration clauses in cross-border business transactions. This chapter will deal with comparative conflict of laws from a non-Western viewpoint. This stance will allow for the relativising of the trends of conflict of laws in Europe and America and shed light on the recent debates on corporate due diligence and Sustainable Development Goals (SDGs) in conflict of laws by considering interests of the most affected and vulnerable people in the Global South. This chapter will also discuss future developments of conflict of laws treaties, which Asian and African countries have rarely joined so far.

Colonialism and German PIL (4) – Exploiting Asymmetries Between Global North and South

This post is part of a series regarding Colonialism and the general structure of (German) Private International Law, based on a presentation I gave in spring 2023. See the introduction here.

As mentioned in the introduction, this series does **not** intent to automatically pass judgment on a norm or method influenced by colonialism **as inherently negative**. Instead, the aim is to reveal these influences and to initiate a first engagement with and awareness of this topic and to stimulate a discussion and reflection.

The first post (after the introduction) dealt with classic PIL and colonialism. This second considered structures and values inherent in German or European law, implicitly resonating within the PIL and, thus, expanding those values to people and cases from other parts of the world. The third category discusses an imagined hierarchy between the Global North and Global South that is sometimes

inherent in private international law thinking. The **fourth and for the moment last (but not least) category** deals with PIL rules that allow or at least contribute to the exploitation of a power asymmetry between parties from the Global North and the Global South. For example, this power and negotiation asymmetry, in conjunction with generous rules on party autonomy, can lead to arbitration and choice of law clauses being (ab)used to effectively undermine rights of land use under traditional tribal law.

After the first post, in the comment section a discussion evolved regarding the (non-)application of tribal law. One question asked for an example. This post can also (hopefully) serve as such an example.

1. Party Autonomy in German and EU PIL

One value inherent to the German and EU legal systems is that of private and party autonomy. It reflects and expresses the individualism of the Enlightenment and a neo-liberal social order and is recognised today, at least in part, as one of the "universal values" of PIL. However, the choice of law and, thus, party autonomy as a core connecting factor or method of PIL can lead to the exploitation of negotiation asymmetries in the relationship between companies in the Global North and states or companies in the Global South, particularly to the detriment of the population in the Global South, by avoiding state control and socially protective regulations.

2. "Land Grabbing" as an Example

"Land grabbing" refers to, among other things, the procedure used by foreign investors to acquire ownership to or rights to exploit territories in former colonies. The contract is concluded with the landowner, often the state, and includes an arbitration and choice of law clause, often within the framework of bilateral investment protection agreements. The use of the land can conflict with the collective, traditional use by certain local groups, which is based on customary and tribal law. Such rights of land use were often only fought for politically after the former colony gained independence, while the original colonial legal system overrode indigenous rights of use (see also former posts **here** and see the discussion in the comment section of the post). These land use rights of indigenous groups often stem from public law and are conceived as protection rights of the indigenous population, who are thus authorised to live on

their traditional land.

The arbitration agreement and the choice of law clause make it possible for legal disputes to be settled before a private arbitration tribunal. The tribes concerned, as they are not part of the treaty on the land and its use, can only become parties to the legal dispute with difficulty. Furthermore, they may not have knowledge of the treaty and the arbitration clause or the possibility to start a proceeding at the tribunal. In addition, a law applicable to the contract and its consequences may be chosen that does not recognise the right of land use based on tribal law. If the arbitrator, not knowing about the not applicable tribal law or the existence of the tribe, makes a decision based on the chosen law, the decision can subsequently become final and enforceable. This may force the tribes using the land having to vacate it as property disturbers without being able to take legal action against it.

3. Party Autonomy and Colonialism

This possibility of "land grabbing" is made possible by the fact that a state – often a former colony – has a high interest in attracting foreign investment. She, therefore, tries to organise its own legal system, and therefore also her conflict of laws, in an investment-friendly manner and accommodate the investor in the contract. The generous granting of party autonomy and individual negotiating power plays a key role here. A domino effect can be observed in former colonies, where a legal system follows that of neighbouring states once they have attracted foreign investment in order to be able to conclude corresponding agreements. The endeavours of states to introduce a liberal economy form, which is reflected in party autonomy in PIL, can therefore also express a structural hierarchy and form of neo-colonialism. It also indirectly revives the original behaviour of the colonial rulers towards the indigenous peoples with the support of the central state (see former post).

4. Assessment of "Land Grabbing"

If the aforementioned power asymmetry is not counter weighted, arbitration and choice of law clauses can lead to an avoidance of unwanted laws, such as those granting traditional land use rights to local tribes. From a German domestic perspective, the problem arises that the enforcement of (one's own) local law is a matter for the foreign state. A case where local law will be addressed before German courts will be scarce, esp. in the case of an arbitration proceeding.

German courts only come into contact with the legal dispute if an arbitration proceeding has already resulted in a legally binding award and this award is now to be enforced in Germany. In my opinion, this case has to be handled in the same procedure proposed in a former post for the integration of local, non-applicable law. If foreign tribal law is mandatory in the state in question, for example, because there is an obligation under international and domestic law, the arbitral tribunal should be presumed to also observe this obligation as an internationally mandatory norm, irrespective of which *lex causae* applies. When enforcing the arbitral award domestically, the declaration of enforceability should be prohibited on the grounds of a violation of public policy if the arbitral tribunal has not complied with this obligation.

Furthermore, the use of party autonomy could be more strictly controlled and restrictively authorised when special domestic values and interests of third parties are at stake, as can be the case in particular with the use of land. The *lex rei sitae* might be more appropriate without allowing for a choice of law.

Finally, restrictions on party autonomy in cases in which negotiation asymmetries are assumed are not unknown to German and European PIL. So, ideas from these rules could be taken up and consideration could be given to which negotiation asymmetries could arise in relation to non-European states. For example, certain types of contract that are particularly typical of power asymmetries could be provided with special protection mechanisms similar to consumer contracts under Art. 6 Rome I Regulation. But that is an international problem that should be discussed on the international level. Therefore, the international community could work towards an international consensus in arbitration proceedings that, for example, property law issues are subject to the *lex rei sitae* and are not open to a choice of law. Similarly, there could be a discussion whether safeguards should ensure that no choice of law can be made to the detriment of third parties and that, where applicable, participation rights must be examined in arbitration proceedings. Many legal systems already provide those saveguards, so this would not come as a huge novelty.

However, it would also be paternalistic and neo-colonialist if such considerations originated in the Global North without involving the countries to which they refer. It would therefore be desirable to have a stronger and more enhanced dialogue with countries from the Global South that also allows representatives of the local population and local communities to have their say, so that these interests and

possibilities for exploiting negotiation asymmetries can be better taken into account.

5. Epilogue

This series has tried to start a debate about Colonialism and Private International Law from the point of view of German PIL. Posts from other jurisdictions might follow. It is a very complex topic and this series only scratched on its surface. As writen in the introduction, I welcome any comments, experiences and ideas from other countries and particularly from countries that are former colonies.

The Nigerian Supreme Court now has a Specialist in Conflict of Laws

The authors of this post are Chukwuma Okoli, Assistant Professor in Commercial Conflict of Laws at the University of Birmingham, and Senior Research Associate at the University of Johannesburg; and Abubakri Yekini, Lecturer in Conflict of Laws at the University of Manchester.

On December 21, 2023, the Nigerian Senate in line with Section 231(2) of the 1999 Constitution, confirmed the appointment of Honourable Justice Habeeb A.O. Abiru ("Justice Abiru"), alongside ten other justices, to the Nigerian Supreme Court, following the recommendation of the National Judicial Council and the Nigerian President. This appointment fills the vacancy created by recent retirements or deaths of some justices.

Justice Abiru's appointment is particularly significant for conflict of laws enthusiasts. Our research suggests that he is the first Nigerian Supreme Court Justice in recent times who is a specialist on conflict of laws. Initially appointed as a judge at the Lagos State High Court in 2001, Justice Abiru was later elevated to the Court of Appeal in 2012.

Justice Abiru briefly served as a law academic at the Lagos State University before his judicial appointment. He equally studied conflict of laws during his LLM at the University of Ife from 1986 to 1987. Nevertheless, this is not to suggest that Justice Abiru's expertise is limited to conflict of laws, nor that other Nigerian judges do not possess expertise in conflict of laws. The point being made is that his Lordship's prominence as a judicial expert in conflict of laws in Nigeria is noteworthy.

Given recent criticisms of judgments from Nigerian appellate courts concerning conflict of laws, Justice Abiru's background is pivotal. Various scholars (Okoli and Oppong, Yekini, and Bamodu) have raised concerns about the quality of judgments from appellate courts regarding conflict of laws. These concerns arise, especially due to the position taken by the Nigerian Supreme Court (and the Court of Appeal) in several cases, stating that, by the provisions of the Nigerian Constitution, the jurisdiction of each State High Court and the High Court of the Federal Capital Territory, Abuja, is restricted to matters that occur within their respective territory. (see for example, Capital Bancorp Ltd v Shelter Savings and Loans Ltd (2007) 3 NWLR (Pt. 1020) 148; Dairo v Union Bank of Nigeria Plc (2007) 16 NWLR (Pt. 640) 99). Okoli and Oppong argue that: "This approach is wrong; there is no provision of the Nigerian Constitution that circumscribes the jurisdiction of the State High Court and the High Court of the Federal Capital Territory to matters that occur within its territory, provided the defendant is present or resident in the jurisdiction or is willing to submit to it. In essence, these appellate decisions ignore the principle of conflict of laws which is part of Nigeria's common law legal system." (See also Yekini, and Bamodu).

During his tenure at the Nigerian Court of Appeal, Justice Abiru consistently drew attention to the importance of addressing conflict of laws issues, often overlooked by legal practitioners and judges.. While dealing with the issue of territorial jurisdiction in Muhammed v Ajingi ((2013) LPELR-20372(CA), his Lordship notes that: "the concept of territorial jurisdiction is one of the most misunderstood concepts. This has always been due to lack of appreciation of the approach to dealing with the concept. The first step in the approach to dealing with a question of territorial jurisdiction of a Court is to always understand that where there is a dispute as to the proper venue of hearing a matter that has inter-State elements, it is an issue of conflict of laws or what is called private international law." Needless to say, Ajingi's case is one of the recent instances where the

courts got the question of territorial jurisdiction right. In addition, his dissenting opinion in Niger Aluminium Manufacturing Co. Ltd v Union Bank (2015) LPELR-26010(CA) 32-36 highlights his commitment to addressing conflict of laws situations even when the majority view falls short.

Justice Abiru has contributed extra-judicially to critiques of the state of conflict of laws in Nigeria. (see here and here). In his foreword to Okoli and Oppong's "Private International Law in Nigeria" (2020), he submitted that: "The legal practitioners and the Courts in Nigeria have over time struggled with the resolution of legal actions which have such foreign elements. The law reports are replete with decisions showing clear evidence of the struggle. The reason for the struggle has been the failure of the lawyers and Courts to appreciate that it is the rules of private international law that are applicable to these situations."

The addition of Justice Abiru to Nigeria's Supreme Court is a positive development that strengthens Nigeria's bench. While acknowledging that a strong bench is not the sole criterion for a developed conflict of laws system, it undoubtedly contributes to building trust in Nigeria's judicial system, both locally and internationally. As stressed elsewhere, if Nigerian and African courts and arbitral panels want to compete favourably with other countries, especially in attracting litigation and arbitration business, Nigeria's judiciary needs ongoing institutional reforms, addressing issues like infrastructure, legal system quality, funding, delays, regular training, and corruption.

In conclusion, Justice Abiru's appointment to the Nigerian Supreme Court is a step in the right direction for the development of Nigerian conflict of laws.

First edition of The Hague Academy of International Law's

Advanced Course in Hong Kong on "Current Trends on International Commercial and Investment Dispute Settlement"

From 11 to 16 December 2023, the first edition of **The Hague Academy of International Law's Advanced Course in Hong Kong** was held, co-organised by the Asian Academy of International Law and the Department of Justice of the Government of the Hong Kong Special Administration Region. For this programme, the Hague Academy of International Law convened distinguished speakers to deliver lectures on "Current Trends on International Commercial and Investment Dispute Settlement".

After welcome notes (Adrian Lai, Deputy Secretary General and Co-Convenor of the Advisory Board of the Asian Academy of International Law; Teresa Cheng,

Founding Member and Co-Chairman of the Asian Academy of International Law, also on behalf of Christophe Bernasconi, Secretary General of the HCCH; Jean-Marc Thouvenin, Secretary-General of The Hague Academy of International Law; and Lam Ting-kwok Paul, Secretary for Justice of the Government of the Hong Kong SAR) a welcome lunch was offered where a "beggar's chicken" was offered, to be hammered out of the bread casing…

In the afternoon the first class, delivered by **Natalie Morris-Sharma**, Singapore, focused on the **UN 2018 Convention on Settlement Agreements Resulting from Mediation (Singapore Convention)**. Structuring her lecture around the drafting procedure of the new instrument, the former Chairperson provided valuable insights into the deliberations within the Working Group. For instance, the question what form (international treaty, model law, or mere guidelines) the future instrument should take was literally up for debate until the very last session, as some delegations felt that national approaches to enforcing settlement agreements were far too different to justify the adoption of a uniform "hard law" solution. This uncertainty during the discussions is the main reason why the Working Group has taken the unusual course of action to produce not only the Convention but also the amended UNCITRAL 2018 Model Law on International Commercial Mediation. Further in the lecture, it was emphasised that the Singapore Convention has taken a stance on at least one of these differences, the legal nature of the mediated settlement agreement. By providing for the "enforcement" ("relief") in Articles 3 and 4 which can only be refused on the limited, discretionary grounds contained in Art. 5, the Singapore Convention rejects the traditional view that mediation results in nothing more than a contractual obligation. Finally, the future of the instrument has been discussed, in

particular the reasons why the major economic powers (China, EU, USA) have not yet ratified the Convention.

The next morning, **Diego Fernández Arroyo** started his lecture on **investor-state dispute resolution**. Using the Euro Disneyland negotiations as an example, in which corporate counsel Joe Shapiro, envisaging the possibility of legal disputes with the French government, pushed relentlessly for the inclusion of an arbitration clause, he first illustrated the practical importance of ISDS. Subsequently, the historical development of this area of law from diplomatic protection to international arbitration was summarised, with particular reference to the highly specialised International Centre for Settlement of Investment Disputes (ICSID) established under the auspices of the World Bank Group. He stressed that the submission of investment disputes, that involve a public law (global) governance dimension, to essentially the same resolution mechanism as private law commercial disputes is by no means self-evident. On this foundation, Fernández Arroyo finally turned to the contemporary criticism towards the current ISDS practice. He stated, *inter alia*, that the concerns regarding transparency have been adequately addressed through the adoption of new standards (e.g. Mauritius Convention, UNCITRAL 2014 Rules) and elaborated on the prospects of the Multilateral Investment Court project advocated by the EU.

Then, **Franco Ferrari** made use of his part of the course on **international commercial arbitration** to powerfully challenge an overly idealistic understanding of international arbitration. Appealing in particular to the Hong Kong barristers in the room, he initially demonstrated how the loopholes between arbitration and litigation may be strategically utilised in legal practice. While the existence of an arbitration agreement obliges the court to dismiss a claim, it does not prevent filing a lawsuit in the first place. Hence, the resulting fear of publicity or discovery can be used effectively as leverage in settlement negotiations. Thereafter, quite in contrast to the idea of global governance underlying the ISDS frameworks, he reminded the audience of F. A. Mann's statement: "every arbitration is a national arbitration, that is to say, subject to a specific system of national law". Along the lines of this famous *bon mot*, Ferrari highlighted the persistent relevance of the *lex loci arbitri* by examining, among others, whether the provisions of the UN 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) require an "international" or rather a "domestic" reading. In this context, he discussed with the audience the

doctrine of delocalisation as promoted in French jurisprudence (e.g. Cass. Civ., 23 mars 1994, *Hilmarton*, Bull. 1994 I N° 104 p. 79). From the perspective of legal positivism, those approaches, even if striving for a truly transnational understanding, are nevertheless dependent on the applicable domestic legal framework, which is determined by the seat of the respective arbitration.

In the following, the author of these lines focused on the **settlement of international disputes before domestic courts**. After laying out a foundational theory for designing judicial cooperation in civil matters within a field of "trust" and "control" ("trust management") in regard to foreign sovereign judicial acts, in particular foreign judgments, to be integrated (or not) into a state's s own administration of justice, this theory was then applied to the "Hague Package" (Christophe Bernasconi) of instruments on judicial cooperation in civil matters, starting with the HCCH 2019 Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (e.g. when and why and to what extent foreign courts are "courts" in the sense of, inter alia, Art. 4 of the Convention?), touching further upon the ongoing HCCH Jurisdiction Project (currently mainly focusing on parallel proceedings), the HCCH 2005 Choice of Court Agreement Convention, as well as the HCCH Conventions on Service, Taking of Evidence, and the Apostille. This emerging "Hague System" – that is evidently emerging under fundamentally different conditions than the well-established "Brussels System" within the EU's supranational Area of Freedom, Security and Justice – was contrasted with current escalations of "distrust", such as e.g. the current trend of antisuit injunctions (ASIs), anti-antisuit injunctions (AASIs) and even anti-anti-antisuit injunctions (AAASIs) in international Standard Essential Patent (SEP) ligitation in respect to setting global FRAND licences, involving domestic courts from all over the world (e.g. China, Germany, India, UK, USA etc.) – an area of law which is – unfortunately – excluded to a large extent from the material scopes of the younger HCCH Conventions.

Jean-Marc Thouvenin added with a fascinating lecture on **dispute settlements before the International Court of Justice**, and **Judge Gao Xiaoli** explained the latest developments of dispute resolution in (Mainland) China, in particular the setting and functions of China's **Supreme People's Court's International Commercial Court (CICC)**.

In the **afternoon of the last day**, the participants, coming from more than 20 nations, received their certificates, and the week concluded with a **closing reception in celebration of the Centenary of the Hague Academy** against the background of Hong Kong's skyline.

The Course took place in the chapel of the **historic Former French Mission Building**, later the seat of Hong Kong's Court of Final Appeal. Lectures and participants convened in the former hearing hall of the building which added further inspiration to the vivid and intense discussions about the settlement of international commercial disputes on all avenues and levels, a holistic perspective that some liked to call an "integrated approach" (M. Weller, Festschrift für

Herbert Kronke 2020), others a “pluralistic dispute resolution” (“PDR”, see e.g. Wang/Chen, Dispute Res. in the PRC, 2019).

Postmodernism in Singapore private international law: foreign judgments in the common law

Guest post by Professor Yeo Tiong Min, SC (honoris causa), Yong Pung How Chair Professor of Law, Yong Pung How School of Law, Singapore Management University

Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck) [2021] 1 SLR 1102, [2021] SGCA 14 (“*Merck*”),

noted previously, is a landmark case in Singapore private international law, being a decision of a full bench of the Court of Appeal setting out for the first time in Singapore law the limits of transnational issue estoppel. It was also the beginning of the deconstruction of the common law on the legal effect to be given to foreign judgments. Without ruling on the issue, the court was not convinced by the obligation theory as the rationale for the recognition of foreign *in personam* judgments under the common law, preferring instead to rest the law on the rationales of transnational comity and reciprocal respect among courts of independent jurisdictions. There was no occasion to depart from the traditional rules of recognition of *in personam* judgments in that case, and the court did not do so. However, the shift in the rationale suggested that changes could be forthcoming. While this sort of underlying movements have generally led to more expansive recognition of foreign judgments (eg, in Canada's recognition of foreign judgments from courts with real and substantial connection to the underlying dispute), the indications in the case appeared to signal a restrictive direction, with the contemplation of a possible reciprocity requirement as a necessary condition for recognition of a foreign judgment, and a possible defence where the foreign court had made an error of Singapore domestic law.

The Republic of India v Deutsche Telekom AG [2023] SGCA(I) 10, another decision of a full bench of the Court of Appeal, provides strong hints of possible future reconstruction of the common law in this important area. While in some respects it signals a possibly slightly more restrictive common law approach towards the recognition of foreign judgments, in another respect, it portends a potentially radical expansion to the common law on foreign judgments.

Shorn of the details, the key issue in the case was a simple one. The appellant had lost the challenge in a Swiss court to the validity of an award against it made by an arbitral tribunal seated in Switzerland. The respondent then sought to enforce the award in Singapore. The question before the Singapore Court of Appeal was whether the appellant could raise substantially the same arguments that had been made before, and dismissed by, the Swiss court. The Court of Appeal formulated the key issue in two parts: (1) whether the appellant was precluded by transnational issue estoppel from raising the arguments; and (2) if not, then whether, apart from law of transnational issue estoppel, legal effect should be given to the judgment from the court of the seat of the arbitration. The second question, in the words of the majority, was:

> *"whether the decision of a seat court enjoys a special status within the framework for the judicial supervision and support of international arbitration, that is established by the body of law including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards …, legislation based on the UNCITRAL Model Law on International Commercial Arbitration …, and case law."*

On the first issue, the court considered that the principles of transnational issue estoppel were applicable in the case. The majority (Sundaresh Menon CJ, Judith Prakash JCA, Steven Chong JCA, and Robert French IJ) summarised the principles in *Merck* as follow:

> *"(a) the foreign judgment must be capable of being recognised in this jurisdiction, where issue estoppel is being invoked. Under the common law, this means that the foreign judgment must:*
>
> *(i) be a final and conclusive decision on the merits;*
>
> *(ii) originate from a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound; and*
>
> *(iii) not be subject to any defences to recognition;*
>
> *(b) there must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised; and*
>
> *(c) the subject matter of the estoppel must be the same as what has been decided in the prior judgment."*

The court found on the facts that all the elements were satisfied in the case, and thus the appellant was precluded by the Swiss judgment from raising the challenges to the validity of the award in the enforcement proceedings in Singapore.

Mance IJ in a concurring judgment agreed that transnational issue estoppel applied to preclude the appellant from raising the challenges in this case. The application of issue estoppel principles to the international arbitration context is relatively uncontroversial from the perspective of private international law. There

was one important distinction, however, between the majority and the concurring judgment on this point. The majority confined its ruling on transnational issue estoppel to a foreign judgment from the seat court, whereas Mance IJ considered transnational issue estoppel to be generally applicable to all foreign judgments in the international commercial arbitration context. Thus, in the view of the majority, the seat court may also enjoy special status for the purpose of transnational issue estoppel. It is not clear what this special status is in this context. At the highest level, it may be that transnational issue estoppel does NOT apply to foreign judgments that are not from the seat court, so that the only foreign judicial opinions that matter are those from the seat court. This will be a serious limitation to the existing common law. At another level, it may be that the rule that the prior foreign judgment prevails in the case of conflicting foreign judgments must give way when the later decision is from the seat court. This would modify the rule dealing with conflicting foreign judgments by giving a special status to judgments from the seat court.

Another notable observation of the majority judgment on the first issue lies in its formulation of the grounds of transnational jurisdiction, or international jurisdiction, ie, the connection between the party sought to be bound and the foreign court that justifies the recognition of the foreign judgment under Singapore private international law. Traditionally, it has been assumed that the common law of Singapore recognises four bases of international jurisdiction: the presence, or residence of the party in the foreign territory at the commencement of the foreign proceedings; or where the party had voluntarily submitted, or had agreed, to the jurisdiction of the foreign court. The majority in this case recognised four possible grounds: (a) presence in the foreign territory; (b) filing of a claim or counterclaim; (c) voluntary submission; and (d) agreement to submit to the foreign jurisdiction. Filing of claims and counterclaims amount to voluntary submission anyway. The restatement of the grounds omit residence as a ground of international jurisdiction. This is reminiscent of a similar omission in the restatement by the UK Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, [2012] UKSC 46, which has since been taken as authoritative for the proposition that residence is not a basis of international jurisdiction under English common law. Notwithstanding that the Court of Appeal did not consider the Singapore case law supporting residence as a common law ground, it may be a sign that common law grounds for recognising foreign judgments may be shrinking. This may not be a retrogression, as international instruments and

legislation may provide more finely tuned tools to deal with the effect of foreign judgments.

The key point being resolved on the first issue, there was technically no need to rule on the second issue. Nevertheless, the court, having heard submissions on the second issue from counsel (as directed by the court), decided to state its views on the matter. The most controversial aspect of the judgment lies in the opinion of the majority that, beyond the law of recognition of foreign judgments and transnational issue estoppel, there should be a "Primacy Principle" under which judgments from the seat of the arbitration have a special status in the law, as a result of the common law of Singapore developing in a direction that advances Singapore's international obligations under the transnational arbitration framework. The majority summarised its provisional view of the proposed Primacy Principle in this way:

> *"By way of summary the Primacy Principle may be understood as follows, subject to further elaboration as the law develops:*
>
> *(a) An enforcement court will act upon a presumption that it should regard a prior decision of the seat court on matters pertaining to the validity of an arbitral award as determinative of those matters.*
>
> *(b) The presumption may be displaced (subject to further development):*
>
> *(i) by public policy considerations applicable in the jurisdiction of the enforcement court;*
>
> *(ii) by demonstration:*
>
> *(A) of procedural deficiencies in the decision making of the seat court; or*
>
> *(B) that to uphold the seat court's decision would be repugnant to fundamental notions of what the enforcement court considers to be just;*
>
> *(iii) where it appears to the enforcement court that the decision of the seat court was plainly wrong. The latter criterion is not satisfied by mere disagreement with a decision on which reasonable minds may differ. (As to where in the range between those two extremes, an enforcement court may land on, is something we leave open for development.) "*

The Primacy Principle may be invoked if the case falls outside transnational estoppel principles. It may also be invoked even if the case falls within the transnational estoppel principles, if the party relying on it prefers to avoid the technical arguments relating to the application of transnational issue estoppel. However, the principle is only applicable if there is a prior judgment from the court of the seat; parties are not expected proactively to seek declarations from that court.

The Primacy Principle is said to build on the international comity in the specific context of international arbitration, by requiring an enforcement court to treat a prior judgment of a seat court as presumptively determinative of matters decided therein relating to the validity of the award, thus ensuring finality and avoiding inconsistency in judicial decisions, and promoting the effectiveness of international commercial arbitration. The majority also pointed out that the principle is aligned with the principle of party autonomy because the seat is generally expressly or impliedly selected by the parties themselves.

Mance IJ pointed out that the exceptions to the proposed Primacy Principle are very similar to the defences to issue estoppel, except that the exception based on the foreign decision being plainly wrong appears to go beyond the law on issue estoppel. In the elaboration of the majority, this refers to perversity (in the sense of the foreign court disregarding a clearly applicable law, and not merely applying a different choice of law) or a sufficiently serious and material error. In *Merck*, the Court of Appeal had suggested that a material error of Singapore law may be a ground for refusing to apply issue estoppel, but in principle it is difficult to differentiate between errors of Singapore law and errors generally, insofar as the principle is based on the constitutional role of the Singapore court to administer justice and the rule of law. So, this limitation in the Singapore law of transnational issue estoppel may well be in a state of flux.

Mance IJ disagreed with the majority on the need for, or desirability of, the proposed Primacy Principle. In his view, the case law supporting the principle are at best ambiguous, and there was no need to give any special status to the court of the seat of the arbitration under the law. In Mance IJ's view, transnational issue estoppel, in the broader sense to include abuse of process (sometimes called *Henderson* estoppel (*Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313), under which generally a party should not be allowed to raise a point that in all the circumstances it should have raised in prior litigation), is an adequate tool to deal

with foreign judgments, even in the context of international arbitration. The rules of transnational issue estoppel are already designed to deal with the problem of injustice caused by repeated arguments and allegations in the context of international litigation. There is force in this view. Barring defences, the transnational jurisdiction requirement for the recognition of judgments from the seat court under the common law does not usually raise practical issues because generally the seat would have been expressly or impliedly chosen by the parties and they are generally taken to have impliedly submitted to the jurisdiction of the court of the seat for matters relating to the supervision of the arbitration. Mance IJ also expressed concern about the uncertainty of a presumptive rule subject to defences where the contents of both the rule and defences are still unclear.

The contrasting views in the majority and the concurring judgments on the proposed Primacy Principle are likely to generate much debate and controversy. The Primacy Principle is said to be aligned with the territorialist view of international arbitration found in many common law countries and derived from the primary role that the court in the seat of the arbitration plays in the transnational arbitration framework. Thus, this view is highly unlikely to find sympathy with proponents of the delocalised theory. It will probably be controversial even in common law countries, where reactions similar to that of Mance IJ may not be unexpected.

Under the obligation theory, *in personam* judgments from a foreign court are recognised because the party sought to be bound has conducted himself in a certain manner in relation to the foreign proceedings leading to the judgment. On this basis, it is difficult to justify the special status of a judgment from the seat court within the principles of recognition or outside it. However, it would appear that, after *Merck*, while the obligation theory may not have been rejected *in toto*, it has not been accepted as the exclusive explanation for the recognition of *in personam* judgments under the common law. On the basis of transnational comity and reciprocal judicial respect, there is much that exists in the current common law that may be questioned, and much more unexplored terrain as far as the legal effect of foreign judgments not falling within the traditional common law rules of recognition is concerned. For example, the UK Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, [2012] UKSC 46 had rejected that there were any special rules that apply to *in personam* judgments arising out of the insolvency context. This line of thinking has already been rejected in Singapore in

the light of its adoption of the UNCITRAL Model Law on Cross-Border Insolvency (*Re Tantleff, Alan* [2022] SGHC 147; [2023] 3 SLR 250), but it remains to be seen what new rules or principles of recognition will be developed.

The idea that the judgment of the court of the seat (expressly or impliedly) chosen by the parties should have some special status in the law on foreign judgments has some intuitive allure. There is a superficial analogy with the position of the chosen court under the Hague Convention on Choice of Court Agreements. As a general rule (though not exclusively), the existence and validity of an exclusive choice of court agreement would be determined by the law applied by the chosen court, and a decision of the chosen court on the validity of the choice of court agreement cannot be questioned by the courts of other Contracting States. The Convention has no application to the arbitration context. However, at least under the common law, the seat of arbitration is invariably expressly or impliedly chosen by the parties, and it will usually carry the implication that the parties have submitted to the jurisdiction of the supervisory court for matters relating to the regulation of the arbitration process. It is also not far-fetched to infer that reasonable contracting parties would intend that court to have exclusive jurisdiction over such matters (*C v D* [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep 239), *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56). But this agreement cannot extend to issues being litigated at the enforcement stage, because naturally, contracting parties would want the freedom to enforce putative awards wherever assets may be found, and the enforcement stage issues frequently involve issues relating to the validity of the arbitration agreement and the award. This duality is the system contemplated under the New York Convention. Whatever other justification there may be for the special status of judgments of the court of the seat, it is hard to find it within the principle of party autonomy.

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Dr Dan Xie, East China University of Political Science and Law: "The Judicial Interpretation and Application of Due Process Defence under the New York Convention: The Experience of Chinese Courts"

Litigation

Professor Vivienne Bath, University of Sydney

Professor Tao Du, East China University of Political Science and Law: The HCCH Conventions in Chinese Courts

Dr Yan Li, Seoul National University Law Research Institute: “Declining Jurisdiction in China and South Korea: A Mixture of Civil and Common Law Culture in Private International Law?”

Dr Thu Thuy Nguyen, Hanoi Law University: The Barriers for Recognition and Enforcement of Foreign Judgments in Vietnam

International commercial transactions

Professor Bing Ling, University of Sydney

Dapo Wang, Shanghai Jiaotong University: Economic Sanctions and the Trade-Compliance Dilemmas for Chinese Companies

Dr Lemuel Didulo Lopez, RMIT University: “Choice of Forum Clause and the Protection of Weaker Parties: Lessons from Asia”

Stefano Dominelli, University of Genoa, Italy: “Once a Trader, Always a Trader” – Or Maybe not: The EU Law Shaping of the Law of State Immunities

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Amendment of Chinese Civil Procedure Law Concerning Foreign Affairs

by Du Tao*/Xie Keshi

On September 1, 2023, the fifth session of the Standing Committee of the 14th National People's Congress deliberated and adopted the Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China, which will come into force on January 1, 2024. This amendment to the Civil Litigation Law implements the Party Central Committee's decision and deployment on coordinating domestic rule of law and foreign-related rule of law, strengthening foreign-related rule of law construction, and among the 26 amendments involved, the fourth part of the Special Provisions on Foreign-related civil Procedure is exclusive to 19, which is the first substantive amendment to the foreign-related civil procedure since 1991.

Expand the jurisdiction of Chinese courts over foreign-related civil cases

The type of cases the court has jurisdiction over has been revised from "disputes due to contract or other property rights" to "foreign-related civil disputes other than personal status." Besides, other appropriate connections have been added as the basis of jurisdiction, from the original enumeration to the combination of enumeration and generalization. In addition to providing jurisdiction based on choice-of-court agreements, this revision also adds two categories of exclusive jurisdiction which are the establishment, dissolution, and liquidation of legal persons or other organizations established in the territory of the People's Republic of China and proceedings brought in connection with disputes relating to the examination of the validity of intellectual property rights granted in the territory of the People's Republic of China.

The above amendments have further expanded the jurisdiction of Chinese courts over foreign-related civil litigation cases, which makes it more convenient for Chinese citizens to sue and respond to lawsuits in Chinese courts and better safeguard the legitimate rights and interests of Chinese citizens and enterprises.

Add provisions on parallel litigation

First, this revision adds a general provision for parallel litigation and a mechanism for coordinating jurisdictional conflicts. Where the parties are involved in the same dispute, one party institutes an action in a foreign court, while the other party institutes an action in a people's court, or one party institutes an action in both a foreign court and a people's court, the people's court which has jurisdiction in accordance with this law may accept the action. If the parties enter into an exclusive jurisdiction agreement and choose a foreign court to exercise jurisdiction, which does not violate the provisions of this law on exclusive jurisdiction and does not involve the sovereignty, security, or public interest of the People's Republic of China, the people's court may rule not to accept.

Second, this revision adds a new suspension and restoration mechanism for civil and commercial cases accepted by foreign courts after being accepted by Chinese courts. After a people's court accepts a case in accordance with the provisions of the preceding article, if a party applies to the people's court in writing for suspending the proceedings on the ground that the foreign court has accepted the case before the people's court, the people's court may render a ruling to suspend the proceedings, except under any of the following circumstances: (1) The parties, by an agreement, choose a people's court to exercise jurisdiction, or the dispute is subject to the exclusive jurisdiction of a people's court. (2) It is evidently more convenient for a people's court to try the case. If a foreign court fails to take necessary measures to try the case or fails to conclude the case within a reasonable time limit, the people's court shall resume proceedings upon the written application of the party. If an effective judgment or ruling rendered by a foreign court has been recognized, in whole or in part, by a people's court, and the party institutes an action against the recognized part in the people's court, the people's court shall rule not to accept the action, or render a ruling to dismiss the action if the action has been accepted.

Third, this revision adds a new jurisdiction objection mechanism in the principle of inconvenient court. Where the defendant raises any objection to jurisdiction

concerning a foreign-related civil case accepted by a people's court under all the following circumstances, the people's court may rule to dismiss the action and inform the plaintiff to institute an action in a more convenient foreign court: (1) It is evidently inconvenient for a people's court to try the case and for a party to participate in legal proceedings since basic facts of disputes in the case do not occur within the territory of the People's Republic of China. (2) The parties do not have an agreement choosing a people's court to exercise jurisdiction. (3) The case does not fall under the exclusive jurisdiction of a people's court. (4) The case does not involve the sovereignty, security, or public interest of the People's Republic of China. (5) It is more convenient for a foreign court to try the case. If a party institutes a new action in a people's court since the foreign court refuses to exercise jurisdiction over the dispute, fails to take necessary measures to try the case, or fails to conclude the case within a reasonable period after a people's court renders a ruling to dismiss the action, the people's court shall accept the action.

The amendments above conform to the international trend, integrate and optimize and further improve the mechanism for handling jurisdictional conflicts, and provide a clearer and more authoritative normative guidance for the people's courts to coordinate handling jurisdictional conflicts in foreign-related civil and commercial cases in the future.

Revise relevant regulations on service of foreign-related documents

First, the limitation that an agent ad litem must have the right to accept service on his behalf in the original Civil Procedure Law is deleted, and it is clear that as long as the agent ad litem entrusted by the person served in this case, they should accept service, so as to curb the phenomenon of parties evading service.

Second, this revision adds the provision of "Documents are served on a wholly-owned enterprise, a representative office, or a branch office formed by the recipient within the territory of the People's Republic of China or a business agent authorized to receive the service of documents".

Third, this revision adds the provision of "[i]f the recipient who is a foreign natural person or a stateless person serves as the legal representative or principal person in charge of a legal person or any other organization formed within the territory of the People's Republic of China and is a co-defendant with such a legal person or other organization, documents are served on the legal person or other organization".

Fourthly, this revision adds the provision of "[i]f the recipient is a foreign legal person or any other organization, and its legal representative or principal person in charge is within the territory of the People's Republic of China, documents are served on its legal representative or principal person in charge".

Fifthly, this revision adds the provision of "documents are served in any other manner agreed upon by the recipient unless it is prohibited by the law of the country where the recipient is located".

Last but not least, the time for the completion of service of a foreign-related announcement is shortened from three months after the date of announcement in the original Civil Procedure Law to 60 days after the date of issuance of the announcement, so that the starting point of service of a foreign-related announcement is more clear and the period of the announcement is shorter.

The above amendments moderately penetrate the veil of a legal person or an unincorporated organization and provide for alternative service between the relevant natural person and the legal person or unincorporated organization, helping enhance the possibility of successful service and the coping of difficult service in foreign-related cases.

Add provisions on extraterritorial investigation and evidence collection

On one hand, amended China's Civil Procedure Law continues the requirement that Chinese courts conduct extraterritorial investigation and evidence collection in accordance with international treaties or diplomatic channels. On the other hand, it adds other alternative ways for Chinese courts to conduct extraterritorial investigation and evidence collection, that is, if the laws of the host country do not prohibit it, Chinese courts can adopt the following methods for investigation and evidence collection: (1) If a party or witness has the nationality of the People's Republic of China, the diplomatic or consular missions of the People's Republic of China in the country where the party or witness is located may be entrusted to take evidence on his behalf; (2) Obtaining evidence through instant messaging tools with the consent of both parties; (3) Obtaining evidence in other ways agreed by both parties.

This revision enriches the methods of extraterritorial investigation and evidence collection of Chinese courts and brings more convenience to the judicial practice of extraterritorial evidence collection in foreign-related civil litigation, thus raising the enthusiasm of judicial personnel for extraterritorial evidence collection and improving the trial efficiency and quality of foreign-related civil cases.

Improve the basic rules on the recognition and enforcement of extraterritorial judgments, rulings, and arbitral awards

Amended Chinese Civil Procedure Law provides the circumstances under which a judgment or order with extraterritorial effect is not recognized or enforced and the suspension and restoration mechanism of litigation involving disputes of foreign effective judgments and rulings applied for recognition and enforcement that have been accepted by Chinese courts. Furthermore, it revises the expression of extraterritorial arbitration award determination and expands the

scope of Chinese courts to apply for recognition and enforcement of extraterritorial effective arbitration award.

Conclusion

This revision of China's Civil Procedure Law focuses on improving the foreign-related civil procedure system. On one hand, the mature provisions in previous judicial interpretations, court meeting minutes, and other documents have been elevated to law, providing a more solid legal basis for the court's jurisdiction and service of foreign-related cases. On the other hand, it gives a positive response to conflicts in judicial practice and differences in interpretation of existing rules, introduces consensus in practice into legislation, reduces various obstacles for courts to exercise jurisdiction over foreign-related cases, conforms to the trend of international treaties and practices, and clarifies the specific scope of application of various rules. It will better protect the litigation rights and legitimate rights and interests of Chinese parties, better safeguard China's national sovereignty, security and development interests, and better create a market-oriented, law-based, and internationalized first-class business environment.

*Dr. Du Tao, Professor at the East China University of Political Science and Law, Shanghai, China

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Australia's statutist orthodoxy:

High Court confirms the extraterritorial scope of the Australian Consumer Law in the Ruby Princess COVID-cruise case

The *Ruby Princess* will be remembered by many Australians with disdain as the floating petri dish that kicked off the spread of COVID-19 in Australia. The ship departed Sydney on 8 March 2020, then returned early on 19 March 2020 after an outbreak. Many passengers became sick. Some died. According to the BBC, the ship was ultimately linked to at least 900 infections and 28 deaths.

Ms Susan Karpik was a passenger on that voyage. She and her husband became very sick; he ended up ventilated, intubated and unconscious in hospital for about four weeks.

Ms Karpik commenced representative proceedings—a class action—in the Federal Court of Australia. She asserted claims in tort and under the Australian Consumer Law (**ACL**) in schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**) against companies behind the ship: Carnival plc and its subsidiary, Princess Cruise Lines Ltd (together, **Princess**). She sought damages for loss and damage allegedly suffered by either passengers of the ship or their relatives.

The case has an obvious cross-border flavour. The respondents are foreign companies: Princess Cruise Lines Ltd is incorporated in Bermuda and headquartered in California; Carnival plc is a UK company which functions together with a Panama-incorporated US-headquartered company, and is dual listed on the New York Stock Exchange and the London Stock Exchange. The ship is registered in Bermuda. The ~2,600 passengers on the diseased voyage included many Australians but also passengers from overseas. They contracted to travel on the cruise in different parts of the world, and according to Princess, were subject to different terms and conditions subject to different systems of law. The cruise itself departed and returned to Sydney but included time outside of Australia, including in New Zealand.

It is unsurprising then that Princess sought to defend the proceedings at a preliminary stage through litigation over where to litigate.

Princess brought an interlocutory application to stay the proceedings as they related to a Canadian passenger, Mr Patrick Ho, who entered the contract with Princess when he was not in Australia. Princess argued that Mr Ho's contract was subject to different terms and conditions to those that governed the contracts of other Aussie passengers. These 'US Terms and Conditions' included a class action waiver clause, a choice of law clause selecting US maritime law, and an exclusive jurisdiction clause selecting US courts. Mr Ho was identified by Ms Karpik as a sub-group representative of those members of the class action that Princess argued were subject to the US Terms and Conditions.

In contesting the stay application, Ms Karpik relied on section 23 of the ACL, which provides among other things that a term of a consumer contract is void if the term is unfair and the contract is a standard form contract. Princess argued that s 23 did not apply to Mr Ho's contract, given it was made outside Australia.

The primary judge refused the stay application, which was then reversed by the Full Court of the Federal Court of Australia.

On further appeal, the High Court held that ACL s 23 does apply to Mr Ho's contract, with the result that the class action waiver clause was void: *Karpik v Carnival plc* [2023] HCA 39. The Court held that there were strong reasons not to give effect to the exclusive foreign jurisdiction clause. Ms Karpik succeeded, meaning that the case may now continue in Australia, even as regards those members of the class action who are not Australian and contracted overseas.

The decision is significant not just for the litigants. It will be commercially significant for foreign businesses that contract with consumers in respect of services that have connections to Australia. For example, it may have serious implications for travel operators, including those who run cruises that stop in Australia. The decision is significant too for private international law nerds like myself, contemplating how to resolve choice of law questions in our age of statutes.

Procedural history

Princess applied to stay the proceedings relying on terms of Mr Ho's contract with Princess. A Calgary resident, he booked his ticked on the *Ruby Princess* via a Canadian travel agent in September 2018. By the time the matter came to the High Court, it was not disputed that when he did so, he became a party to a contract subject to the US Terms and Conditions, which contained three clauses of particular relevance.

First, it included a choice of law clause (cl 1):

> *'[A]ny and all disputes between Carrier and any Guest shall be governed exclusively and in every respect by the general maritime law of the United States without regard to its choice of law principles … To the extent such maritime law is not applicable, the laws of the State of California (U.S.A.) shall govern the contract, as well as any other claims or disputes arising out of that relationship. You agree this choice of law provision replaces, supersedes and preempts any provision of law of any state or nation to the contrary.'*

Second, it included an exclusive foreign jurisdiction clause (cl 15B(i)):

> *'Claims for Injury, Illness or Death: All claims or disputes involving Emotional Harm, bodily injury, illness to or death of any Guest whatsoever, including without limitation those arising out of or relating to this Passage Contract or Your Cruise, shall be litigated in and before the United States District Courts for the Central District of California in Los Angeles … to the exclusion of the courts of any other country, state, city, municipality, county or locale. You consent to jurisdiction and waive any objection that may be available to any such action being brought in such courts.'*

Third, it included a class action waiver clause (cl 15C):

> *'WAIVER OF CLASS ACTION: THIS PASSAGE CONTRACT PROVIDES FOR THE EXCLUSIVE RESOLUTION OF DISPUTES THROUGH INDIVIDUAL LEGAL ACTION ON YOUR OWN BEHALF INSTEAD OF THROUGH ANY CLASS OR REPRESENTATIVE ACTION. EVEN IF THE APPLICABLE LAW PROVIDES OTHERWISE, YOU AGREE THAT ANY ARBITRATION OR LAWSUIT AGAINST*

> *CARRIER WHATSOEVER SHALL BE LITIGATED BY YOU INDIVIDUALLY AND NOT AS A MEMBER OF ANY CLASS OR AS PART OF A CLASS OR REPRESENTATIVE ACTION, AND YOU EXPRESSLY AGREE TO WAIVE ANY LAW ENTITLING YOU TO PARTICIPATE IN A CLASS ACTION …'*

By its interlocutory application, Princess sought an order that certain questions be heard and determined separately. The questions included whether Mr Ho was bound by the exclusive foreign jurisdiction clause.

At first instance, Ms Karpik argued that Mr Ho was not subject to the US Terms and Conditions, and so denied that the foreign exclusive jurisdiction clause and the class action waiver clause were incorporated into his contract. It was argued in the alternative that those clauses if incorporated were void or otherwise unenforceable.

In July 2021, Stewart J refused the application for a stay as regards Mr Ho on the basis that the US Terms and Conditions were not incorporated into his contract, and held further that if they were incorporated, the class action waiver was void and unenforceable under ACL s 23. Stewart J held there would be strong reasons for not enforcing the exclusive foreign jurisdiction clause even if it were incorporated and enforceable: *Karpik v Carnival plc (The Ruby Princess) (Stay Application)* [2021] FCA 1082; (2021) 157 ACSR 1, [331].

In September 2022, by majority, the Full Court of the Federal Court allowed the Princess appeal. The Full Court was comprised of judges who are, with respect, well known for their private international law and maritime law expertise: Allsop CJ, Rares J and Derrington J. All three agreed that the primary judge erred in holding that the exclusive foreign jurisdiction clause and the class action waiver clause were not terms of Mr Ho's contract. Allsop CJ and Derrington J agreed that the clauses were enforceable and not contrary to the policy of Part IVA of the *Federal Court of Australia Act 1976* (Cth) which regulates representative proceedings in the Federal Court. Rares J dissented in holding that it was contrary to public policy to permit contracting out of that class actions regime. The majority did not decide on the extraterritorial application of ACL s 23 but enforced the exclusive foreign jurisdiction clause by staying the proceeding as regards Mr Ho's claim: *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149; (2022) 294 FCR 524.

Mrs Karpik obtained special leave. The Attorney-General of the Commonwealth and the Australian Competition and Consumer Commission intervened. The appeal was heard in August 2023.

The High Court was comprised of Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ. The Court unanimously allowed Ms Karpik's appeal and re-exercised the primary court's discretion by refusing to stay the proceedings. The decision may be distilled into three key propositions.

1. Section 23 of the ACL had extraterritorial application and applied to the contract between Mr Ho and Princess.
2. The class action waiver clause was void under ACL s 23 because it was unfair.
3. Although the exclusive foreign jurisdiction clause formed part of the contract, there were strong reasons for not enforcing the clause.

The territorial scope of ACL s 23

The first proposition turned on resolution of difficult issues of private international law, or the conflict of laws.

Princess argued that the application of the ACL in a matter with a foreign element depended first on determining that the law of the forum (*lex fori*) was the applicable law (*lex causae*) in accordance with the forum's choice of law rules.

Where a contract selects a system of foreign law as the applicable law, as this contract did in cl 1, the relevant choice of law rule is that generally, the selected system of law supplies the proper law of the contract, which is the applicable law: see *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418.

The High Court held that 'Princess' submissions incorrectly invert the inquiry': [22]. Rather, the application of ACL s 23 to Mr Ho's contract, a contract made outside Australia, was described as 'a question of statutory construction': [18]. So the Court construed the ACL as part of the CCA by holding as follows at [26], [34]ff:

- The ACL applies to the extent provided by CCA pt XI: ACL s 1.
- CCA s 131(1), within CCA pt XI, provides that the ACL applies to the conduct of corporations and in relation to contraventions of certain

chapters of the ACL by corporations.

- CCA s 5 extends the application of relevant parts of the ACL to conduct engaged in outside Australia, where the conduct outside Australia was by a corporation carrying on business within Australia.
- ACL s 23, as part of ACL pt 2-3, prescribes a norm of conduct. Section 23 in particular addresses adhesion contracts—that is, contracts in which one of the parties enters into a contract on a take-it-or-leave it basis. ACL s 23 protects consumer contracts and small business contracts but not others.

There was no dispute before the High Court that Princess was carrying on business in Australia. (On the role of that jurisdictional hook in Australian legislation, see Douglas, 'Long-Arm Jurisdiction over Foreign Tech Companies "Carrying on Business" Online: Facebook Inc v Australian Information Commissioner' (2023) 45(1) *Sydney Law Review* 109).

The High Court clarified that ACL s 23 should not be considered a generally worded statutory provision: [43]–[44]. Rather, the statute expressly provided for the territorial scope of the ACL via CCA s 5. The Court held that there was no justification to only apply s 23 to situations where the proper law of the contract is Australian law. The Court considered the CCA's policy objective of consumer protection (CCA s 2) as supporting a construction which would extend protection to Australian consumers with companies even where the contract was for services wholly or predominantly performed overseas: [47], [49].

The class action waiver clause was an unfair term

The US Terms and Conditions were therefore subject to s 23 of the ACL. Was the class action waiver clause 'unfair' for the purposes of s 23(1)(a)? The Court applied the definition in ACL s 24(1), which provides:

> *'(1) A term of a consumer contract or small business contract is unfair if:*
>
> *(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and*
>
> *(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and*

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.'

The Court considered that the clause had the effect of preventing or discouraging passengers from vindicating their legal rights where the cost to do so individually and not as part of a class action would be economical. The clause therefore caused a significant imbalance in the parties' rights and obligations: [54]. The Court held that Princess had not proved that the clause was reasonably necessary in order to protect their interests: [55]–[56]. Further, being denied access to the representative proceedings regime was considered a sufficient detriment: [58].

The Court recognised that courts in the United States have held differently, but considered that the class action waiver clause was unfair, and therefore void under ACL s 23: [60].

The Court further opined in *obiter* that the class action waiver clause would not be inconsistent with the Federal Court's representative proceedings regime: [61]–[64].

Strong reasons not to enforce the exclusive foreign jurisdiction clause

Australian courts give effect to the norm of party autonomy by enforcing exclusive foreign jurisdiction clauses in the absence of strong reasons to not enforce such clauses. The primary judge held that there were strong reasons in this case to not enforce the party's exclusive choice of foreign fora. The High Court agreed.

The Court held that the following 'strong' reasons justified denying the application for the stay, as a matter of discretion: first, the class action waiver clause was an unfair term, which corresponded to Mr Ho's juridical advantage in litigating in Australia in circumstances where he could be denied participation in a class action in the US; and second, the enforcement of the exclusive jurisdiction clause would fracture the litigation: [67]–[69].

Conclusion

The High Court's decision is significant for its consideration of the territorial scope of ACL s 23. It means that many companies outside of Australia that

operate in a way that touches on Australia will have difficulty in contracting out of Australia's consumer protection regime as regards standard contracts with consumers and small businesses. The decision will be a big deal for businesses like Princess, who operate travel services that involve Australia.

Theoretically, the Australian consumer protection regime could apply to regulate contracts between persons who are not Australian, with limited connection to Australia, and in respect of transactions with subject matter with a closer connection to places other than Australia. But as the High Court recognised at [50], the practical significance of this possibility should not be overstated. *Forum non conveniens* should operate to limit the prosecution of those kinds of claims.

On the other hand, Australia's parochial approach to that doctrine via the 'clearly inappropriate forum' test could mean that in some cases, it is worth it for foreigners to have a crack in an Australian forum over subject matter with a tenuous connection to Australia. Strong consumer protection may provide the 'legitimate juridical advantage' by reference to which a court may decline a stay application in a matter with a foreign element: see generally Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23(1) *Melbourne University Law Review* 30.

The case is similarly significant for its treatment of class action waivers within the framework of the ACL. Contracts with consumers are the kind in which such clauses have the most work to do: these are contracting parties who may not sue at all unless they are part of representative proceedings. Australia's plaintiff-focused class action lawyers should be licking their lips.

For me, the case is most significant for its approach to choice of law. The High Court has now expressly endorsed an approach that has been applied in a number of cases and described by some as 'statutist'. I've previously argued that the statute-first approach to choice of law should be orthodox in the Australian legal system: Douglas, 'Does Choice of Law Matter?' (2021) 28 *Australian International Law Journal* 1; an approach which now appears right, if I do say so myself. Australian private international law may seem incoherent when viewed within the theoretical framework of multilateralism espoused by the likes of Savigny. But it makes sense when you approach matters with foreign elements with regard to our usual constitutional principles.

In Australian courts, all Australian statutes are ‘mandatory’, even in matters with a foreign element—there is no such thing as ‘mandatory law’. In every case where a forum statute is involved, the question is whether the statute applies. Statutory interpretation is the primary tool to resolve such questions.

Nigeria ratifies the Singapore Convention on Mediation

On 27 November 2023, Nigeria became the thirteenth country/State to ratify the Singapore Convention on Mediation. The Convention will enter into force in Nigeria on 27 May 2024.

The Singapore Convention on Mediation facilitates international trade and promotes mediation as an alternative and effective method of resolving commercial disputes by providing an effective mechanism for the enforcement of international settlement agreements resulting from mediation.

Nigeria ratified the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards since 1988. Nigeria recently passed a new law on Arbitration and Mediation Act 2023, which repeals its old arbitration law. This demonstrates that Nigeria is interested in being a global hub for international commercial dispute settlement. Indeed, on 23 November 2023, on the invitation of the the Nigerian Group of Private International Law, Professor Adewale Olawoyin delivered a lecture on how the new Arbitration and Mediation Act will enhance Nigeria’s adjudication appeal. One of the points he mentioned was the need for Nigeria to also ratify the Singapore Convention on Mediation as it did with the 1958 New York Convention, which the Nigerian government has now done.

It remains to be seen whether Nigeria will ratify the Hague 2005 (on Choice of Court) and 2019 (on Recognition and Enforcement of Foreign Judgments) Convention as well. One of the points that I have stressed in recent times is for

Nigeria and Africa to make itself very attractive for adjudication. For example, it is unacceptable that high value government matters that involve African resources are resolved in the global North, like London and Paris. This is a point Professor Richard Frimpong Oppong has also stressed in the context of choice of law, in the Pan African Conference on Choice of Law in International Commercial Contracts, that held on 31 May 2023 to 3 June 2023 at the University of Johannesburg.

I have also stressed elsewhere that if Nigerian and African courts and arbitral panels want to compete favourably with other countries outside the continent in attracting litigation and arbitration business to the continent, serious institutional reforms would be required. Issues such as infrastructure, quality of the legal system, funding, delays, regular training, and corruption in the judiciary will have to be addressed. If these issues are addressed, ratification of international instruments would make Nigeria and Africa attractive and effective for adjudication. In turn this will generate a lot of revenue for Nigeria and Africa, and Nigerian and African lawyers, judges and arbitrators stand to benefit the most by increased demand from foreign clients for their services. This will consequently improve Nigeria and Africa's economy. Indeed, Nigeria and African countries already have talented persons that can bring this to fruition.

The time to act is now.

Second Act in Dutch TikTok class action on privacy violation: court assesses Third Party Funding Agreements

Written by Eduardo Silva de Freitas (Erasmus University Rotterdam), Xandra Kramer (Erasmus University Rotterdam/Utrecht University) & Jos Hoevenaars (Erasmus University Rotterdam), members of the Vici project Affordable Access to

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Introduction

Third Party Litigation Funding (TPLF) has been one of the key topics of discussion in European civil litigation over the past years, and has been the topic of earlier posts on this forum. Especially in the international practice of collective actions, TPLF has gained popularity for its ability to provide the financial means needed for these typically complex and very costly procedures. The Netherlands is a jurisdiction generally considered one of the frontrunners in having a well-developed framework for collective actions and settlements, particularly since the Mass Damage Settlement in Collective Actions Act (WAMCA) became applicable on 1 January 2020 (see also our earlier blogpost). A recent report commissioned by the Dutch Ministry of Justice and Security found that most collective actions seeking damages brought under the (WAMCA) have an international dimension, and that all of these claims for damages are brought with the help of TPLF.

This blogpost provides an update of the latest developments in the Dutch collective action field focusing on a recent interim judgment by the Amsterdam District Court in a collective action against *TikTok c.s* in which the Dutch court assessed the admissibility of the claimant organisations based, among other criteria, on their funding agreements. This is the second interim judgment in this case, following the first one year ago which dealt with the question of international jurisdiction (see here). After a brief recap of the case and an overview of the WAMCA rules on TPLF, we will discuss how the court assessed the question of compatibility of the TPLF agreements with such rules. Also in view of the EU Representative Action Directive for consumers, which became applicable on 25 June 2023, and ongoing discussions on TPLF in Europe, developments in one of the Member States in this area are of interest.

Recap

In the summer of 2021, three Dutch representative foundations – the Foundation for Market Information Research (*Stichting Onderzoek Marktinformatie*, SOMI), the Foundation Take Back Your Privacy (TBYP) and the Foundation on Mass Damage and Consumers (*Stichting Massaschade en Consument*, SMC) – initiated

a collective action against, in total, seven TikTok entities, including parent company Bytedance Ltd. The claims concern the alleged infringement of privacy rights of children (all foundations) and adults and children (Foundation on Mass Damage and Consumers). The claims include, *inter alia,* the compensation of (im)material damages, the destruction of unlawfully obtained personal data, and the claimants request the court to order that an effective system is implemented for age registration, parental permission and control, and measures to ensure that TikTok complies with the Code of Conduct of the Dutch Media Act and the GDPR.

In a its second interim judgment in this case, rendered on 25 October 2023, the District Court of Amsterdam assessed the admissibility of the three representative organisations (DC Amsterdam, 25 October 2023, ECLI:NL:RBAMS:2023:6694; in Dutch), and deemed SOMI admissible and conditioned the admissibility of TBYP and SMC on amendments to their TPLF agreements. This judgment follows the District Court's acceptance of international jurisdiction in this collective action in its first interim judgment, which we discussed on this blog in an earlier blogpost.

TPLF under the WAMCA

The idea of TPLF refers essentially to the practice of financing litigation in which the funder has no direct involvement with the underlying claim, as explained by Adrian Cordina in an earlier post on this blog. The basic TPLF contract entails the funder agreeing to bear the costs of litigation on a non-recourse basis in exchange for a share of the proceeds of the claim. Collective actions tend to attract this type of funding for two reasons. Firstly, these claims are expensive for several reasons such as the need for specialised legal expertise and complex evidence gathering, thereby creating a need for external financing through TPLF. Secondly, considering that these proceedings seek damages for mass harm, the potential return on investment for a funder can be substantial. This makes it an appealing prospect for funders who may be interested in investing with the possibility of sharing in these proceeds.

The WAMCA has put in place some rules on the practice of TPLF in the context of collective actions. These rules are inserted in the revised Article 3:305a Dutch Civil Code (DCC), which concerns the admissibility requirements for representative organisations to file such actions. Among other requirements, these rules stipulate that claimant organisations must provide evidence of their financial capacity to pursue the action while maintaining adequate control over

the proceedings. This provision aims to ensure the enforceability of potential adverse cost orders and to prevent conflicts of interest between the funding entity and the claimant organisation (Tzankova and Kramer, 2021). This requirement can be waived if the collective action pursues an "idealistic" public interest and does not seek damages or only a very low amount, commonly referred to as the "light" WAMCA regime (Article 305a, paragraph 6, DCC). However, foll0wing the implementation of the Representative Actions Directive (Directive (EU) 2020/1828, or RAD) in the Netherlands, the stipulations related to financial capacity and procedural control persist when the collective action derives its legal basis from any of the EU legislative instruments enumerated in Annex I of the RAD, irrespectively of whether or not the collective action pursues an "idealistic" public interest.

Additionally, within the framework of the Dutch implementation of the RAD, it is stipulated that the financing for the collective action cannot come from a funder who is in competition with the defendant against whom the action is being pursued (Article 3:305a, paragraph 2, paragraph f, DCC).

Additional rules on TPLF can also be found in the Dutch Claim Code, a soft-law instrument governing the work of *ad hoc* foundations in collective proceedings. The latest version of the Claim Code (2019) mandates organisations to scrutinise both the capitalisation and reputation of the litigation funder. The Claim Code also stipulates that TPLF agreements should adopt Dutch contract law as the governing law and designate the Netherlands as the forum for resolving potential disputes. Most importantly, it emphasises that the control of the litigation should remain exclusively with the claimant organisation. Moreover, it prohibits the funder from withdrawing funding prior to the issuance of a first instance judgment. This Claim Code is non-binding, but plays an important role in Dutch practice.

The District Court's assessment of the TPLF agreements

In the most recent interim judgment, the District Court of Amsterdam assessed the admissibility requirements concerning financial capacity and control over the proceedings for each of the organisations separately. In its first interim judgment the court had determined that, with a view to assessing the admissibility of each of the claimants and also with a view to the appointment of an exclusive representative, the financing agreement the claimants had reached with their

respective funders should be submitted to the court.

After the review of these agreements all three organisations were deemed to have sufficient resources and expertise to conduct the proceedings since they are all backed by TPLF agreements (SMC and TBYP) and donation endowments (SOMI). However, the court ordered amendments to the TPLF agreements of both SMC and TBYP due to concerns related to control over the proceedings. The District Court also acknowledged concerns about potential excessiveness in compensation, particularly if calculated as a fixed percentage irrespective of awarded amounts and the number of eligible class members. Notably, the court considered the proportionality of compensation to the invested amount and emphasised the need to align it with the potential risks faced by litigation funders.

In this sense, the court indicated that the acceptable percentage of compensation for litigation funders should be contingent on the awarded amount and the expected number of class members. While a maximum of 25% accepted in case law (for example, in the *Vattenfall* case, DC Amsterdam 25 October 2023) could play a role, the court indicates it will use a five-times-investment maximum as a more practical approach. The court stressed the importance of adjusting compensation rates based on damages to be assessed, ensuring appropriate remuneration for funders without exceeding the established maximum.

In light of these considerations, the District Court also outlined preconditions for future approval of settlement agreements, limiting the amount deducted from the compensation of the class members to a percentage that will be established by the court and capping litigation funder fees.

Assessment of each organisation's control over the proceedings

The three claimant organisations have entered into different financial agreements to pursue this collective action. SOMI is financed by donations from another organisation, which does not require repayment of the amount invested. The District Court assessed the independence of SOMI's decision-making, given that the sole shareholder of the donating organisation is also the director of SOMI. The court concluded that appropriate safeguards are in place, as the donation agreement contains clauses stipulating that this person should refrain from taking any decisions in case of a conflict of interest. It was also stressed that the

donating organisation declared to be independent from SOMI's directors and lawyers, as well as from TikTok.

On the other hand, TBYP and SMC have entered into TPLF agreements. The District Court highlighted some provisions of TPLF agreement of TBYF that were deemed dubious under the WAMCA. One clause required that no actions could be taken that could potentially harm the funder's interests, with an exception made if such actions were legally necessary to protect the interests of the class members. The court decided that this clause compromised TBYP's independence in controlling the claim. Another clause stipulated that TBYP could not make, accept, or reject an offer of partial or full settlement in the proceedings without first receiving advice from the lawyers that such a step was reasonable. The court viewed this clause as further compromising TBYP's control over the proceedings.

Similarly, the District Court had reservations about some clauses in the TPLF agreement SMC had entered into. One clause stipulated that if the lawyers were dismissed, the funder could inform SMC of the replacing lawyers they would like to appoint, subject to SMC's approval. Also, if the funder wanted to dismiss the lawyers and SMC disagreed, the dispute should be resolved by arbitration. The court decided that this gave power to the funder to disproportionately influence the proceedings. Another clause stipulated that if the chance of winning significantly decreased, the parties would need to discuss whether to continue or terminate the agreement. The court rejected this clause, stressing that terminating the TPLF agreement prematurely is unacceptable. Finally, the agreement contained a clause allowing the funder to transfer its rights, benefits, and obligations under the agreement, even without SMC's consent. The court also rejected this clause, emphasising that SMC should not be involuntarily associated with another funder.

In view of all these considerations the District Court decided that these provisions in the TPLF agreements could compromise the independence of TBYP and SMC from their respective litigation funders. In principle, the presence of these contractual provisions should lead to TBYP and SMC being deemed inadmissible. However, considering the overall intent of the TPLF agreements and the novelty of such agreements being reviewed, the court has given TBYP and SMC the opportunity to amend their TPLF agreements to remove the contentious clauses.

Outlook

In its decision, the District Court repeatedly stressed that it was 'entering new territory' with this detailed assessment of the funding agreements. This is also reflected in the careful consideration the court has for the various, potentially problematic, aspects of TPLF in collective actions and the fact that it chooses to formulate a number of preconditions that it intends to apply when determining what will count as reasonable compensation in the event of future approval of a settlement agreement. It thereby forms the second act in this *TikTok* case, but also the firsts steps in clarifying some uncertainties in the practical implementation of the WAMCA.

The challenges collective actions and TPLF face are not unique to The Netherlands, as for instance also the *PACCAR* judgment by the UK Supreme Court 0f earlier this year showed (see also this recent blogpost by Demarco and Olivares-Caminal on OBLB). In this ruling, the Supreme Court considered whether Litigation Funding Agreements (LFAs) should be regarded as Damages-Based Agreements (DBAs) within the context of 'claims management services'. The court concluded that the natural meaning of 'claims management services' in the Compensation Act 2006 (CA 2006) encompassed LFAs. The court dismissed arguments suggesting a narrower interpretation of 'claims management services', stating it would be contrary to the CA 2006's purpose. As a result of this ruling, these agreements could potentially be deemed unenforceable if they fail to adhere to the regulations applicable to DBAs.

This second interim judgment in the *TikTok* case is a novelty in the Dutch practice of collective actions in terms of the detailed review of funding agreements. While generally being a collective action-friendly jurisdiction, this judgment and other (interim) judgments under the WAMCA so far, show that bringing international collective actions for damages is a long road, or what some may consider to be an uphill battle. The rather stringent requirements of the WAMCA are subject to rigorous judicial review, which has also resulted in the inadmissibility of claimant organisations and their funding agreements in other cases (notably, in the *Airbus* case, DC The Hague 20 September 2023, ECLI:NL:RBDHA:2023:14036). Almost four years after the WAMCA became applicable no final judgment rewarding damage claims has been rendered yet. But in the *TikTok* case the claimant organisations got a second chance. This open trial-and-error approach is perhaps the only way to further shape the collective action practice both in The Neterlands and other European countries.

To be continued.