Call for papers workshop Collective Actions on ESG

For a workshop on collective actions on ESG toics that will take place in Amsterdam on 21 and 22 November 2024 a call for paper has been posted, deadline 1 July 2024.

As a follow-up from the 4th International Class Action Conference in Amsterdam, 30 June – 1 July 2022, the University of Amsterdam, Tilburg University and Haifa University are jointly organizing a workshop on large scale collective actions on Environmental, Social and Governance topics. The workshop is intended to act as a forum for the sharing of experiences and knowledge. In an increasingly interconnected world, such opportunities for international scholars and practitioners to come together and discuss notes and views on the development of collective redress in their jurisdictions, are more relevant than ever. We choose to organize this as a workshop centered around academic papers in order to both give serious substance to the forum and to convert the exchange of knowledge into lasting contributions in the shape of publications in a special issue journal.

More information is available here: Call for papers for workshop on ESG collective action in Amsterdam – 21 and 22 Nov 2024

No role for anti-suit injunctions under the TTPA to enforce exclusive jurisdiction agreements

Australian and New Zealand courts have developed a practice of managing trans-Tasman proceedings in a way that recognises the close relationship between the countries, and that aids in the effective and efficient resolution of cross-border disputes. This has been the case especially since the implementation of the

Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement, which was entered into for the purposes of setting up an integrated scheme of civil jurisdiction and judgments. A key feature of the scheme is that it seeks to "streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency" (Trans-Tasman Proceedings Act 2010 (TTPA), s 3(1)(a)). There have been many examples of Australian and New Zealand courts working to achieve this goal.

Despite the closeness of the trans-Tasman relationship, one question that had remained uncertain was whether the TTPA regime allows for the grant of an anti-suit injunction to stop or prevent proceedings that have been brought in breach of an exclusive jurisdiction agreement. The enforcement of exclusive jurisdiction agreements is explicitly protected in the regime, which adopted the approach of the Hague Convention on Choice of Court Agreements in anticipation of Australia and New Zealand signing up to the Convention. Section 28 of the Trans-Tasman Proceedings Act 2010 (NZ) and s 22 of the Trans-Tasman Proceedings Act 2010 (Cth) provide that a court must not restrain a person from commencing or continuing a civil proceeding across the Tasman "on the grounds that [the other court] is not the appropriate forum for the proceeding". In the secondary literature, different opinions have been expressed whether this provision extends to injunctions on the grounds that the other court is not the appropriate forum due to the existence of an exclusive jurisdiction agreement: see Mary Keyes "Jurisdiction Clauses in New Zealand Law" (2019) 50 VUWLR 631 at 633-4; Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, 2020) at [2.445].

The New Zealand High Court has now decided that, in its view, there is no place for anti-suit injunctions under the TTPA regime: *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] NZHC 736 at [4]. Justice O'Gorman reasoned that the TTPA involves New Zealand and Australian courts applying "mirror provisions to determine forum disputes, based on confidence in each other's judicial institutions" (at [4]), and that anti-suit injunctions can have "no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction" (at [17]).

A-Ward Ltd, a New Zealand company, sought an interim anti-suit injunction to stop proceedings brought against it by Raw Metal Corp Pty Ltd, an Australian company, in the Federal Court of Australia. The dispute related to the supply of

shipping container tilters from A-Ward to Raw Metal. A-Ward's terms and conditions had included an exclusive jurisdiction clause selecting the courts of New Zealand, as well as a New Zealand choice of law clause. In its Australian proceedings, Raw Metal sought damages for misleading and deceptive conduct in breach of the Competition and Consumer Act 2010 (Cth) (CCA). A-Ward brought proceedings in New Zealand seeking damages for breach of its trade terms, including the jurisdiction clause, as well as an anti-suit injunction.

O'Gorman J's starting point was to identify the different common law tests that courts had applied when determining an application to the court to stay its own proceedings, based on the existence (or not) of an exclusive jurisdiction clause. While *Spiliada* principles applied in the absence of such a clause, *The Eleftheria* provided the relevant test to determine the enforceability of an exclusive jurisdiction clause: at [16]. The alternative to a stay was to seek an anti-suit injunction, which, however, was a controversial tool, because of its potential to "interfere unduly with a foreign court controlling its own processes" (at [17]).

Having set out the competing views in the secondary literature, the Court concluded that anti-suit injunctions were not available to enforce jurisdiction agreements otherwise falling within the scope of the TTPA, based on the following reason (at [34]):

1. The term "appropriate forum" in ss 28 (NZ) and s 22 (Aus) of the respective Acts could not, "as a matter of reasonable interpretation", be restricted to questions of appropriate forum in the absence of an exclusive jurisdiction agreement. This was not how the term had been used in the common law (see *The Eleftheria*).
2. The structure of the TTPA regime reinforced this point, because it is on an application under s 22 (NZ)/ s 17 (Aus), for a stay of proceedings on the basis that the other court is the more appropriate forum, that a court must give effect to an exclusive jurisdiction agreement under s 25 (NZ)/ s 20 (Aus).
3. Sections 25 (NZ) and 20 (Aus) already provided strong protection to exclusive choice of court agreements, and introducing additional protection by way of anti-suit relief "would only create uncertainty, inefficiency, and the risk of inconsistency, all of which the TTPA regime was designed to avoid".
4. The availability of anti-suit relief would "rest on the assumption that the

courts in each jurisdiction might reach a different result, giving a parochial advantage". This, however, would be "inconsistent with the entire basis for the TTPA regime – that the courts apply the same codified tests and place confidence in each other's judicial institutions".

5. Australian case law (*Great Southern Loans v Locator Group* [2005] NSWSC 438), to the effect that anti-suit injunctions continue to be available domestically as between Australian courts, was distinguishable because there was no express provision for exclusive choice of court agreements, which is what "makes a potentially conflicting common law test unpalatable".
6. Retaining anti-suit injunctions to enforce exclusive jurisdiction agreements would be inconsistent with the concern underpinning s 28 (NZ)/ s 22 (Aus) about "someone trying to circumvent the trans-Tasman regime as a whole".
7. The availability of anti-suit relief would defeat the purpose of the scheme to prevent duplication of proceedings.
8. More generally, anti-suit injunctions "have no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction".

The Court further concluded that, even if the TTPA did not exclude the power to order an anti-suit injunction, there was no basis for doing so in this case in relation to Raw Metal's claim under the CCA (at [35]). There was "nothing invalid or unconscionable about Australia's policy choice" to prevent parties from contracting out of their obligations under the CCA, even though New Zealand law (in the form of the Fair Trading Act 1986) might now follow a different policy. The TTPA regime included exceptions to the enforcement of exclusive jurisdiction agreements. Here, A-Ward seemed to have anticipated that, from the perspective of the Australian court, enforcement of the New Zealand jurisdiction clause would have fallen within one of these exceptions, and the High Court of Australia's observations in *Karpik v Carnival plc* [2023] HCA 39 at [40] seemed to be consistent with this. The "entirely orthodox position" seemed to be that the Federal Court in Australia "would regard itself as having jurisdiction to determine the CCA claim, unconstrained by the choice of law and court" (at [35]).

Time will tell whether Australian courts will agree with the High Court's emphatic rejection of anti-suit relief under the TTPA as being inconsistent with the

cooperative purpose of the scheme. The parallel debate within the context of the Hague Choice of Court Convention – which does not specifically exclude anti-suit injunctions – may be instructive here: Mukarrum Ahmed "Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT" (2017) 13 Journal of Private International Law 386. Despite O'Gorman J's powerful reasoning, her judgment may not be the last word on this important issue.

From a New Zealand perspective, the judgment is also of interest because of its restrained approach to the availability of anti-suit relief more generally. Even assuming that the Australian proceedings were, in fact, in breach of the New Zealand jurisdiction clause, O'Gorman J would not have been prepared to grant an injunction as a matter of course. In this respect, the judgment may be seen as a departure from previous case law. In *Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc* [2023] NZHC 793, for example, the Court granted an anti-suit injunction to compel compliance with an arbitration agreement, without inquiring into the foreign court's perspective and its reasons for taking jurisdiction. O'Gorman J's more nuanced approach is to be welcomed (for criticism of *Maritime Mutual*, see here on The Conflict of Laws in New Zealand blog).

A more challenging aspect of the judgment is the choice of law analysis, and the Court's focus on the potential concurrent or cumulative application of foreign and domestic statutes (at [28]-[31], [35]). The Court said that, to determine whether a foreign statute is applicable, the New Zealand court can ask whether the statute applies on its own terms (following *Chief Executive of the Department of Corrections v Fujitsu New Zealand Ltd* [2023] NZHC 3598, which I criticised here on The Conflict of Laws in New Zealand blog, also published as [2024] NZLJ 22). It is not entirely clear how this point was relevant to the issue of the anti-suit injunction. The Judge's reasoning seemed to be that, from the New Zealand court's perspective, the Australian court's application of the CCA was appropriate as a matter of statutory interpretation and/or choice of law, which meant that the proceedings were not unconscionable or unjust (at [35]).

CfP: Enforcement of Rights in the Digital Space (7/8 Nov 24, Osnabrück)

On 7 and 8 November, the European Legal Studies Institute (ELSI) at the University of Osnabrück, Germany, is hosting a conference on "Enforcement of Rights in the Digital Space".

The organizers have kindly shared the following Call for Papers with us:

> *The European Legal Studies Institute (ELSI) is pleased to announce a Call for Papers for a conference at Osnabrück University on November 7th and 8th, 2024.*
>
> *We invite submissions on the topic of »Enforcement of Rights in the Digital Space« and in particular on the interplay between the current EU acts on the digital space and national law. The deadline for submissions is May 15th, 2024.*
>
> *Legal Acts regulating the digital space in the European Union, such as the GDPR, the Data Act and the Digital Services Act, establish manifold new rights and obligations, such as a duty to inform about data use and storage, rights of access to data or requests for interoperability. Yet, with regard to many of these rights and obligations it remains unclear whether and how private actors can enforce them. Often, it is debatable whether their enforcement is left to the member states and whether administrative means of enforcement are intended to complement or exclude private law remedies. The substantial overlap in the scope of these legal acts, which often apply simultaneously in one and the same situation, aggravates the problem that the different legal acts lack a coherent and comprehensive system for their enforcement.*
>
> *The conference seeks to address the commonalities, gaps and inconsistencies within the present system of enforcement of rights in the digital space, and to explore the different approaches academics throughout Europe take on these*

issues.

Speakers are invited to either give a short presentation on their current work (15 minutes) or present a paper (30 minutes). Each will be followed by a discussion. In case the speakers choose to publish the paper subsequently, we would kindly ask them to indicate that the paper has been presented at the conference. We welcome submissions both from established scholars and from PhD students, postdocs and junior faculty.

All speakers are invited to a conference dinner which will take place on November 7th, 2024. Further, the European Legal Studies Institute will cover reasonable travel expenses.

Electronic submissions with an abstract in English of no more than 300 words can be submitted to [elsi@uos.de]. Please remove all references to the author(s) in the paper and include in the text of the email a cover note listing your name and the title of your paper. Any questions about the submission procedure should be directed to Mary-Rose McGuire [mmcguire@uos.de]. We will notify applicants as soon as practical after the deadline whether their papers have been selected.

Reminder: Conference on Informed Consent to Dispute Resolution Agreements, Bremen, 20–21 June 2024

We have kindly been informed that a limited number of places remains available at the conference on Informed Consent to Dispute Resolution Agreements on 20 and 21 June in Bremen, which we advertised a couple of weeks ago.

The full schedule can be found on this flyer, which has meanwhile been released.

‘Conflict of Laws’ in the Islamic Legal Tradition – Between the Principles of Personality and Territoriality of the Law

Béligh Elbalti (Osaka University): ‘Conflict of Laws’ in the Islamic Legal Tradition – Between the Principles of Personality and Territoriality of the Law

Research Group on the Law of Islamic Countries at the Max Planck Institute for Comparative and International Private Law

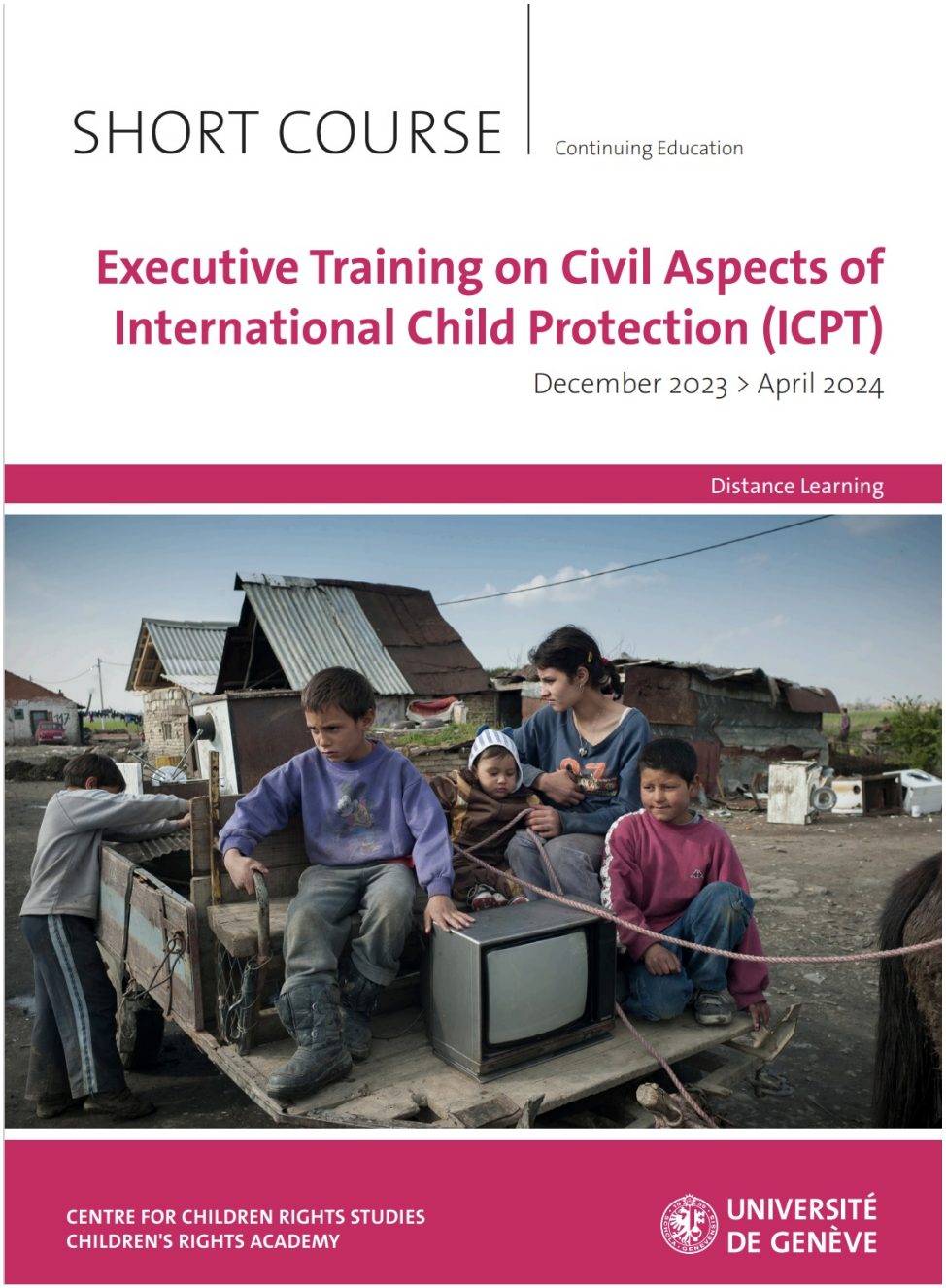
Afternoon Talks on Islamic Law

- DATE: Apr 25, 2024

- TIME: 04:00 PM (Local Time Germany)
- LOCATION: online

more info here.

Geneva Executive Training – Module 4: Practice of Child Protection Stakeholders: Focus on Inter-agency Co-operation in Context



Registrations are still open for Module n°4, which is taking place on April 18th, 2024.

The speakers are the following:

- **Dr Nicolas Nord**, Secretary General, CIEC, "*The ICCS Activities and Good Practices in the field of International Child Protection*"
- **Ms Joëlle Schickel-Küng**, Deputy Head of Division, Co-Head of Unit, Swiss OFJ, "*Cooperation in the area of international child abduction under the 1980 Hague Convention*"
- **Mr Jean Ayoub**, Secretary General, International Social Service, "*ISS – Bridging support to vulnerable children on the move*"

Price per module registration fee: 200 CHF. More information is available here.

Lex Fori Reigns Supreme: Indian High Court (Finally) Confirms Applicability of the Indian Law by 'Default' in all International Civil and Commercial Matters

Written by Shubh Jaiswal, student, Jindal Global Law School, Sonipat (India) and Professor Saloni Khanderia, JGLS.

In the landmark case of *TransAsia Private Capital vs Gaurav Dhawan*, the Delhi High Court clarified that Indian Courts are not automatically required to determine and apply the governing law of a dispute unless the involved parties introduce expert evidence to that effect. This clarification came during the court's examination of an execution petition stemming from a judgment by the High Court of Justice Business and Property Courts of England and Wales Commercial Court. The Division Bench of the Delhi High Court invoked the precedent set by the United Kingdom Supreme Court in *Brownlie v. FS Cairo*, shedding light on a contentious issue: the governing law of a dispute when parties do not sufficiently prove the applicability of foreign law.

The Delhi High Court has established that in the absence of evidence proving the applicability of a foreign law identified as the 'proper law of the contract', Indian law will be applied as the default jurisdiction. This decision empowers Indian courts to apply Indian law by 'default' in adjudicating international civil and commercial disputes, even in instances where an explicit governing law has been selected by the parties, unless there is a clear insistence on applying the law of a specified country. This approach aligns with the adversarial system common to most common law jurisdictions, where courts are not expected to determine the

applicable law proactively. Instead, the legal representatives must argue and prove the content of foreign law.

This ruling has significant implications for the handling of foreign-related civil and commercial matters in India, highlighting a critical issue: the lack of private international law expertise among legal practitioners. Without adequate knowledge of the choice of law rules, there's a risk that international disputes could always lead to the default application of Indian law, exacerbated by the absence of codified private international law norms in India. This situation underscores the need for specialized training in private international law to navigate the complexities of international litigation effectively.

Facts in brief

As such, the dispute in *Transasia* concerned an execution petition filed under Section 44A of the Indian Civil Procedure Code, 1908, for the enforcement of a foreign judgment passed by the High Court of Justice Business and Property Courts of England and Wales Commercial Court. The execution petitioner had brought a suit against the judgment debtor before the aforementioned court for default under two personal guarantees with respect to two revolving facility loan agreements. While these guarantee deeds contained choice of law clauses and required the disputes to be governed by the 'Laws of the Dubai International Finance Centre' and 'Singapore Law' respectively, the English Court had applied English law to the dispute and decided the dispute in favour of the execution petitioner. Accordingly, the judgment debtor opposed the execution of the petition before the Delhi HC for the application of incorrect law by the Court in England.

It is in this regard that the Delhi HC invoked the 'default rule' and negated the contention of the judgment debtor. The Bench relied on the decision rendered by the Supreme Court of the United Kingdom in *Brownlie v. FS Cairo,* which postulated that "*if a party does not rely on a particular rule of law even though it would be entitled to do so, it is not generally for the court to apply the rule of its own motion.*"

The HC confirmed that foreign law is conceived as a question of fact in India. Thus, it was for each party to choose whether to plead a case that a foreign system of law was applicable to the claim, but neither party was obliged to do so, and if neither party did, the court would apply its own law to the issues in dispute.

To that effect, the HC also relied on *Aluminium Industrie Vaassen BV,* wherein the English Court had applied English law to a sales contract even when a provision expressly stipulated the application of Dutch law—only because neither party pleaded Dutch law.

Thus, in essence, the HC observed that courts would only be mandated to apply the chosen law if either party had pleaded its application and the case was 'well-founded'. In the present dispute, the judgment debtor had failed to either plead or establish that English law would not be applicable before the Court in England and had merely challenged jurisdiction, and thus, the Delhi HC held that the judgment could not be challenged at the execution stage.

Choosing the Proper Law

The mechanism employed to ascertain the applicable law under Indian private international law depends on whether the parties have opted to resolve their dispute before a court or an arbitral tribunal. In arbitration matters, the identification of the applicable law similarly depends on the express and implied choice of the parties. Similarly, in matters of litigation, courts rely on the common law doctrine of the 'proper law of the contract' to discern the applicable law while adjudicating such disputes on such obligations. Accordingly, the proper law depends on the express and implied choice of the parties. When it comes to the determination of the applicable law through the express choice of the parties, Indian law, despite being uncodified, is coherent and conforms to the practices of several major legal systems, such as the UK, the EU's 27 Member States, and its BRICS partners, Russia and China – insofar as it similarly empowers the parties to choose the law of any country with which they desire their disputes to be settled. Thus, it is always advised that parties keen on being governed by the law of a particular country must ensure to include a clause to this effect in their agreement if they intend to adjudicate any disputes that might arise by litigation because it is unlikely for the court to regard any other factor, such as previous contractual relationships between them, to identify their implied choice.

Questioning the Assumed: Manoeuvring through the Intricate Terrain of Private International Law and Party Autonomy in the Indian Judicial System

By reiterating the 'default rule' in India and presenting Indian courts with another opportunity to apply Indian law, this judgment has demonstrated the general

tendency on the part of the courts across India to invariably invoke Indian law – albeit in an implicit manner – without any (actual) examination as to the country with which the contract has its closest and most real connection. Further, the lack of expertise by the members of the Bar in private international law-related matters and choice of law rules implies that most, if not all, foreign-related civil and commercial matters would be governed by Indian law in its capacity as the *lex fori*. Therefore, legal representatives should actively advocate for disputes to be resolved according to the law specified in their dispute resolution clause rather than assuming that the court will automatically apply the law of the designated country in adjudicating the dispute.

Foreign parties may not want Indian law to apply to their commercial contracts, especially when they have an express provision against the same. Apart from being unclear and uncertain, the present state of India's practice and policy debilitates justice and fails to meet the commercial expectations of the parties by compelling litigants to be governed by Indian law regardless of the circumstance and the nature of the dispute—merely because they failed to plead the application of their chosen law.

This would inevitably lead to foreign parties opting out of the jurisdiction of the Indian courts by concluding choice of court agreements in favour of other forums so as to avoid the application of the Republic's ambiguous approach towards the law that would govern their commercial contracts. Consequently, Indian courts may rarely find themselves chosen as the preferred forum through a choice of court agreement for the adjudication of such disputes when they have no connection to the transaction. In circumstances where parties are unable to opt out of the jurisdiction of Indian courts – perhaps because of the lack of agreement to this effect, the inconsistencies would hamper international trade and commerce in India, with parties from other jurisdictions wanting to avoid concluding contracts with Indian businessmen and traders so as to avert plausible disputes being adjudicated before Indian courts (and consequently being governed by Indian law).

Therefore, Indian courts should certainly reconsider the application of the 'default rule', and limit the application of the *lex fori* in order to respect party autonomy.

Cross-Border Litigation and Comity of Courts: A Landmark Judgment from the Delhi High Court

Written by Tarasha Gupta, student, Jindal Global Law School, Sonipat (India) and Saloni Khanderia, Professor, Jindal Global Law School

In its recent judgment in *Shiju Jacob Varghese v. Tower Vision Limited*,[1] the Delhi High Court ("HC") held that an appeal before an Indian civil court was infructuous due to a consent order passed by the Tel Aviv District Court in a matter arising out of the same cause of action. The Court deemed the suit before Indian courts an attempt to re-litigate the same cause of action, thus an abuse of process violative of the principle of comity of courts.

In doing so, the Court appears to have clarified confusions arising in light of the explanation to Section 10 of the Civil Procedure Code, 1908 ("CPC"), on one side, and parties' right to choice of court agreements and *forum non conveniens* on the other. The result is that, as per the Delhi HC, Indian courts now ought to stay proceedings before them if the same cause of action has already been litigated before foreign courts.

The Indian Position on Concurrent Proceedings in Foreign and Domestic Courts

In the European Union, Article 33 of the Brussels Recast gives European courts the power to stay proceedings if concurrent proceedings based on the same cause of action are pending before a foreign court. The European court may exercise this right if the foreign court will give a judgment capable of recognition, and

such a stay is necessary for the proper administration of justice. By contrast, in India, the Explanation to Section 10 of the CPC provides that the pendency of a suit in a foreign Court does not preclude Indian courts from trying a suit founded on the same cause of action.

The Indian Supreme Court in *Modi Entertainment v. WSG Cricket*[2] upheld parties' right to oust the jurisdiction of Indian courts in favour of a foreign forum through choice of court agreements. Where parties have agreed to approach a foreign forum by a non-exclusive jurisdiction clause, they would have considered convenience and other relevant factors. Therefore an anti-suit injunction cannot be granted.

Notwithstanding this judgment, however, when it came to situations where parties did not confer jurisdiction upon a foreign court through a choice of court agreement, the explanation to Section 10 of the CPC would still apply. Therefore, a party could initiate proceedings before both foreign and domestic courts on the same cause of action, resulting in the possibility of conflicting judgements and creating a nightmare for their enforcement. It would also increase the costs of resolving any dispute, as multiple litigation proceedings may occur simultaneously.

Courts in India tried to mitigate the impacts that could arise from these conflicting judgements through the doctrine of '*forum non conveniens*'. The doctrine permits courts to stay proceedings on the ground that another forum would be more appropriate or convenient to adjudicate the matter. There are no fixed criteria in considering whether to invoke the doctrine. However, courts may consider, *inter alia*, the existence of a more appropriate forum, the expenses involved, the law governing the transaction, the plausibility of multiple proceedings and conflicting judgements.

The doctrine of *forum non conveniens*, however, is only a discretionary power and can only be invoked if the defendant is able to prove that the current proceedings would be vexatious or oppressive to them and the foreign forum is "clearly or distinctly more appropriate than the Indian courts" (clarified by the Indian Supreme Court in *Mayar (HK) Ltd. v. Owners and Parties, Vessels MV Fortune Ltd.*[3]). Thus, it would not be mandatory in every situation for an Indian court to stay a suit pending before it, even if proceedings on the same cause of action are pending or completed in a foreign court.

Dismissal of the Appeal before Indian courts in *Shiju Jacob*

The dispute concerned a Share Entitlement executed in favour of the present Appellant, based on which the Appellant had filed a civil suit before the Tel Aviv District Court. More than two years later, they filed a suit for interim relief that was partially allowed by the Tel Aviv District Court but set aside by the Supreme Court of Israel. After that, the Appellant filed a suit before the Indian court, which was dismissed as a re-litigation and violative of the principle of comity. Consent terms were then filed in the Tel Aviv suit, and the suit was disposed of as settled. Shortly after that, the appellant moved an application to rescind the order to dispose of the suit, which the Tel Aviv District Court dismissed.

The Respondents now claimed, before the Indian court, that the appeal against the previous order by the Indian court was infructuous in view of the consent order passed by the Tel Aviv District Court. The Appellants, on the other hand, argued that the explanation to Section 10 of the CPC allowed them to file a suit in India, even if it was on the same cause of action as the suit before the Israeli courts.

The Delhi High Court held that allowing the appeal to continue would violate the principle of comity of courts, as it could result in conflicting decisions between the Israeli and Indian courts. It would also constitute re-litigation, which, although may not in every case be barred as *res judicata*, depending on the facts and circumstances, could be an 'abuse of process'. The concept of 'abuse of process' is thus more comprehensive than the concept of *res judicata* or issue estoppel. The Court therefore held that a suit or appeal must be struck down as an abuse of process even if the party is not bound by *res judicata* if it is shown that the new proceeding is manifestly unfair or would bring the administration of justice into disrepute.

Implications of the Judgment

The judgment thus provides that Indian courts must dismiss suits which have already been litigated before foreign courts. This is a welcome change, considering that the explanation to Section 10 of the CPC allows such

proceedings to occur at the same time.

However, given that this is a High Court judgement, it will not be binding on Courts outside of Delhi and would simply have persuasive value. This difficulty is compounded by the fact that as per the facts of *Shiju Jacob*, the suit had been dismissed by the Tel Aviv District Court by the time the appeal was heard. Thus, it is unclear whether Indian courts will be able to follow the same approach where proceedings in the foreign court haven't been completed yet. In fact, the HC had observed that the effect of the explanation to Section 10 of the CPC did not even arise for consideration in the present case, as the settlement in question was not being executed or enforced in the proceedings before the Indian Court.

That said, the judgment of the Single Judge (which was being challenged in the present appeal) dismissed the suit even before the consent terms were passed because it was violative of the principle of comity of courts and amounted to re-litigation. The judgment signals that the Delhi HC intended for courts to apply the same principle where proceedings on the same cause of action are ongoing in a foreign court.

Ultimately, however, it is unfortunate that this intervention had to come from the judiciary and not the legislature. India still does not have comprehensive legislation governing transnational disputes, and its position on private international law has been gauged by extending domestic rules by analogy. In the absence of legislation, uncertainty continues to reign as parties must piece together the position of law from hundreds of judgements. Regardless, the judgment in *Shiju Jacob* is an encouraging precedent for improving the finality of transnational litigation in India and ending the difficulties created by the explanation to Section 10 of the CPC.

[1] 2023 SCC OnLine Del 6630.

[2] (2003) 4 SCC 341.

[3] AIR [2006] SC 1828.

New rules for extra-territorial jurisdiction in Western Australia

The rules regarding service outside the jurisdiction are about to change for the Supreme Court of Western Australia.

In a March notice to practitioners, the Chief Justice informed the profession that the *Supreme Court Amendment Rules 2024* (WA) (**Amendment Rules**) were published on the WA legislation website on 26 March 2024.

The Amendment Rules amend the *Rules of the Supreme Court 1971* (WA) (**RSC**). The primary change is the replacement of the current RSC Order 10 (Service outside the jurisdiction) while amending other relevant rules, including some within Order 11 (Service of foreign process) and Order 11A (Service under the Hague Convention).

The combined effect of the changes is to align the Court's approach to that which has been applicable in the other State Supreme Courts for some years.

The changes will take effect on 9 April 2024.

Background

The rules as to service outside the jurisdiction are important to cross-border litigation in Australian courts. Among other things, the rules on service provide the limits to the court's jurisdiction *in personam*: *Laurie v Carroll* (1957) 98 CLR 310, 323.

Whether a litigant has a judicial remedy before a court with respect to a person located outside of that court's territorial jurisdiction will depend on that court's rules as to service, among other things.

'[C]ivil jurisdiction is territorial': *Gosper v Sawyer* (1985) 160 CLR 548, 564 (Mason and Deane JJ). So historically, the rules on service would authorise

'service out' when there was an appropriate connection between the subject matter of the claim and the court's territory. For example, a court would have the requisite connection to a contract dispute where the contract was made in the forum jurisdiction, even though the defendant in breach was located outside the jurisdiction.

The requisite connection to forum territory sufficient to justify a court's extra-territorial jurisdiction over a person not within the forum would depend on the rules of that particular court.

State Supreme Courts' approaches to 'long-arm jurisdiction' depend on where the defendant is located. If within Australia, the rules are effected by the *Service and Execution of Process Act 1992* (Cth) as modified by the rules of the forum court. Within New Zealand, the rules are in the *Trans-Tasman Proceedings Act 2010* (Cth)—legislation in the spirit of the Hague Conference on Private International Law—as modified by the rules of the forum court. Defendants in any other foreign country are captured by the rules of the forum court. The same goes for the Federal Court of Australia via the *Federal Court Rules 2011* (Cth); see *Overseas Service and Evidence Practice Note* (GPN-OSE).

In characteristically Western Australian fashion, the Supreme Court of Western Australia has historically taken a unique approach to service out as compared to other State Supreme Courts of the Federation. As Edelman J explained in *Crawley Investments Pty Ltd v Elman* [2014] WASC 233, [45], the Western Australian rules have derived from Chancery practice, whereas the approach under the historical *Supreme Court Rules 1970* (NSW) pt 10—underpinning leading authorities like *Agar v Hyde* (2000) 201 CLR 552—was quite different. See *Agar v Hyde*, CLR 572 [16].

The key difference was that the Supreme Court of WA had retained a need for leave to serve outside of the jurisdiction in advance, together with leave to have the writ issued, for persons outside Australia and not in New Zealand: see historical RSC O r 9 and O 10 r 4. Previously, the Federal Court was somewhat similar by also requiring leave, until it took a new approach from January 2023.

Some years ago, the Council of Chief Justices' Rules Harmonisation Committee agreed to harmonise the rules as to service out as between Australia's superior courts. New South Wales took the step of giving effect to what were then 'new

rules' back in 2016. I discussed those changes with Professor Vivienne Bath: Michael Douglas and Vivienne Bath, 'A New Approach to Service Outside the Jurisdiction and Outside Australia under the Uniform Civil Procedure Rules' (2017) 44(2) *Australian Bar Review* 160. Other States took the same approach.

In comparison to WA, the 'new approach' of the eastern States' courts required very little connection between the forum jurisdiction and the subject matter of the dispute. For example, the Supreme Court of NSW could claim jurisdiction over a claim involving a tort occurring outside Australia provided there was just *some* damage occurring in Australia (not occurring in New South Wales—occurring in Australia): see *Uniform Civil Procedure Rules 2005* (NSW) sch 6(a). Damage in the forum was not enough in the Supreme Court of WA: the tort had to occur in Western Australia (not just occurring in Australia): see historical RSC O 10 r 1(1)(k).

Through the Amendment Rules, the Supreme Court of WA is finally giving effect to what was agreed by the Rules Harmonisation Committee.

The changes

The changes for practice in the Supreme Court of Western Australia are significant in a number of respects. The full impact of the changes will require further pondering. The following is immediately apparent.

First, RSC Order 10 has been replaced with most significant impact for cases where the person to be served is outside Australia and not in New Zealand: see the new RSC O 10 div 3.

Second, service outside Australia is now possible without leave in the same circumstances that service would be permitted without leave in other 'harmonised' jurisdictions, like the Supreme Court of NSW. See the new RSC O 10 r 5.

Third, even if the circumstances do not satisfy the very broad pigeonholes of connection specified by the new RSC O 10 r 5, service outside Australia is still permissible with leave if the claim has a real and substantial connection with Australia, and Australia is an appropriate forum (which oddly means not a clearly inappropriate forum per the Australian doctrine of *forum non conveniens*—a

whole other conundrum), among other things: see the new RSC O 10 r 6(5).

A remaining issue is the interaction between the new RSC O 10 and RSC OO 11 and 11A, particularly as regards service in accordance with the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. The latter order deals with service under the Hague Convention, but it is not clear if the Hague Convention procedure for service out displaces the autochthonous procedure for service out under RSC O 10, or merely prescribes the manner or mode of service in convention countries as opposed to impacting substantive bases for whether long-arm jurisdiction is warranted.

The relationship between the historical OO 10, 11 and 11A has been one for debate, as recognised by my co-author Bell CJ in chapter 3 of the latest edition of *Nygh's Conflict of Laws in Australia*: see [3.27]. The situation remains confusing. I am still confused. I look forward to becoming less confused after conferring with more learned colleagues.

Comment

The changes will likely be welcomed by the profession. They make cross-border litigation easier in Western Australia. They will make life easier for 'foreign' east-coast practitioners trying to dabble at practice in WA.

But I expect they will be lamented by many in the private international law community. Most academics I know subscribe to the Savigny orthodoxy that forum shopping is bad, and courts should only seize themselves of jurisdiction when they have a genuine, or *real and substantive*, territorial connection to the subject matter of the dispute. I know Professor Reid Mortensen will criticise these changes as 'exorbitant' and contrary to principle. I disagree with Reid (to hell with multilateralism—Australia first!) but I respect the arguments to the contrary. We can all agree: these changes reaffirm Australia's unique willingness to exercise jurisdiction in a way that many foreign courts would consider exorbitant.

International tech litigation reaches the next level: collective actions against TikTok and Google

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Introduction

We have reported on the Dutch WAMCA procedure for collective actions in a number of previous blogposts. This collective action procedure was introduced on 1 January 2020, enabling claims for damages, and has since resulted in a stream of (interim) judgments addressing different aspects in the preliminary stages of the procedure. This includes questions on the admissibility and funding requirements, some of which are also of importance as examples for the rolling out of the Representative Action Directive for consumers in other Member States. It also poses very interesting questions of private international law, as in particular the collective actions for damages against tech giants are usually international cases. We refer in particular to earlier blogposts on international jurisdiction in the privacy case against *TikTok* and the referral to the CJEU regarding international jurisdiction under the Brussels I-bis Regulation in the competition case against *Apple.*

In this blogpost we focus on two follow-up interim judgments: one in the collective action against TikTok entities and the other against Google. The latter case is being discussed due to its striking similarity to the case against Apple.

The next steps in the *TikTok* collective action

The collective action against *TikTok* that was brought before the Amsterdam District Court under the Dutch WAMCA in 2021. Three representative organisations brought the claim against seven *TikTok* entities located in different countries, on the basis of violation of the Code of Conduct of the Dutch Media Act

and the EU General Data Protection Regulation (GDPR). The series of claims include, among others, the destruction of unlawfully obtained personal data, the implementation of an effective system for age registration, parental permission and control, measures to ensure compliance with the Dutch Media Act and the GDPR as well as the compensation of material and immaterial damages.

In an earlier blogpost we reported that the Amsterdam District Court ruled that it had international jurisdiction under the Brussels I-bis Regulation and the GDPR. In the follow-up of this case, the court reviewed the admissibility requirements, one of which concerns the funding and securing that there is not conflict of interest (see Tzankova and Kramer, 2021). This has led to another interim judgment focusing on the assessment of the third party funding agreement as two out of the three claimant organisations had concluded such agreement, as reported on this blog here. In short, the court conditioned the admissibility of the representative claimant organisations on amendments of the agreement with the commercial funder due to concerns related to the control of the procedure and the potential excessiveness of the fee. The court provided as a guideline that the percentage should be determined in such a way that it is expected that, in total, the financers can receive a maximum of five times the amount invested.

On 10 January 2024 the latest interim judgment was rendered. Without providing further details the Amsterdam District Court concluded that the required adjustments to the funding agreement had been made and that the clauses that had raised concern had been deleted or amended. It considered that the independence of the claimants in taking procedural decisions was sufficiently guaranteed. The court declared the representative organisations admissible, appointing two of them as Exclusive Representative (one for minors and the other for adults) based on their experience, the number of represented people they represent, their collaboration and support. The court confirmed its statement made in a previous interim judgment that the claim for immaterial damages is inadmissible as that would require an assessment per victim, which it considered impossible in a collective action. This is admittedly a setback for the collective protection of privacy rights, notably similar to the one following the 2021 United Kingdom Supreme Court ruling in *Lloyd* v *Google*.

With this last interim judgment the preliminary hurdles have been overcome, and the court proceeded to provide further guidelines as to the opt-out and opt-in as the next step. The WAMCA is an opt-out procedure, but to foreign parties in

principle an opt-in regime applies. The collective action was aimed representing people in the Netherlands, but was extended to people who have moved abroad during the procedure, and these are under the opt-in rule. The information on opt-out and opt-in will be widely published.

It remains to be seen how the case will progress considering the further procedural decisions and the assessment on the merits.

The claim against Google and its private international law implications

Another case with an international dimension is the collective action for damages against Google that was filed under the WAMCA, alleging anticompetitive practices concerning the handling of the app store (DC Amsterdam, 27 December 2023, ECLI:NL:RBAMS:2023:8425; in Dutch). This development comes amidst a landscape marked by high-profile antitrust collective actions with international dimensions, such as the one filed against Apple, in which there is an ongoing legal battle regarding Apple's alleged anticompetitive behavior in the market for app distribution and in-app products on iOS devices. Cases like these are either pending before courts or under investigation by competition authorities worldwide, reflecting a broader global trend towards increased scrutiny of antitrust practices in the digital marketplace.

In the present case, the claimant organisation argues that the anticompetitive nature of Google's business stems from a collection of practices rather than an isolated practice. Such a collection of practices would shield Google from nearly all possible competition and allow it to charge excessive fees due to its dominance in the market. The practices that, taken together, form this anticompetitive behaviour are essentially:

(i) The bundling of pre-installed apps, including Google's Play Store, with the licensing of the Android operating system to the manufacturers of smartphones;

(ii) The imposition that transactions related to the Play Store be undertaken only within Google's own payment system;

(iii) The charging of a fee of 30% from the app's developer, which the claimant organisation deems abusive and only possible due to Google's dominant position created by the abovementioned practices.

Based on these allegations, the claimant organisation accuses Google of engaging in mutually exclusive and exploitative practices, thereby abusing a dominant position in a manner contrary to Article 102 TFEU. This case unfolds within a broader global context where antitrust actions against Google's Play Store, its payment system, and the bundling with the Android operating system have gained significant momentum. Just last December, Google reached a settlement in a multidistrict litigation involving all 50 states of the United States, the District of Columbia, Puerto Rico, and the Virgin Islands. The settlement addressed issues very similar to those raised in this case, as explicitly outlined in the agreement. The Competition and Markets Authority in the United Kingdom is also conducting an antitrust investigation into these aspects of Google's operations. Furthermore, the practice of pre-installing Google apps as a requirement for obtaining a license to use their app store is under investigation by the Brazilian Competition Authority.

From a private international law perspective, this case closely resembles another one against Apple referred to the CJEU by the District Court of Amsterdam and discussed earlier in this blog, in which similar antitrust claims were raised due to the handling of the app store and the exclusionary design of the respective payment system. However, unlike the collective action against Apple, in this case the District Court of Amsterdam clearly did not refer the case to the CJEU and instead decided by itself whether it had jurisdiction to hear the claim. And again, like the Apple case, the court was called upon to decide on both international jurisdiction and its territorial jurisdiction within the Netherlands.

International jurisdiction

The collective action under the Dutch WAMCA in the Google case was filed against a total of eight defendants. Two of the defendants (Google Netherlands B.V. and Google Netherlands Holdings B.V.) against whom the claim was filed are established in the Netherlands, and for them the standard rule of Article 4 Brussels I-bis Regulation applies. There are also three other defendants (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) established in another EU Member State, namely Ireland. With regards to these defendants, the court also assessed whether it had jurisdiction based on the Brussels I-bis Regulation. Finally, there are three defendants based outside of the EU – Alphabet Inc. and Google LLC in the United States and Google Payment Limited in the United Kingdom. Jurisdiction with regards to these defendants

based outside of the EU was established under the pertinent rules contained in the Dutch Code of Civil Procedure (DCCP).

The court initiated its assessment by recognizing that, due to the lack of jurisdiction rules specifically addressing collective actions in both the Brussels I-bis Regulation and the Dutch Code of Civil Procedure, the standard rules within these frameworks should be applied. The court's reasoning was based on the established principle that no differentiation exists between individual and collective actions when determining jurisdiction. The court primarily conducted its assessment regarding whether the Netherlands could be considered the *Erfolgsort* under Article 7(2) of the Brussels I-bis Regulation, mostly *ex officio*, as this was not a point of contention between the parties.

The court's view is that the criteria from Case C-27/17 *flyLAL-Lithuanian Airlines* (ECLI:EU:C:2018:533) should be applied, according to which the location of the market affected by the anticompetitive practice is the *Erfolgsort*. The location of the damage is where the initial and direct harm occurred, which primarily involves users overpaying for purchases made on the Play Store. In the present case the court, applying such criteria, decided that the Netherlands can be considered the *Erfolgsort*, given that the claimant organisation represents users that make purchases and reside in the Netherlands. This reasoning is very similar to the one used by the District Court of Amsterdam in deciding to refer the Apple case to the CJEU.

Territorial jurisdiction within the Netherlands

With regards to the jurisdiction of the District Court of Amsterdam to hear this collective action in which the claimant organisation sues on behalf of all the users residing in the Netherlands, the decision contains an assessment starting from the CJEU ruling in Case C-30/20 *Volvo* (ECLI:EU:C:2021:604). Such ruling states that Article 7(2) Brussels I-bis Regulation grants jurisdiction over claims for damages due to infringement of Article 101 TFEU to the court where the goods were purchased. If purchases were made in multiple locations, jurisdiction lies with the court where the alleged victim's registered office is located.

In the case at hand, given the mobile nature of the purchases, it is not possible to pinpoint a specific location. However, under the criteria just mentioned, the District Court of Amsterdam has jurisdiction over the victims' registered offices

for those residing in Amsterdam in accordance with both Article 7(2) Brussels I-bis Regulation (Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited) and the similar provision in Article 102 DCCP (Alphabet Inc., Google LLC, and Google Payment Limited).

For users residing elsewhere in the Netherlands, the parties agreed that the District Court of Amsterdam would serve as the chosen forum for users who are not based in Amsterdam. The court decided that, with regards to Alphabet Inc., Google LLC, and Google Payment Limited, this is possible under Article 108(1) DCCP on choice of court. As to Google Ireland Limited, Google Commerce Limited, and Google Payment Ireland Limited, the court interpreted Article 7(2) Brussels I-bis Regulation in light of the principle of party autonomy (see Kramer and Themeli, 2016) as enshrined in Recitals 15 and 19, as well as Article 25 Brussels I-bis Regulation. The court also noted that no issues concerning exclusive jurisdiction arise in the present case and made a reference to the rule contained in Article 19(1) Brussels I-bis Regulation according to which the protective rule of Article 18 Brussels I-bis Regulation can be set aside by mutual agreement during pending proceedings.

Finally, the court decided that centralising this claim under its jurisdiction is justified under the principle of sound administration of justice and the prevention of parallel proceedings. In the court's understanding, the goal of Article 7 Brussels I-bis Regulation is to place the claim before the court that is better suited to process it given the connection between the two and, given that the mobile nature of the purchases gives rise to damages all over the Netherlands, such a court would be difficult to designate. Hence the need for respecting the choice of court agreement.

Applicable law

The court established the law applicable to the present dispute under Article 6(3)(a) Rome II Regulation. The court used the same reasoning it had laid out to establish jurisdiction in the Netherlands as the *Erfolgsort*, since it is the market affected by the alleged anticompetitive practices where the users concerned reside and made their purchases. The court also considered the claimant organization's argument that, according to Article 10(1) of the Rome II Regulation, the Dutch law of unjust enrichment could govern the claim. Although the court did not provide extensive elaboration, it agreed with this view.

Funding aspects of the claim against Google

Lastly, in a naturally similar way as regarding the TikTok claim explained above, the court assessed the funding arrangements of the claim against Google under the requirements set by the WAMCA. The court took issue with the fact that the funding arrangement entered by the claimant organisation is somewhat indirect, since it is apparent that the funder itself relies on another funder which is not a part of the agreement presented to the court. Under these circumstances, the court deems itself unable to properly assess the claimant organisation's independence from the "actual" funder and its relationship with the remuneration structure.

For this reason, the court ordered the claimant organisation to resubmit the agreement, which it is allowed to do in two versions. One version of the agreement will be presented in full and will be available to the court only, to assess it in its entirety. The other version, also available to Google, will have the parts concerning the overall budget for the claim concealed. However, the parts concerning the funder's compensation share must remain legible for discussion around the organisation's independence from the funder, and confirmation that such agreement reflects the whole funding arrangement of the claim was also required.