The long tentacles of the Helms-Burton Act in Europe (III)

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There has recently been a new and disappointing development in the saga of the Sánchez-Hill, a Spanish-Cuban-US family who filed a lawsuit before Spanish courts against a Spanish Hotel company (Meliá Hotels) for unjust enrichment. Meliá is exploiting several hotels located on land owned by Gaviota S.A., a Cuban company owned by the Republic of Cuba. That land was expropriated by Cuba without compensation, following the revolution of 1959.

In 2019, the First Instance Court of Mallorca (Spain) held that the lawsuit was a means to circumvent the sovereign immunity of Cuba, given the fact that, in order to decide on the right to compensation of the claimants for the unjust enrichment of the defendant, the court would allegedly have to decide on the lawfulness of a sovereign act – i.e. expropriation –, because only if the expropriation had been unlawful could the defendant be exploiting land which did not belong to Gaviota but to the claimants. The court held that the claimants were also arguing that they had a right *in rem* – such as property or possession – over assets of a sovereign state and that such assets were also protected by the rules of sovereign immunity. This alone would have been enough to dismiss the lawsuit but, unnecessarily, the court added that it did not have jurisdiction to decide about property rights concerning real estate assets located outside Spain.

The Court of Appeal of Mallorca disagreed with the lower court. It held that sovereign immunity was not an issue because Cuba had not been named a defendant in the claim. Besides, Spanish courts had jurisdiction because Spain was the place of the domicile of the defendant and the claim was one of unjust enrichment – i.e. a claim in tort –, not one whose subject matter was the existence or scope of a right *in rem* over a real estate asset. In brief, the claimants were not asking Cuba to give back their land and were not asking monetary compensation neither from Cuba nor from Gaviota.

Meliá then filed a motion arguing that the claim was an attempt to eschew the EU

Blocking Statute meant to prevent the effectiveness of US court rulings against EU companies, under the Helms-Burton Act of 1996. The defendants further requested that the matter be taken to the European Court of Justice for a preliminary ruling on the scope and correct interpretation of the Blocking Statute. The CJEU may have taken years to issue such a ruling but the Spanish First Instance Court denied the motion.

Later on, Meliá filed another motion requesting that Gaviota and the Republic of Cuba be joined to the lawsuit (*exceptio plurium litisconsortium*) and the First Instance Court granted the motion on the basis, once again, that any ruling on unjust enrichment would previously and necessarily require a decision about the property rights of Gaviota and Cuba, which should therefore be heard in the Spanish proceedings. Probably making a very serious strategic mistake, the claimants did not appeal this decision of the First Instance Court and agreed to join Gaviota and Cuba to their claim with the result that, last January 2023, the First Instance Court once again dismissed the lawsuit on grounds of sovereign immunity, given the fact that, now, a sovereign entity is in fact a defendant in the proceedings.

In the meantime, the Cuban Government had been correctly notified and had claimed that it enjoyed sovereign immunity before foreign courts. Beyond that, Cuba never made an appearance in the proceedings but Gaviota did, requesting that the proceedings be stayed on the basis that it also enjoyed sovereign immunity. Besides, the Spanish Government had also issued a report requested by Spanish law, indicating that the Cuban acts of expropriation must indeed be considered acts *iure imperii*.

The potential implications of a claimants' improbable victory for the Spanish tourism industry in Cuba are worrisome but, above all, this muddled and already long-lasting lawsuit has given rise to much interest among Spanish scholars, especially conflict of laws specialists. The 2019 decision of the First Instance Court was criticised for applying the doctrine of sovereign immunity in the absence of a sovereign defendant – e.g. something much more similar to the Act of State doctrine, which has no place in Spanish law – and for confusing an action in rem with an action *in personam*. That initial ruling of the First Instance Court may have also inappropriately mentioned and relied on immunity from execution against property of a sovereign state, which is mostly relevant in enforcement proceedings.

Now, however, the Spanish First Instance Court apparently feels vindicated because its recent an relatively short ruling reiterates verbatim practically everything it said in its 2019 decision. The judge also warns the claimants that they had the chance to appeal the ruling granting the motion to join Gaviota and Cuba but did not do so, which means that such decision is now *res judicata*. The logic of the argument is somewhat baffling. The judge initially dismissed the claim on grounds of sovereign immunity, despite the fact that no sovereign was a party. Then, the judge requested that the sovereign be joined as a party and, when the claimant yielded and did so, the judge once again dismissed the claim on grounds of sovereign immunity.

The key to this stage of the proceedings may have been the joinder of Gaviota and Cuba to the claim. Arguably, it was not necessary to do so. In Spanish law, the *exceptio plurium litisconsortium* can be raised in certain cases provided by statute as well as in certain cases provided by case law. Whenever there is a plurality of parties to the same legal relationship, which is the subject-matter of the proceedings, a joinder is obligatory as a condition for a decision on the merits, based on the inseparable nature of that legal relationship. Its justification lies in the right to be heard of all those who might be affected by the ruling on the merits. A joinder is not necessary when the ruling only affects certain individuals or entities in an indirect manner. In the case at hand, the parties to the unjust enrichment are Meliá, i.e. the party who has allegedly enriched itself at the expense of the other party, i.e. the claimants. Cuba is therefore not a party to the alleged unjust enrichment. Moreover, any findings of Spanish courts concerning the unlawfulness of the expropriation would have no bearing on the property rights of Cuba over that land.

In fact, Spanish courts are no strangers to litigation related to the Cuban nationalisation program and, on several occasions, the Supreme Court has taken into consideration the unlawfulness of that nationalisation process with respect to, for instance, ownership rights over trademarks registered in Spain, emphasising that it is not for Spanish courts to decide on such lawfulness but that they can accept or reject some of the extraterritorial effects of the sovereign acts of the foreign state in the territory of the forum. In those cases, the Supreme Court said that the Cuban nationalization was against the public policy of Spain because of the absence of due process and compensation. However, the Supreme Court added that the applicable law to property rights over trademarks registered

in Spain was Spanish law, not Cuban law.

The Sánchez-Hill family has just a few more days left to appeal this new decision of the First Instance Court, in proceedings which may potentially have opened a new venue for victims of the Cuban revolution, given the EU Blocking Statute and given the fact that, since the end of the suspension of Title III of the Helms-Burton Act, claims before US Federal Courts based on that piece of legislation have not been very being successful.

Choice of Law in the American Courts in 2022: Thirty-Sixth Annual Survey

The 36th Annual Survey of Choice of Law in the American Courts (2022) has been posted to SSRN.

The cases discussed in this year's survey cover such topics as: (1) choice of law, (2) party autonomy, (3) extraterritoriality, (4) international human rights, (5) foreign sovereign immunity, (6) foreign official immunity, (7) adjudicative jurisdiction, and (8) the recognition and enforcement of foreign judgments. Happy reading!

John Coyle (University of North Carolina School of Law)
William Dodge (University of California, Davis School of Law)
Aaron Simowitz (Willamette University College of Law)

Book: Intolerant Justice: Conflict and Cooperation on Transnational Litigation by Asif Efrat

Summary provided by the author, Asif Efrat

In a globalized world, legal cases that come before domestic courts are often transnational, that is, they involve foreign elements. For example, the case before the court may revolve around events, activities, or situations that occurred in a foreign country, or the case may involve foreign parties or the application of foreign law. Such cases typically present an overlap between the legal authorities of two countries. To handle a transnational case cooperatively, one legal system must cede its authority over the case, in full or in part, to a foreign legal system. This effectively means that a local citizen would be subjected to the laws or jurisdiction of a foreign legal authority, and that raises a host of questions and concerns: Does the foreign legal system abide by the rule of law? Does it guarantee human rights? Will the foreign court grant our citizen the due process and fair treatment they would have enjoyed at home?

The newly published book *Intolerant Justice: Conflict and Cooperation on Transnational Litigation* (Oxford University Press) argues that the human disposition of *ethnocentrism* – the tendency to divide the world into superior in-groups and inferior out-groups – would often lead policymakers to answer these questions negatively. The ethnocentric, who fears anything foreign, will often view the foreign legal system as falling below the home country's standards and, therefore, as unfair or even dangerous. Understandably, such a view would make cooperation more difficult to establish. It would be harder to relinquish the jurisdiction over legal cases to a foreign system if the latter is seen as unfair; extraditing an alleged offender to stand trial abroad would seem unjust; and the local enforcement of foreign judgements could be perceived as an affront to legal sovereignty that contravenes fundamental norms.

This book examines who expresses such ethnocentric views and how they frame them; and, on the other hand, who seeks to dispel these concerns and establish cooperation between legal systems. In other words, the domestic political debate

over transnational litigation stands at the center of this book.

In this debate, the book shows, some domestic actors are particularly likely to oppose cooperation on ethnocentric grounds: the government's political opponents may portray the government's willingness to cooperate as a dangerous surrender to a foreign legal system, which undermines local values and threatens the home country's citizens; NGOs concerned for human rights might fear the human-rights consequences of cooperation with a foreign legal system; and lawyers, steeped in local rules and procedures, may take pride in their legal system and reject foreign rules and procedures as wrong or inferior.

By contrast, actors within the state apparatus typically view cooperation on litigation more favorably. Jurists who belong to the state – such as judges, prosecutors, and the justice-ministry bureaucracy – may support cooperation out of a concern for reciprocity or based on the principled belief that offenders should not escape responsibility by crossing national borders. The ministry of foreign affairs and the ministry of defense may similarly support cooperation on litigation that could yield diplomatic or security benefits. These proponents of cooperation typically argue that legal differences among countries should be respected or that adequate safeguards can guarantee fair treatment by foreign legal authorities. In some cases, these arguments prevail and cooperation on litigation is established; in other cases, the ethnocentric sentiments end up weakening or scuttling the cooperative efforts.

These political controversies are examined through a set of rich case studies, including the Congressional debate over the criminal prosecution of U.S. troops in NATO countries, the British concerns over extradition to the United States and EU members, the dilemma of extradition to China, the wariness toward U.S. civil judgments in European courts, the U.S.-British divide over libel cases, and the concern about returning abducted children to countries with a questionable human rights record.

Overall, this book offers a useful analytical framework for thinking about the tensions arising from transnational litigation and conflict of laws. This book draws our attention to the political arena, where litigation-related statutes and treaties are crafted, oftentimes against fierce resistance. Yet the insights offered here may also be used for analyzing judicial attitudes and decisions in transnational cases. This book will be of interest to anyone seeking to understand the challenges of

establishing cooperation among legal systems.

Comparative Analysis of Doctrine of Separability between China and the UK

Written by Jidong Lin, Wuhan University Institute of International Law

1. **Background**

Separability is a world-recognized doctrine in commercial arbitration. It means that an arbitration clause is presumed to be a separate and autonomous agreement, reflecting contractual commitments that are independent and distinct from its underlying contract.[1] Such a doctrine is embraced and acknowledged by numerous jurisdictions and arbitral institutions in the world.[2]

However, there are different views on the consequences of separability. One of the most critical divergences is the application of separability in the contract formation issue. Some national courts and arbitral tribunals held that in relatively limited cases, the circumstances giving rise to the non-existence of the underlying contract have also resulted in the non-existence of the associated arbitration agreement, which is criticized as an inadequacy of the doctrine of separability.[3] On the contrary, other courts hold the doctrine of separability applicable in such a situation, where the non-existence of the underlying contract would not affect the existence and validity of the arbitration agreement. This divergence would directly affect the interest of commercial parties since it is decisive for the existence of the arbitration agreement, which is the basis of arbitration.

Two contrary judgements were recently issued by two jurisdictions. The Chinese Supreme People's Court (hereinafter "**SPC**") issued the Thirty-Sixth Set of Guiding Cases, consisting of six guiding cases concerning arbitration. In Guiding

Case No. 196 *Yun Yu v. Zhong Yun Cheng*, the SPC explains the Chinese version of separability should apply when the formation of the underlying contract is in dispute.[4] Although the SPC's Guiding Cases are not binding, they have an important persuasive effect and Chinese courts of the lower hierarchy are responsible for quoting or referring to the Guiding Cases when they hear similar cases. On the other hand, the English Court of Appeal also issued a judgement relating to separability, holding this doctrine not applicable in the contractual formation issue.[5]

2. **Chinese judgment**

The Chinese case concerns a share transfer transaction between Yun Yu Limited. (hereinafter "**YY**") and Shenzhen Zhong Yuan Cheng Commercial Investment Holding Co. Limited. (hereinafter "**ZYC**"). On 9th May 2017, YY sent the Property Transaction Agreement (hereinafter "**PTA**") and the Settlement of Debts Agreement (hereinafter "**SDA**") to ZYC. The PTA was based on the Beijing Stock Exchange (hereinafter "**BSE**") model agreement. PTA and SDA included a dispute resolution clause in which the parties agreed that the governing law should be Chinese law and the dispute should be submitted to Beijing Arbitration Commission. On 10th May 2017, ZYC returned the PTA and SDA to YY with some revisions, including a modification on the dispute resolution clause, which changed the arbitration institution to the Shenzhen Court of International Arbitration. On 11st May 2017, YY commented on the revised version of the PTA and SDA but kept the dispute resolution clause untouched. In the accompanying email, YY stated, "Contracts confirmed by both parties would be submitted to Beijing Stock Exchange and our internal approval process. We would sign contracts only if we got approval from BSE and our parent company." On the same day, ZYC returned the PTA and SDA with its stamp to YY. On 27th October 2017, YY announced to ZYC that the negotiation was terminated. On 4th April 2018, ZYC commenced arbitration based on the dispute resolution clause in PTA and SDA.

The SPC held that separability means the arbitration agreement could be separate and independent from the main contract in its existence, validity and governing law. To support its opinion, the SPC refers to Article 19 of the People's

Republic of China's Arbitration Law (hereinafter "**Arbitration Law**"), which stipulates that: "An arbitration agreement shall exist independently, the amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement." SPC submits that the expression "(t)he arbitration agreement shall exist independently" is general and thus should cover the issue of the existence of the arbitration agreement. This position is also supported by the SPC's Interpretation of Several Issues concerning the Application of Arbitration Law (hereinafter "**Interpretation of Arbitration Law**"), [6]Article 10 of which stipulates: "Insofar as the parties reach an arbitration agreement during the negotiation, the non-existence of the contract would not affect the validity of the arbitration agreement." Thus, the SPC concluded that the existence of an arbitration clause should be examined separately, independent from the main contract. Courts should apply the general rules of contractual formation, to examine whether there is consent to arbitrate. If the court found the arbitration clause formed and valid, the very existence of the main contract should be determined by arbitration, unless it is "necessary" for the court to determine this matter. The SPC concludes that the PTA and SDA sent by YY on 11st May 2017 constituted an offer to arbitrate. The stamped PTA and SDA sent by ZYC on the same day constituted an acceptance and came into effect when the acceptance reached YY. Thus, there exists an arbitration agreement between the parties. It is the arbitral tribunal that should determine whether the main contract was concluded.

3. **English judgment**

The English case concerns a proposed voyage charter between DHL Project & Chartering Limited (hereinafter "**DHL**") and Gemini Ocean Shipping Co. Limited (hereinafter "**Gemini**"). The negotiations were carried on through a broker. On 25th August 2020, the broker circulated what was described as the Main Terms Recap. It is common ground that the recap accurately reflected the state of the negotiations thus far. Within the Recap, both parties agreed that the vessel would be inspected by Rightship. This widely used vetting system aims to identify vessels suitable for the carriage of iron ore and coal cargoes. Also, both parties agreed that the dispute should be submitted to arbitration. There was an attached proforma, including a provision that the vessel to be nominated should be acceptable to the charterer. Still, that acceptance in accordance with detailed

requirements set out in clause 20.1.4 “shall not be unreasonably withheld”. By 3rd September, however, Rightship approval had not been obtained. DHL advised that “(p)lease arrange for a substitute vessel” and finally, “(w)e hereby release the vessel due to Rightship and not holding her any longer.” In this situation, the attached proforma was not approved by DHL, and there is no “clean” fixture, [7]which means the parties did not reach an agreement. After that, Gemini submitted that there is a binding charter party containing an arbitration clause and commenced arbitration accordingly.

The Court of Appeal made a detailed analysis of separability. Combining analysis of numerous cases, including Harbour v. Kansa, [8]Fiona Trust, [9]BCY v. BCZ[10] and Enka v. Chubb, [11]and analysis of International Commercial Arbitration written by Prof. Gary Born, the Courts of Appeal concluded that separability should not be applied if the formation of the underlying contract is in dispute. Separability applies only when the parties have reached an agreement to refer a dispute to arbitration, which they intend (applying an objective test of intention) to be legally binding. In other words, disputes as to the validity of the underlying contract in which the arbitration agreement is contained do not affect the arbitration agreement unless the ground of invalidity impeaches the arbitration agreement itself. But separability is not applicable when the issue is whether an agreement to a legally binding arbitration agreement has been reached in the first place. In this case, the parties agreed in their negotiations that if a binding contract were concluded as a result of the subject being lifted, that contract would contain an arbitration clause. However, based on the analysis of the negotiation and the commercial practice in the industry, the Court of Appeal concludes that either party was free to walk away from the proposed fixture until the subject was lifted, which it never was. Thus, there was neither a binding arbitration agreement between the parties.

4. Comments

Before discussing the scope of the application of separability, one thing needed to be clarified in advance: Separability does not decide the validity or existence of the arbitration agreement in itself. Separability is a legal presumption based on the practical desirability to get away from a theoretical dilemma. However, separability does not mean the arbitration agreement necessarily exists or is

valid. It only means the arbitration agreement is separable from the underlying contract, and it cannot escape the need for consent to arbitrate.[12] Therefore, the existence of the arbitration agreement should not be considered when discussing the scope of application of the arbitration agreement.

The justification of the doctrine of separability should be considered when discussing its scope of application. The justification for the doctrine of separability can be divided into three factors: (a) The commercial parties' expectations. Parties to arbitration agreements generally "intended to require arbitration of any dispute not otherwise settled, including disputes over the validity of the contract or treaty. (b) Justice and efficiency in commerce. Without the separability doctrine, "it would always be open to a party to an agreement containing an arbitration clause to vitiate its arbitration obligation by the simple expedient of declaring the agreement void." and (c) Nature of the arbitration agreement.[13] The arbitration agreement is a procedural contract, different from the substantive underlying contract in function. If these justifications still exist in the contract formation issue, the doctrine of separability should be applied.

It is necessary to distinguish the contract formation issue and contract validity issue, especially the substantive validity issue, when discussing the applicability of those justifications. The contract formation issue concerns whether parties have agreed on a contract. The ground to challenge the formation of a contract would be that the parties never agree on something, or the legal condition for the formation is not satisfied. The contract substantive validity issue is where the parties have agreed on a contract, but one party argue that the agreement is invalidated because the true intent is tainted. The grounds to challenge the substantive validity would be that even if the parties have reached an agreement, the agreement is not valid because of duress, fraud, lack of capacity or illegality. The formation and validity issues are two different stages of examining whether the parties have concluded a valid contract. The validity issue would only occur after the formation of the contract. In other words, an agreement can be valid or invalid only if the agreement exists.

It is argued that separability should be applicable to the formation of contract. Firstly, separability satisfies the parties expectation where most commercial parties expect a one-stop solution to their dispute, irrespective of whether it is for breach of contract, invalidity or formation. Furthermore, the application of separability would achieve justice and efficiency in commerce. Separability is

necessary to prevent the party from vitiating the arbitration obligation by simply declaring a contract not concluded. In short, since the justifications still stand in the issue of contract formation, separability should also apply in such an issue.

The English Court of Appeal rejected the application of separability in the formation of contract holding the parties' challenge to the existence of the main contract would generally constitute a challenge to the arbitration clause. However, the same argument may apply for invalidity of the underlying contract. Since the arbitration agreement is indeed concluded in the same circumstances as the underlying contract the challenging to the validity of the contract may also challenge the validity of the arbitration clause, while separability still applies. On the contrary, the Chinese approach probably is more realistic. The SPC ruled that separability applies where the formation of the underlying contract is disputed. But before referring the dispute to arbitration, the SPC separately considered the formation of the arbitration clause. Only after being satisfied the arbitration clause is prima facie concluded, the court declined jurisdiction and referred the parties to arbitration.

[1] Ronan Feehily, *Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine*, 34 Arbitration International 355 (2018), p. 356.

[2] See Blackaby Niegel, Constantine Partasides et al., *Redfern and Hunter on International Arbitration*, Kluwer Law International; Oxford University Press 2015, pp. 104–107.

[3] See Gary B. Born, International Commercial Arbitration (3rd edition), Kluwer Law International 2021, pp. 492-493.

[4] The Guiding Case No. 196: Dispute in Validity of Arbitration Agreement between YunYu Limited and Shenzhen ZhongYuanCheng Commercial Investment Holding Co. Limited.

[5] DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd [2022] EWCA Civ 1555 (24 November 2022)

[6] SPC's Interpretation of Several Issues concerning the Application of

Arbitration Law, Fa Shi?2006?No. 7.

[7] Clean Fixture is a concept in the maritime area. It means the Parties' confirmation that the contract has been concluded and that there are no further Subjects and/or restrictions to the execution of the agreed Contract. The Fixture is not clean until both parties have waived their subjects/restrictions.

[8] Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701.

[9] Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40, [2007] 4 All ER 951.

[10] BCY v BCZ [2016] SGHC 249, [2016] 2 Lloyd's Rep 583.

[11] Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38, [2020] 1 WLR 4117

[12] See McNeill M. S. & Juratowitch B., *Agora: Thoughts on Fiona Trust: The Doctrine of Separability and Consent to Arbitrate*, 3 Arbitration International 475 (2008).

[13] See Gary B. Born, International Commercial Arbitration (3rd edition), Kluwer Law International 2021, p. 428.

The standard of human rights review for recognition and enforcement of foreign judgments: 'due satisfaction' or 'flagrant

denial of justice’?

Note on *Dolenc v. Slovenia* (ECtHR no. 20256/20, 20 October 2022)

by Denise Wiedemann, Hamburg

1. Facts and Holding

On 20 October 2022, the ECtHR issued a decision that provides guidance regarding the human rights review of recognition and enforcement decisions. The decision concerns the recognition of Israeli civil judgments by Slovenian courts. The Israeli judgments obliged Vincenc Vinko Dolenc, an internationally renowned neurosurgeon, to compensate a former patient for pecuniary and non-pecuniary damage in an amount equivalent to approximately 2.3 million euros (para. 22). Dolenc had performed surgery on the claimant, who was left severely disabled. After Slovenian courts recognized the Israeli judgments, Dolenc applied to the ECtHR. He contended that Slovenia had violated Art. 6(1) ECHR because it had recognized Israeli judgments that resulted from an unfair proceeding. Specifically, he argued that he had been unable to participate effectively in the trial in Israel because the Israeli court had refused to examine him and his witnesses by way of the procedure provided under the Hague Evidence Convention (para. 61).

The ECtHR found that the Slovenian courts had not examined the Israeli proceedings duly and had not given enough weight to the consequences that the non-examination of the witnesses had for the applicant’s right to a fair trial (para. 75). Therefore, the ECtHR unanimously held that Slovenia had violated Art. 6(1) ECHR.

2. Standard of Review

In its reasoning, the Court confirmed the standard of review that it had laid down in *Pellegrini v. Italy* (no. 30882/96, ECtHR 20 July 2001). In *Pellegrini*, the ECtHR found that Contracting States to the ECHR have an obligation to refuse recognition or enforcement of a foreign judgment if the defendant’s rights were violated during the adjudication of the dispute in the state of the judgment’s origin (para. 40). As in *Dolenc v. Slovenia*, the ECtHR in *Pellegrini* did not

examine whether the proceedings before the court of origin complied with Art. 6(1) of the Convention. Instead, the Court scrutinized whether the Italian courts, i.e. courts in the state of enforcement, applied a standard of review in reviewing the foreign judgment which was in conformity with Art. 6(1) ECHR. As regards the standard of review, the ECtHR required the Italian courts to 'duly satisfy' themselves that the proceedings in the state of the judgment's origin fulfilled the guarantees of Art. 6(1) ECHR (para. 40). Thus, when recognizing or enforcing a civil judgment from a non-Contracting State, Contracting States have to verify that the foreign proceedings complied with Art. 6(1) ECHR.

Yet, in respect of other issues, the ECtHR has limited the standard of review from due satisfaction to that of a 'flagrant denial of justice'. In the criminal law context, the ECtHR held in *Drozd and Janousek v. France and Spain* that Contracting States are obliged to refuse the enforcement of a foreign sentence only if 'it emerges that the conviction is the result of flagrant denial of justice' (para. 110). The same limited review has been applied to extradition cases (*Othman (Abu Qatada) v. the United Kingdom*) and to child return cases (*Eskinazi and Chelouche v. Turkey)*. A flagrant denial of justice is a breach that 'goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.' (*Othman*, para. 260).

It has been argued that in cases regarding the recognition or enforcement of a foreign civil judgement, the review should likewise be limited because the fundamental rights violation in the state of recognition or enforcement would be only of an indirect nature (e.g. *Matscher*, 'Der Begriff des fairen Verfahrens nach Art. 6 EMRK' in Nakamura et al. (eds), Festschrift Beys, Sakkoulas, Athens 2003, pp. 989–1007, 1005). Contrary to this view, the ECtHR confirmed in *Dolenc v. Slovenia* the requirement of an unlimited review of the proceeding in the state of origin; the Court saw 'no reason to depart from the approach set out in *Pellegrini*' (§ 60).

The approach taken in *Pellegrini* and *Dolenc* is convincing with regard to Art. 1 ECHR, which obliges the Contracting States to fully secure all individuals' rights and freedoms. A deviation from the requirement set out in Art. 1 ECHR is not justified by the fact that recognition or enforcement of a decision issued in

violation of Art. 6(1) ECHR would only be of an indirect nature; rather, such a recognition or enforcement would exacerbate the violation and would, therefore, be in direct breach of the Convention. The ECtHR explained the restricted level of review in extradition and child return cases with the fact that, unlike in a recognition or enforcement situation, 'no proceedings concerning the applicants' interests [had] yet been disposed of' (see *Eskinazi and Chelouche v. Turkey*).

However, it is not obvious why the ECtHR applies different standards for the enforcement of foreign criminal judgments ('flagrant denial of justice') and the recognition or enforcement of foreign civil judgment ('due satisfaction'). Whereas Contracting States are not required to verify whether a foreign criminal proceeding was compatible with all the requirements of Art. 6(1) ECHR, they are obliged to do so when a foreign civil proceeding is at issue. In justifying the reduced effect of Art. 6(1) ECHR in criminal cases, the Court explained that a review of all the requirements of Art. 6(1) ECHR would 'thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned.' (*Drozd and Janousek v. France and Spain*, para. 110). Thus, the ECtHR seems to place greater importance on cooperation in criminal matters than on cooperation in civil matters. A reason is not apparent.

3. Situations Allowing for a More Limited Review

Despite the confirmation of *Pellegrini v. Italy* in *Dolenc v. Slovenia*, the ECtHR left open the possibility of a more limited review in certain civil recognition and enforcement cases. First, the *Pellegrini* case and the *Dolenc* case concerned judgments emanating from non-Contracting States. If, in contrast, the recognition or enforcement of a judgment from a Contracting State was at issue, debtors would be obliged to challenge violations of Article 6(1) ECHR in the state of the judgment's origin. If debtors fail to do so – e.g. if they miss the time limit for lodging a complaint at the ECtHR (Art. 35(1) ECHR) –, a further review in the state of enforcement would not be successful. Otherwise, procedural limits for human rights challenges would lose their preclusive effect.

Second, the ECtHR qualified *Pellegrini* as a case having 'capital importance' (para. 40) and *Dolenc* as a case of 'paramount importance to the defendant' (para.

60). While *Pellegrini* concerned a decision annulling a marriage, i.e. determining personal status, the foreign judgment in *Dolenc* caused serious financial and reputational damage to the applicant. However, it is questionable why a judgment for payment of a small amount of money should allow for a more limited review as Art. 1 ECHR does not differentiate between important and less important matters.

Finally, different standards would in any event apply to recognition and enforcement within the EU: In the case of recognition and enforcement under strict EU procedures (without the possibility of refusal), Member States benefit from the 'presumption of compliance' (*Sofia Povse and Doris Povse v. Austria*; *Avoti?š v. Latvia*). With this presumption, the ECtHR seeks to establish a balance between its own review powers vis-à-vis states and its respect for the activities of the EU. In cases with a margin of manoeuvre, in particular through the public policy clause, the ECtHR will not require the Member State of recognition or enforcement to 'duly satisfy' itself that the adjudication proceeding in the Member State of origin complied with Art. 6(1) ECHR. Rather, the ECtHR will assess only whether the application of the public policy clause has been 'clearly arbitrary' (*Royer v. Hungary*, para. 60).

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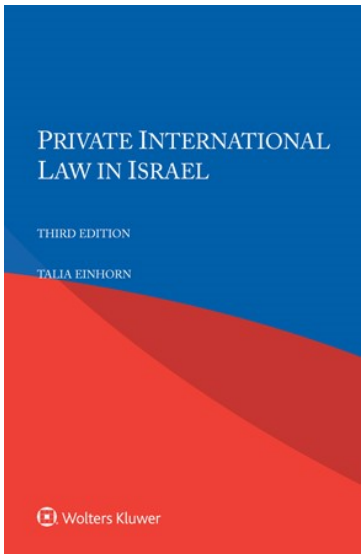

It is my pleasure to recommend to the global CoL community a real treat: Talia Einhorn's "Private International Law in Israel", an analysis of the country's private international law of no less than almost 900 pages, now in its third edition. This monograph, significantly enlarged and extended, grounds on the respective country report for the International Encyclopedia of Laws/Private International Law amongst a large series of country reports on which the "General Section" by Bea Verschraegen, the editor of the entire series, builds.

According to the Encyclopedia's structure for country reports, the text covers all conceivable aspects of a national private international law, from "General Principles (Choice of Law Techniques)" in Part I, including the sources of PIL, the technical and conceptual elements of choice of law rules ("determination of the applicable law") as well as "basic terms". Part II unfolds a fascinating tour d'horizon through the "Rules of Choice of Law" on persons, obligations, property law, intangible property rights, company law, corporate insolvency and personal bankruptcy, family law and succession law. Part III covers all matters of international civil procedure, including jurisdictional immunities, international jurisdiction, procedure in international litigation, recognition and enforcement and finally international arbitration.

The analyses offered seem to be extremely thorough and precise, including in-depth evaluations of key judgments, which enables readers to grasp quickly core concepts and issues beyond basic information and the mere black letter of the rules. For example, Chapter 4 of Part III on the recognition and enforcement of foreign judgments explains that Israel is a State Party to only one rather specific convention, the UN Convention on the Recovery Abroad of Maintenance 1956 (apparently operated without any implementing legislation, see para. 2434). Further, Israel entertains four bilateral treaties (with Austria, Germany, Spain and the UK) that provide generally for recognition and enforcement of judgments in civil and commercial matters. These four treaties, however, seem to differ substantially from each other and from the domestic statutory regime under the Israeli Foreign Judgments Enforcement Law ("FJEL"), see para. 2436. These differences are spelled out down to the level of decisions of first instance courts of

the respective foreign State Party, see e.g. footnote 1927 with reference to recent jurisprudence (of the German Federal Court of Justice and) of the local court of Wiesbaden on Article 8(2) of the bilateral treaty with Germany stipulating, according to these courts' interpretation, a far-reaching binding effect to the findings of the first court. This is contrasted with case law of the Israeli Supreme Court rejecting recognition and enforcement of a German judgment, due to the lack of a proper implementation of the Treaty in Israeli domestic law, see paras. 2437 et seq. – a state of things criticized by the author who also offers an alternative interpretation of the legal constellation that would have well allowed recognition and enforcement under the Treaty, see para. 2440. Additionally, interpretation of the domestic statutory regime in light of treaty obligations of the State of Israel, irrespective of a necessity of any specific implementation measures, is suggested, para. 2447. On the level of the domestic regime, the FJEL, in § 3 (1), prescribes as one out of a number of cumulative conditions for enforcement that "the judgment was given in a state, the courts of which were, according to its laws, competent to give it", see para. 2520. Indeed, "the first condition is puzzling", para. 2526, but by no means unique and does even appear in at least one international convention (see e.g. Matthias Weller, RdC 423 [2022], at para. 251, on Art. 14(1) of the CEMAC 2004 Agreement and on comparable national rules). At the same time, and indeed, controlling the jurisdiction of the first court according to its own law appears hardly justifiable, all the more, as there is no control under § 3 FJEL of the international jurisdiction according to the law of the requested court / State, except perhaps in extreme cases under the general public policy control in § 3 (3) FJEL. Additionally, on the level of domestic law, English common law seems to play a role, see paras. 2603, but the relation to the statutory regime seems to pose a question of normative hierarchy, see para. 2513, where Einhorn proposes that the avenue via common law should only be available as a residual means. In light of this admirably clear and precise assessment, one might wonder whether Israel should considering participating in the HCCH 2019 Judgments Convention and the reader would certainly be interested in hearing the author's learned view on this. The instrument is not listed in the table of international treaties dealt with in the text, see pp. 821 et seq., nor is the HCCH 2005 Choice of Court Agreements Convention. Of course, these instruments do not (yet?) form part of the Israeli legal system, but again, the author's position whether they should would be of interest.

As this very brief look into one small bit of Einhorn's monograph shows, this is the

very best you can expect from the outsider's and a PIL comparative perspective, probably as well from the insider's perspective if there is an interest in connecting the own with the other. Admirable!

Return of the anti-suit injunction: parallel European proceedings and English forum selection clauses

Written by Kiara van Hout. Kiara graduated from the Law Tripos at the University of Cambridge in 2021 (St John's College). She is currently an Associate to a Judge at the Supreme Court of Victoria.

In two recent English cases, the High Court has granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. This article compares the position on anti-suit injunctive relief under the Brussels I Regulation Recast and the English common law rules, and the operation of the latter in a post-Brexit landscape. It considers whether anti-suit injunctions to protect forum selection clauses will become the new norm, and suggests that there is Supreme Court authority militating against the grant of such injunctive relief as a matter of course. Finally, it speculates as to the European response to this new English practice. In particular, it questions whether the nascent European caselaw on anti anti-suit injunctions foreshadows novel forms of order designed to protect European proceedings.

Anti-suit injunctions under the Brussels I Regulation Recast

In proceedings commenced in the English courts before 1 January 2021, it is not possible to obtain an anti-suit injunction to restrain proceedings in other EU

Member States.

In Case 159/02 Turner v Grovit [2004] ECR I-3565, the Full Court of the European Court of Justice found that it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country. That is so even where that party is acting in bad faith in order to frustrate existing proceedings. The Court stated that the Brussels I Regulation enacted a compulsory system of jurisdiction based on mutual trust of Contracting States in one another's legal systems and judicial institutions:

> It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them… Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

In the subsequent Case 185/07 Allianz v West Tankers [2009] ECR I-00663, the question arose as to whether it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country on the basis that such proceedings would be contrary to an English arbitration agreement. In its decision, the Grand Chamber of the European Court of Justice found that notwithstanding that Article 1(2)(d) excludes arbitration from the scope of the Brussels I Regulation, an anti-suit injunction may have consequences which undermine the effectiveness of that regime. An anti-suit injunction operates to prevent the court of another Contracting State from exercising the jurisdiction conferred on it by the Brussels I Regulation, including its exclusive jurisdiction to determine the very applicability of that regime to the dispute. The decision in Allianz v West Tankers represents an extension of Turner v Grovit insofar as it prohibits the issue of anti-suit injunctions in support of English arbitration as well as jurisdiction agreements.

Anti-suit injunctions under the common law rules

The Brussels I Regulation Recast rules govern proceedings commenced in the English courts before 1 January 2021. The regime governing jurisdiction in

proceedings commenced after 1 January 2021 comprises the Hague Choice of Court Convention and, more pertinently for present purposes, the common law rules.

At common law, a more flexible approach to parallel proceedings is taken. Anti-suit injunctions may be deployed to ensure the dispute is heard in only one venue. Section 37 of the Senior Courts Act 1981 empowers courts to grant an anti-suit injunction where it appears just and convenient to do so. The ordinary justification for injunctive relief is protection of the private rights of the applicant by preventing a breach of contract. Where parties have agreed to a forum selection clause, either in the form of a jurisdiction or arbitration agreement, anti-suit injunctions may be available to prevent a breach of contract.

In two recent cases, the English courts have granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. These cases demonstrate clearly the change of position as compared with Allianz v West Tankers and Turner v Grovit, respectively.

Proceedings in violation of English arbitration agreement

In QBE Europe SA/NV v Generali España de Seguros Y Reaseguros [2022] EWHC 2062 (Comm), a yacht allegedly caused damage to an underwater power cable which resulted in hydrocarbon pollution. The claimant had issued a liability insurance policy to the owners in respect of the yacht. That policy contained a multi-faceted dispute resolution and choice of law clause, which provided *inter alia* that any dispute arising between the insurer and the assured was to be referred to arbitration in London.

The defendant had issued a property damage and civil liability insurance policy with the owners of the underwater power cable. The defendant brought a direct claim against the claimant in the Spanish courts under a Spanish statute. The claimant responded by issuing proceedings in England, and applied for an anti-suit injunction in respect of the Spanish proceedings brought by the defendant.

The court found that the claims advanced by the defendant in the Spanish proceedings were contractual in nature, as the Spanish statute provided the defendant with a right to directly enforce the contractual promise of indemnity created by the insurance contract. The matter therefore concerned a so-called ‘quasi-contractual’ anti-suit injunction application, as the defendant was not a

party to the contractual choice of jurisdiction in issue. Nevertheless, the right which the defendant purported to assert before the Spanish court arose from an obligation under a contract (the claimant's liability insurance policy) to which the arbitration agreement is ancillary, such that the obligation sued upon is said to be 'conditioned' by the arbitration agreement.

That the defendant was seeking to advance contractual claims without respecting the arbitration agreement ancillary to that contract provided grounds for granting an anti-suit injunction. As such, the position under English conflict of laws rules is that the court will ordinarily exercise its discretion to restrain proceedings brought in breach of an arbitration agreement unless the defendant can show strong reasons to refuse the relief (see Donohue v Armco Inc [2001] UKHL 64). The defendant advanced several arguments, which were dismissed as failing to amount to strong reasons against the grant of relief. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining Spanish proceedings brought by the defendants.

Proceedings in violation of exclusive English jurisdiction agreement

In Ebury Partners Belgium SA/NV v Technical Touch BV [2022] EWHC 2927 (Comm), the defendants were interested in receiving foreign exchange currency services from the claimant company. The claimant submitted that the parties had entered into two agreements in early 2021.

The first agreement was a relationship agreement entered into by the second defendant Mr Berthels as director of the first defendant Technical Touch BV. Mr Berthels completed an online application form for currency services, agreeing to the claimant's terms and conditions. These terms and conditions were available for download and accessible via hyperlink to a PDF document, though in the event Mr Berthels did not access the terms and conditions by either method. The terms and conditions included an exclusive jurisdiction agreement in favour of the English courts.

The second agreement was a personal guarantee and indemnity given by Mr Berthels in respect of the defendant company's obligations to the claimant. This guarantee also included an exclusive English jurisdiction agreement.

When a dispute arose in April 2021 as to the first defendant's failure to pay a margin call made by the claimant under the terms of the relationship agreement, the defendants initiated proceedings in Belgium seeking negative declaratory relief and challenging the validity of the two agreements under Belgian law. The claimant responded by issuing proceedings in England, and applied for an interim anti-suit injunction in respect of Belgian proceedings brought by the defendants. The claimant submitted that the Belgian proceedings were in breach of exclusive jurisdiction agreements in favour of the English court.

An issue arose as to whether there was a high degree of probability that the English jurisdiction agreement was incorporated into the relationship agreement, and which law governed the issue of incorporation. It is not within the scope of this article to consider this choice of law issue in depth. For present purposes, it is sufficient to note that the court decided that it was not unreasonable to apply English law to the issue of incorporation, and that on this basis, there was a high degree of probability that the clause was incorporated into the relationship agreement.

As in QBE Europe, the court approached the discretion to award injunctive relief on the basis that the court will ordinarily restrain proceedings brought in breach of a jurisdiction agreement unless the defendant can show strong reasons to refuse the relief. No sufficiently strong reasons were shown. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining the Belgian proceedings.

Anti-suit injunctions to protect forum selection clauses: the new norm?

It is plainly important to the status of London as a litigation hub in Europe that English forum selection clauses maintain their security and enforceability. The Brussels I Regulation Recast provided one means of managing parallel proceedings contrived to circumvent such clauses. Absent the framework provided by the Brussels I Regulation Recast; the English courts appear to be employing anti-suit injunctions as an alternative means of protecting English forum selection clauses. This ensures that litigants are still equipped to resist parallel proceedings brought to 'torpedo' English proceedings.

Proceedings in which there is an exclusive English forum selection clause represent among the most compelling circumstances in which the court might

grant an anti-suit injunction. In those circumstances, the court is likely to grant injunctive relief to protect the substantive contractual rights of the applicant. The presence of an exclusive forum selection clause is a powerful ground for relief which tends to overcome arguments as to comity and respect for foreign courts. As noted in the joint judgment of Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed) in Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38, citing Millett LJ in Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87, a foreign court is unlikely to be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.

Nevertheless, it is not to be assumed that injunctive relief will always be granted to enforce English forum selection clauses. As Lord Mance (with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Toulson agreed) stated in Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35, at paragraph [61]:

> In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum. But in the present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC.

It is too early to say whether anti-suit injunctions will be granted as a matter of course in circumstances such as those in QBE Europe and Ebury Partners. The judgment of Lord Mance indicates that there is a residual role for comity and respect for foreign courts even in cases of breach of a forum selection clause. The English court should not necessarily assume that its own view as to the validity, scope and interpretation of a forum selection clause is the only one. In some instances, it will be appropriate to allow a foreign court to come to its own conclusion, and consequently to refuse injunctive relief. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022)

117-124] It is clear, at least, that anti-suit injunctions have returned to the toolbox.

The European response: anti anti-suit injunctions?

It seems likely that English anti-suit injunctions will be met with resistance by European courts who find their proceedings obstructed by such orders. As a matter of theory, it is now possible for European courts to issue anti-suit injunctions to restrain English proceedings: the inapplicability of Allianz v West Tankers and Turner v Grovit vis-à-vis England cuts both ways. However continental European legal systems have traditionally regarded anti-suit injunctions as being contrary to international law on the basis that they operate extraterritorially and impinge on the sovereignty of the State whose legal proceedings are restrained.

It is more plausible that European courts would deploy anti anti-suit injunctions to unwind offending English orders. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 50] Assuming that the grant of anti-suit injunctions becomes a regular practice of the English courts in these circumstances, this could provide the impetus for legal developments in this direction across the Channel. In recent years both French and German courts have issued orders of this kind in the context of patent violation. In a December 2019 judgment, the Higher Regional Court of Munich issued an anti anti-suit injunction to prevent a German company from making an application in US proceedings for an anti-suit injunction (see Continental v Nokia, No. 6 U 5042/19). In a March 2020 judgment, the Court of Appeal of Paris issued an anti anti-suit injunction ordering various companies of the Lenovo and Motorola groups to withdraw an application for an anti-suit injunction in US proceedings (see IPCom v Lenovo, No. RG 19/21426).

However, neither decision endorses the general availability of anti anti-suit injunctions outside of the specific circumstances in which relief was sought in those cases. It remains to be seen whether European courts will be willing to utilise anti anti-suit injunctions in circumstances wherein parties have agreed to English forum selection clauses. At this stage, it can only be said that there is a possibility of an undesirable tussle of anti-suit injunctions and anti anti-suit injunctions. This would expose litigants to increased litigation costs, wasted time and trouble, uncertainty as to which court will ultimately hear their case, and the

spectre of coercive consequences in the event of non-compliance. Furthermore, a move towards relief of this kind would have a profound impact on the security of English jurisdiction and arbitration agreements. Developments in this area should be watched with interest.

The "Event Giving Rise to the Damage" under Art. 7 Rome II Regulation in CO2 Reduction Claims – A break through an empty Shell?

Written by Madeleine Petersen Weiner/Marc-Philippe Weller

In this article, we critically assess the question of where to locate the "event giving rise to the damage" under Art. 7 Rome II in CO_2 reduction claims. This controversial – but often overlooked – question has recently been given new grounds for discussion in the much discussed "*Milieudefensie et al. v. Shell*" case before the Dutch district court in The Hague. In this judgment, the court had to determine the law applicable to an NGO's climate reduction claim against *Royal Dutch Shell*. The court ruled that Dutch law was applicable as the law of the place where the damage occurred under Art. 4 (1) Rome II and the law of the event giving rise to the damage under Art. 7 Rome II as the place where the business decision was made, *i.e.*, at the Dutch headquarters. Since according to the district court both options – the place of the event where the damage occurred and the event giving rise to the damage – pointed to Dutch law, this question was ultimately not decisive.

However, we argue that it is worth taking a closer look at the question of where to locate the event giving rise to the damage for two reasons: First, in doing so, the court has departed from the practice of interpreting the event giving rise to

the damage under Art. 7 Rome II in jurisprudence and scholarship to date. Second, we propose another approach that we deem to be more appropriate regarding the general principles of proximity and legal certainty in choice of law.

1. *Shell* – the judgment that set the ball rolling (again)

The Dutch environmental NGO *Milieudefensie* and others, which had standing under Dutch law before national courts for the protection of environmental damage claims, made a claim against the *Shell* group's parent company based in the Netherlands with the aim of obliging *Shell* to reduce its CO_2 emissions. According to the plaintiffs, *Shell's* CO_2 emissions constituted an unlawful act. The Dutch district court agreed with this line of reasoning, assuming tortious responsibility of *Shell* for having breached its duty of care. The court construed the duty of care as an overall assessment of *Shell's*obligations by, among other things, international standards like the UN Guiding Principles of Human Rights Responsibilities of Businesses, the right to respect for the private and family life under Art. 8 ECHR of the residents of the Wadden region, *Shell's* control over the group's CO_2 emissions, and the state's and society's climate responsibility etc. This led the district court to ruling in favor of the plaintiffs and ordering *Shell* to reduce its greenhouse gas emissions by 45% compared to 2019.

In terms of the applicable law, the court ruled that Dutch law was applicable to the claim. The court based its choice of law analysis on Art. 7 Rome II as the relevant provision. Under Art. 7 Rome II, the plaintiff can choose to apply the law of the event giving rise to the damage rather than the law of the place where the damage occurred as per the general rule in Art. 4 (1) Rome II. The court started its analysis by stating that "climate change, whether dangerous or otherwise, due to CO_2 emissions constitutes environmental damage in the sense of Article 7 Rome II", thus accepting without further contemplation the substantive scope of application of Art. 7 Rome II.

The court went on to find that the adoption of the business policy, as asserted by the plaintiffs, was in fact "an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region". The court thereby declined *Shell's* argument that *Milieudefensie's* choice pointed to the law of the place where the actual CO_2 emissions occurred, which would lead to a

myriad of legal systems due to the many different locations of emitting plants operated by *Shell*.

2. The enigma that is "the event giving rise to the damage" to date

This line of reasoning marks a shift in the way "the event giving rise to the damage" in the sense of Art. 7 Rome II has been interpreted thus far. To date, there have been four main approaches: A broad approach, a narrower one, one that locates the event giving rise to the damage at the focal point of several places, and one that allows the plaintiff to choose between several laws of events which gave rise to the damage.

(1.) The Dutch district court's location of the event giving rise to the damage fits into the broad approach. Under this broad approach, the place where the business decision is made to adopt a policy can qualify as a relevant event giving rise to the damage. As a result, this place will usually be that of the effective headquarters of the group. On the one hand, this may lead to a high standard of environmental protection as prescribed by recital 25 of the Rome II Regulation, as was the case before the Dutch district court, which applied the general tort clause Art. 6:162 BW. On the other hand, this may go against the practice of identifying a *physical* action which *directly* leads to the damage in question, rather than a purely internal process, such as the adoption of a business policy.

(2.) Pursuant to a narrower approach, the place where the direct cause of the violation of the legal interest was set shall be the event giving rise to the damage. In the case of CO_2 reduction claims, like *Milieudefensie et al. v. Shell*, that place would be located (only) at the location of the emitting plants. This approach – while dogmatically stringent – may make it harder to determine responsibility in climate actions as it cannot necessarily be determined which plant led to the environmental damage, but rather the emission as a whole results in air pollution.

(3.) Therefore, some scholars are in favor of a focal point approach, according to which the event giving rise to the damage would be located at the place which led to the damage in the most predominant way by choosing one focal point out of several events that may have given rise to the damage. This approach is in line with the prevailing opinion regarding jurisdiction in international environmental damage claims under Art. 7 Nr. 2 Brussels I-*bis* Regulation. In practice, however, it may sometimes prove difficult to identify one focal point out of several locations

of emitting plants.

(4.) Lastly, one could permit the victim to choose between the laws of several places where the events giving rise to the damage took place. However, if the victim were given the option of choosing a law, for example, of a place that was only loosely connected to the emissions and resulting damages, Art. 7 Rome II may lead to significantly less predictability.

3. Four-step-test: A possible way forward?

Bearing in mind these legal considerations, we propose the following interpretation of the event giving rise to the damage under Art. 7 Rome II:

First, as a starting point, the laws of the emitting plants which *directly* lead to the damage should be considered. However, in order to adequately mirror the legal and the factual situations, the laws of the emitting plants should only be given effect insofar as they are responsible for the total damage.

If there are several emitting plants, some of which are more responsible for greenhouse gas emissions than others, these laws should only be invoked under Art. 7 Rome II for the *portion of their responsibility regarding the entire claim*. This leads to a *mosaic approach* as adopted by the CJEU in terms of jurisdiction for claims of personality rights. This would give an exact picture of contributions to the environmental damage in question and would be reflected in the applicable law.

Second, in order not to give effect to a myriad of legal systems, this mosaic approach should be slightly moderated in the sense that courts are given the opportunity to make estimations of proportions of liability in order not to impose rigid calculation methods. For example, if a company operates emitting plants all over the world, the court should be able to roughly define the proportions of each plant's contribution, so as to prevent potentially a hundred legal systems from coming into play to account for a percentile of the total emissions.

Third, as a fall-back mechanism, should the court not be able to accurately determine each plant's own percentage of responsibility for the total climate output, the court should identify the central place of action in terms of the company's environmental tort responsibility. This will usually be at the location of the emitting plant which emits the most CO_2 for the longest period of time, and

which has the most direct impact on the environmental damage resulting from climate change as proclaimed in the statement of claim.

Fourth, only as a *last resort*, should it not be possible to calculate the contributions to the pollution of each emitting plant, and to identify one central place of action out of several emitting plants, the event giving rise to the damage under Art. 7 Rome II should be located at the place where the *business decisions* are taken.

This proposal is discussed in further detail in the upcoming Volume 24 of the Yearbook of Private International Law.

A few developments on the modernisation of the service of judicial and extrajudicial documents and the taking of evidence in the European Union

Written by Mayela Celis

This year has been marked by the high number of EU instruments that have been adopted (and entered into force) or that have started to apply in the European Union, which are directly or indirectly related to the modernisation of the service of judicial and extrajudicial documents and the taking of evidence in civil or commercial matters.

These developments include three (full-fledged) *regulations* and two *Commission implementing regulations*. In addition, two *Commission implementing decisions* were adopted on 20 December 2022 concerning a related topic (*i.e.* e-CODEX). We have previously reported on this here and here. While the great number of EU

instruments in this field and their interrelationship can be daunting to a non-European, they seem to provide a smooth and flexible way forward for EU Member States.

Undoubtedly, such legislative efforts attest to the commitment of EU institutions to modernise this area of Private International Law, in particular by making the electronic transmission of requests for service and the taking of evidence, as well as other communications, a reality at least from 2025 onwards (for more information, see below).

In my view, this goes beyond anything that currently exists among States (at any level) regarding judicial cooperation as the electronic transmission of requests for both service and the taking of evidence is usually done in a piecemeal approach or lacks the necessary security safeguards, including data protection. Having said that, and in the context of cross-border recovery of maintenance obligations, there exists a state-of-the-art electronic case management and secure communication system that is coordinated by the Permanent Bureau of the HCCH: iSupport.

On 1 July 2022 **two recast Regulations** started to apply in the European Union:

1. Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast). See, in particular, Articles 5 (means of communication), 6, 19 (electronic service), 25, 27 and 28;
2. Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast). See, in particular, Articles 7 (transmission), 8, 12(4), 19 (direct taking of evidence), 20 (videoconferencing), 25, 27 and 28.

These two regulations modernise this field in **two distinctive ways**.

First and foremost these regulations contain provisions dealing with the means of communication to be used by transmitting agencies, receiving agencies, courts and central bodies through a **secure and reliable decentralised IT system**. This primarily intends to replace the cumbersome paper transmission of requests and other documents and in this way, speed up proceedings.

For those of you who are wondering what a "decentralised IT system" is, please note that it has been defined in both recast versions as a "network of national IT systems and interoperable access points, operating under the individual responsibility and management of each Member State, that enables the secure and reliable cross-border exchange of information between national IT systems".

Secondly, these regulations provide for the **actual service by electronic means and the taking of evidence by videoconferencing** or other distance communications technology. The Service Regulation has included a provision regarding electronic service of documents by allowing this to take place by means of qualified electronic registered delivery services (see EU Regulation (EU) 910/2014) or by email, both requiring (thankfully and rightfully, I must note) the prior express consent of the addressee; on the other hand, the Evidence Regulation provides for the direct taking of evidence by videoconferencing or other distance communication technology.

With respect to the implementation of the decentralised IT system, **two Commission Implementing Regulations** were adopted and entered into force in 2022:

1. Commission Implementing Regulation (EU) 2022/423 of 14 March 2022 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1784 of the European Parliament and of the Council;
2. Commission Implementing Regulation (EU) 2022/422 of 14 March 2022 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1783 of the European Parliament and of the Council.

It should be noted that the decentralised IT system as an *obligatory* means of communication to be used for the transmission and receipt of requests, forms and other communication will start applying from **1 May 2025** (the first day of the month following the period of three years after the date of entry into force of the *Commission Implementing Regulations* above-mentioned).

Interestingly, Recital 3 of the *Commission Implementing Regulations* indicates

that "[t]he decentralised IT system should be comprised of the back-end systems of Member States and interoperable access points, through which they are interconnected. **The access points of the decentralised IT system *should* be based on e-CODEX**." Designating e-CODEX as the system on which access points *should* be based is in my view a breakthrough, given the apparent ambivalent feelings of some regarding such system.

The Annexes of these *Commission Implementing Regulations* provide more information as to the specificities of the system and indicate that:

- *"The **Service of Documents (SoD)** exchange system is an e-CODEX based decentralised IT system that can carry out exchanges of documents and data related to the service of documents between the different Member States in accordance with Regulation (EU) 2020/1784. The decentralised nature of the IT system would enable data exchanges exclusively between one Member State and another, without any of the Union institutions being involved in those exchanges."*

- *"The **Taking of Evidence (ToE)** exchange system is an e-CODEX based decentralised IT system that can carry out exchanges of documents and messages related to the taking of evidence between the different Member States in accordance with Regulation (EU) 2020/1783. The decentralised nature of the IT system would enable data exchanges exclusively between one Member State and another, without any of the Union institutions being involved in those exchanges."*

This takes us to the new EU instruments relating to e-CODEX.

As a matter of fact, a **brand-new Regulation on e-CODEX** has entered into force this year:

- Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726

(Text with EEA relevance).

This regulation explains **e-CODEX** in detail and specifies that the *European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice* (**eu-LISA**) will take over the administration of e-CODEX.

In particular, I would like to highlight Recitals 7 and 8 of the Regulation (EU) 2022/850, which explain what e-CODEX is and which read as follows:

> *"(7) The e-CODEX system is a tool specifically designed to facilitate the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters. In the context of increased digitalisation of proceedings in civil and criminal matters, the aim of the e-CODEX system is to improve the efficiency of cross-border communication between competent authorities and to facilitate citizens' and businesses' access to justice.* ***Until the handover of the e-CODEX system to the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA)****, established by Regulation (EU) 2018/1726 of the European Parliament and of the Council, the e-CODEX system will be managed by a consortium of Member States and organisations with funding from Union programmes (the 'entity managing the e-CODEX system')."*
>
> *"(8) The e-CODEX system provides an interoperable solution for the justice sector to connect the IT systems of the competent national authorities, such as the judiciary, or other organisations. The e-CODEX system should therefore be viewed as the preferred solution for an interoperable, secure and decentralised communication network between national IT systems in the area of judicial cooperation in civil and criminal matters."*

As previously indicated, two **Commission Implementing Decisions** have been adopted this week:

- Commission implementing decision (EU) …/… of 20.12.2022 on the technical specifications and standards for the e-CODEX system, including for security and methods for integrity and authenticity verification;
- Commission implementing decision (EU) …/… of 20.12.2022 on the specific arrangements for the handover and takeover process of the e-

CODEX system.

The Annexes of the *Commission Implementing Decisions* are particularly interesting as they provide all the specificities of the system and its handover.

All in all this looks very promising to the long-awaited modernisation of this field in the European Union.

Arbitration-Favored Policy Has its Boundary: Case Study and Takeaways for China

(This post is written by Chen Zhi, a Ph.D. candidate at the University of Macau, a trainee lawyer in Mainland China)

The arbitration-favored policy has been adopted by many jurisdictions across the world in recent years, as the support of arbitration by local judiciaries has been viewed as an important standard for gauging the business environment of a jurisdiction. While the decision of Morgan v. Sundance Inc. rendered in May 2022 by the Supreme Court of the USA illustrates that arbitration-favored policy has its boundary, this seems a trend emerging from the laws and legal trends in other jurisdictions.

Summary of the Fact

This case concerned a class action initiated by a former employee, Morgan against Sundance Incorporate (the owner of a Taco Bell franchise restaurant, hereinafter "Company") regarding the arrear of overtime payment in the context of Federal law of the USA.

Albeit there was an arbitration agreement incorporated in the contract between

Morgan and the Company, the Company failed to raise any motion about the arbitration agreement at the outset and defended as if the arbitration agreement did not exist.

Nearly 8 months after the commencement of the litigation, the company raised jurisdictional objection by invoking the omitted arbitration agreement and filed the motion to compel arbitration under the 1925 Federal Arbitration Act (hereinafter "FAA"). Morgan argued that the Company had waived the right to arbitrate. By measuring the case against the standard for the waiver as set out in the precedent of the Court of Appeal of Eighth Circuit, the court of first instance ruled in favor of Morgan and rejected to refer the case to arbitration.

Nonetheless, the Court of Appeal of the Eighth Circuit had adopted the requirement for waiver based on the "federal policy favoring arbitration". Under the new requirement, Morgan shall furnish the proof showing prejudice incurred by the delay, and overturns the trial court's decision thereby.[i] The case was subsequently appealed before the Supreme Court of the USA.

Supreme Court's Decision

It is not surprising that lower courts in the USA have been consistently adopting specific rules for arbitration in the name of the arbitration-favored policy, which is contradictory to the proposition of the Supreme Court.[ii]

In the Morgan case, the Supreme Court holds that the Appeal Court of the Eighth Circuit has erred in inventing a novel rule tailored for the arbitration agreement, and reiterates that the arbitration agreement shall be placed on the same footing as other contracts. In the unanimous opinion delivered by Justice Kagan, the Supreme Court explicitly states that:

"*Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation.*" [iii]

In this regard, the arbitration agreement shall not be distinguished from other types of contracts in the context of Federal Law, under which the prejudice will generally not be asked about in the assessment of waiver. By Stripping off the requirement of prejudice, the Supreme Court remands the case to the Court of Eighth Circuit for reconsideration.

The Supreme Court does not delve into the jurisprudence behind arbitration-favored policy but simply states that the purpose of this policy is to make arbitration agreements as enforceable as other contracts, but not more. [iv]

The Main Concern of Morgan v. Sundance Inc.

In the context of American law, the grounds for equal treatment emerges from Section 2 of the 1925 Federal Arbitration Act, which stipulates that an arbitration agreement is valid and enforceable unless the grounds for revocation of any contract as set out in law or equity were found. Against this backdrop and in collaboration with the drafting history of the enactment of the Federal Arbitration Act, the Supreme Court has set out the basic principle that the arbitration agreement shall be placed on the same footing as other contracts, by which the arbitration-favored policy does entitle a higher protecting standard for arbitration agreement, as stated in Granite Rock Co. v. Teamsters:

"[…]the *'policy' is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.*"[v]

Through the decision in the Morgan case, the equal treatment principle is recapped and stressed, by which the arbitration-favored policy creates no new rules tailored for waiver of arbitration clauses under the legal framework of the USA.

The Complexity of Arbitration-favored Policy and the Boundary

Recent years have witnessed state courts' preference to embrace the notion of "arbitration-favored policy" or "pro-arbitration policy". Nonetheless, the arbitration-favored policy is a sophisticated and vague concept without an agreed definition worldwide. In principle, this policy flows from the well-recognized characteristics of international commercial arbitration such as autonomy, expediency, efficiency, and enforceability across the world. As per the analysis of Prof. Bremann, there are at least 12 criteria for gauging the arbitration-friendliness policy.[vi]

Likewise, Justice Mimmie Chan at the Court of the Instance of Hong Kong SAR fortifies 10 pro-arbitration principles employed by courts in Hong Kong towards enforcement of arbitration awards in the case of KB v S and Others, which sets up

relatively high thresholds for parties to challenge arbitral awards in the enforcement stage, as the Chan J. highlights: (1) the courts' reluctancy to looking to the merits of the case, (2) challenger's duty to make a prompt objection against any alleged irregularities under the bona fide principle and, (3) the court's residual discretion to enforce the award albeit the statutory grounds of rejection has been made out.[vii] Similar principles can also be extracted from decisions by courts in other jurisdictions like Singapore. [viii]

In the author's view, these considerations for arbitration-favored policy can be distilled as the following four limbs:

(1) adherence to the parties' autonomy to the largest extent,

(2) promoting the fairness and efficiency of commercial arbitration,

(3) minimizing the judicial interference throughout the arbitration proceedings, including the stages before and after the issuance of the arbitral award, among others, refraining from conducting the review on the merits issue of the case unless in exceptional circumstances and nullifying arbitral award based on trivial errors,

(4) providing legal assistance to arbitration proceedings for the promotion of fairness, expediency and efficiency (i.e., auxiliary proceedings for the enforcement of arbitration agreement and award, issuance, and execution of interim reliefs, taking of evidences).

As to the field of arbitral jurisdiction, the arbitration-favored policy always takes the form of the validation principle, where at least four scenarios are present in legal practice:

First, when confronted with the issue of the law governing arbitration agreement, and more than one laws are relevant, courts are required to apply laws that are in favor of the effectiveness of the arbitration agreement, either by virtue of statutory regulations[ix] or provided as one of the considerations in judicial practice.[x]

Second, courts are declined to intervene in the dispute over arbitral jurisdiction before the decision of the arbitration tribunal is rendered, as a result of the negative effect of the *competence – competence* principle to ensure the integrity

and efficiency of arbitration proceedings.[xi]

Third, the invalidity of the matrix contract does not necessarily negate the arbitration agreement incorporated therein as per the widely-accepted separability doctrine.[xii]

Fourth, the courts will interpret in a manner that is likely to give effect to the arbitration agreement, particularly where the arbitration agreement is pathological in form or substance.[xiii]

At least one of the aforesaid scenarios emerges from legislation or judicial practices in jurisdictions featuring or advocating arbitration-favored policy, in which courts are always inclined to refer the case to arbitration. Nonetheless, the arbitration-favored policy does not mean that the court will give effect to the arbitration agreement unconditionally. The aforesaid Morgan case demonstrates that arbitration-favored policy has boundaries in the context of American law, taking the form of the equal treatment principle.

The boundary of arbitration-favored policy also emerges from laws and legal practices in other jurisdictions, as representative examples, the BNA case by the Court of Appeal of Singapore, the Kabab-Ji case by the Supreme Court of the UK, and the Uber case by the Supreme Court of Canada will be further illustrated below:

BNA Case

In this case, at issue before Singaporean courts was the law governing arbitration agreement, where the parties had designated PRC law as the governing law of the contract and expressly set out the term "arbitration in Shanghai" in the arbitration clause. The plaintiff objected to arbitral jurisdiction after the commencement of arbitration proceedings before the tribunal and subsequently resorted to courts in Singapore for recourse against the tribunal's decision ruling that the arbitration agreement was valid under the laws of Singapore.

The plaintiff contended that the laws of China shall be applied, while the respondent argued that the arbitration clause in dispute was alleged to be invalid under PRC law, and submitted that the Singaporean court shall apply laws that are more in favor of the effectiveness of the arbitration agreement under validation principle hence the governing law shall be the laws of Singapore. The

Singapore High Court applied Singaporean law and the dispute was filed before the Court of Appeal of Singapore.

The Court of Appeal opines that the validation principle can only be taken into consideration when there are other laws that can compete with PRC law to be the governing law of arbitration clause,[xiv] as all factors point to China as the proper law and Singapore was not the seat in the context of Article 10 of International Arbitration Act, this case shall be given to Chinese courts to decide.[xv] Therefore, the Appeal Court overturned the controversial decision by the Singapore High Court which determined Singapore as the seat by twisting the meaning of arbitral seat.[xvi]

Per the decision in the BNA case, the validation principle is only applicable where some prerequisites are met. While parties expressly reach an intention likely to negate the arbitration agreement without other competing factors, the court shall not rewrite the contract to nakedly validate the arbitration agreement.

Kabab-Ji Case

In this case, a Paris seated tribunal decided to extend the arbitration agreement to Kout, the parent company to the signatory which had been actively engaging in performance and re-negotiation of the contract in dispute, while not being a signatory to the contract. The tribunal's decision was under the scrutiny of judiciaries in the UK at the enforcement stage.

Unlike the scenario in the BNA case, there were two competing factors regarding the determination of the proper law of arbitration agreement in Kabab-Ji: laws of England as the designated laws governing the main contract and the laws of France as the *lex arbitri* fixed in the contract. While the French laws turn out to be more in favor of the effectiveness of the arbitration clause, the Supreme Court of the UK rejected enforcing the arbitral award for lack of valid arbitration agreement via the application of English law as the proper law of arbitration clause. The court stresses in the decision that the validation principle does not apply to issues concerning the formation of a contract, and hence this principle was not relevant in deciding the issue of non-signatory.[xvii] And departing from the validation principle as set out in its precedent.

Per the decision of the Supreme Court of the UK, the extension of the arbitration agreement to non-signatory pertains to the formation of an arbitration agreement

rather than the interpretation of the contract, which is contrary to the approach employed by French courts over the same case scenario. The decision in the Kabab-Ji case has given rise to controversies, as a commentator pointed out, the English court may be criticized for stepping over the line.[xviii] Nonetheless, the decision of Kabab-Ji is to some extent in line with the stringent attitude toward the non-signatory issue of arbitration agreement that judiciaries in England have consistently taken.[xix]

Uber Case

The dispute arose out of the putative employment relationship between Heller, a delivery driver, and UberEATS, a Toronto-based subsidiary of Uber. During the litigation, UberEATS filed a motion to compel arbitration by invoking the arbitration clause embedded in the boilerplate service agreement between Uber and all drivers who sign in for service of Uber.

The Supreme Court of Canada finds the arbitration clause unconscionable based on two main findings: (1) inequality of bargaining power between Heller and Uber, (2) improvidence produced by the underlying arbitration clause. The court stresses the fact that according to the arbitration clause, arbitration proceedings shall be administered under the Rules of Arbitration of the International Chamber of Commerce, which requires US$14,500 in up-front administrative fees for the commencement of the putative arbitration proceedings. Also, Amsterdam shall be the place of arbitration per the arbitration clause, hence further fees for traveling and accommodation will be incurred thereby. The court ruled that the arbitration clause was invalid and rejected to compel arbitration.[xx]

The judgment also discusses the arbitration-favored policy contention, stating that arbitration is respected based on it being a cost-effective and efficient method of resolving disputes.[xxi] By this logic, arbitration clauses creating a hurdle toward cost-effective and efficient resolution of disputes will not be safeguarded albeit the arbitration-favored policy is applicable.

The Uber case illustrates that different values may at odds with each other in the application of arbitration-favored policy, hence trade-offs will be presented before decision-makers. As discussed by Prof. Bremann, one given policy or practice may be pro-arbitration in some respects while anti-arbitration in other respects, further, the implication of arbitration-favored policy may also be detrimental to

policies extrinsic to arbitration.[xxii] In the Uber case, two kinds of conflict are present simultaneously, first, upholding the effectiveness of the underlying arbitration clause may be detrimental to the policy for the protection of those who are vulnerable(trade-off between arbitration-friendly policy and extrinsic policies), second the enforcement of alleged parties' autonomy taking the form of "arbitration administered by ICC in Netherland" is likely to be detrimental to the expediency and efficiency nature of arbitration(trade-off between arbitration-favored policy and extrinsic).

The answer to the said trade-offs remains unresolved, as there is no agreed standard by far, and courts in different jurisdictions can be divergent on this issue. As a prime example, while there is a discrepancy regarding the number of tribunal members between the rules of the arbitration institution and the arbitration clause, where the former provides a mandatory sole-arbitrator regulation for consideration of expedition and efficiency, the latter had designated a three-member-tribunal, the court of Singapore upheld the preemption of arbitration rules over the arbitration clause,[xxiii] while Chinese court once ruled in favor of the arbitration clause and rejected to enforce the award rendered by the sole arbitrator.[xxiv]

Takeaways for China

The arbitration-favored policy is a complicated notion that includes a myriad of separate and to some extent, conflicting considerations. In a general sense, courts embracing arbitration-favored policy are reluctant to negate the arbitration agreement. However, there are some exceptional instances where:

(1) the vindication of the arbitration agreement will produce prejudice to other values that are extrinsic to arbitration, such as the rule of law principle, the consistency of legal practice, policies for the protection of vulnerable parties, etc., like the situations in Morgan case and Uber case, and,

(2) the interpretation or implementation of the arbitration clause will undermine other considerations among the arbitration-favored policy, for instance, while the enforcement of the arbitration clause can be low-efficient and costly, or the validation principle may be contrary to the parties' true intention, like the situations in BNA case and Kabab-Ji case.

Therefore, every jurisdiction shall tailor the arbitration-favored policy for its legal

system and meet its own needs, instead of employing a dogmatic understanding of the policy.

Like other rising economic bodies like India,[xxv] China is also moving toward a jurisdiction that is "arbitration-favored" under the Belt and Road imitative and the blueprint for the construction of the Guangdong- Hong Kong- Macao Greater Bay Area. Against this backdrop, judiciaries are taking more liberal approaches that are tended to give effect to arbitration agreements that are likely to be considered invalid previously, particularly in disputes regarding the choice of law issue and the substance of the arbitration agreement. [xxvi]As to the formal requirement of arbitration agreement, the Supreme People's Court also made a great leap in dispensing with the stringent approach by acknowledging the effectiveness of an arbitration clause as set out in a draft contract not being signed by neither party, based on the findings that the parties have discussed and finalized the arbitration clause in the draft of the contract during the negotiating phase.[xxvii]

Moreover, the Draft Revised Arbitration Law released in late July 2021 provides more liberal approaches for the validity of arbitration agreements, which includes:

(1) the recognition of *ad hoc* arbitration agreement in foreign-related disputes,

(2) the relaxing requirement for a valid arbitration agreement, where parties' failure to designate a sole arbitration institution does not negate the arbitration agreement,

(3) the promulgation of extension of the arbitration agreement to non-signatories in some types of disputes, and

(4) the adoption of a new framework of *competence-competence* principle that is more in line with the international framework as set out in UNCITRAL Model Law.[xxviii]

These attempts have been heatedly debated and are by and large arbitration-favored and laudable by lifting the unreasonable hurdles for the autonomy, expediency, and efficiency of arbitration. Nonetheless, recognizing the validity of arbitration agreement is not the sole consideration, lawmakers, judiciaries, and other participants in commercial arbitration of Mainland China will confront

trade-offs during the law-making and implementation of the rules under the arbitration-favored policy. As a corollary, an arbitration agreement can be safeguarded to the extent it is in line with the basic principles that are placed at a higher level.

[i] Morgan v. Sundance, Inc. 596 U. S. ____ (2022) (Supreme Court of USA, decided on 23 May 2022).

[ii] Amicus brief of Law Professors in Morgan v. Sundance, Inc., 596 U.S. ___ (2022), pp. 11-12, available at https://www.supremecourt.gov/DocketPDF/21/21-328/207550/20220106140817376_Morgan%20amicus%20brief%20final.pdf last visited on 21 November 2022.

[iii] Morgan v. Sundance, Inc. 596 U. S. ____ (2022) (Supreme Court of USA, decided on 23 May 2022).

[iv] *Ibid.*

[v] Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U. S. 487(1989), as quoted in Granite Rock Co. v. Teamsters, 561 U. S. 287, 302 (2010) (Supreme Court of USA, decided on 24 June 2010).

5 These considerations are: (1) to what extent does it render international arbitration economical in term of time or cost? (2) to what extent does it ensure consent to arbitrate and enhance the scope for party autonomy? (3) to what extent does it effectuate the likely intentions or expectations of the parties? (4) to what extent is it consistent with the *lex arbitri* or the institutional rules chosen by the parties? (5) to what extent does it, consistent with party intent, enable the tribunal to exercise sound discretion and flexibility on matters of arbitral procedure? (6) to what extent does it ensure the independence and impartiality of arbitrators? (7) to what extent does it protect a party's right to be heard? (8) to what extent does it promote accuracy in the administration of justice? (9) to what extent does it minimize, to the fullest extent reasonably possible, the intervention of national courts in the arbitral process? (10) to what extent does it help ensure that the resulting award will be an effective one? (11) to what extent does it enable the resulting award to withstand challenges in an annulment or enforcement action? (12) to what extent does it expand the categories of legal claims treated as arbitrable? See George A. Bermann, *What Does it Mean to be 'Pro-Arbitration'?,* Arbitration International, Volume 34 (2018), p. 343.

[vii] KB v S. and Others, [2015] HKCFI 1787, para.1(Hong Kong Court of First Instance, decided on 15 September 2015).

[viii] China Machine New Energy Corporation v Jaguar Energy Guatemala LLC, [2020] SGCA 12, para. 87(The threshold for the finding of breach of natural breach for the purpose of vacating arbitral award is a high one and can only be crossed in exceptional cases.) (Appeal Court of Singapore, decided on 28 February 2020).

[ix] See Article 178 (2) of Private International Law of Switzerland ("As regards its substance, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, or to the law applicable to the dispute, in particular the law governing the main contract, or to Swiss law.").

[x] Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb, [2020] UKSC 38, para. 97 (Where the clause in question is an arbitration clause, because of its severable character its putative invalidity may support an inference that it was intended to be governed by a different law from the other provisions of the contract […]) (Supreme Court of the UK, decided on 9 October 2020). See also BCY v. BCZ, [2016] SGHC 249, para. 74 ("[…] governing law of the main contract should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would negate the arbitration agreement even though the parties have themselves evinced a clear intention to be bound to arbitrate their disputes.") (Singapore High Court, decided on 9 November 2016).

[xi]Article 16(1) of UNCITRAL Model Law on International Commercial Arbitration("[…] an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.")

[xii] Tomolugen Holdings Ltd and Another v. Silica Investors Ltd and other appeals, [2015] SGCA, para. 60 (Singapore court should adopt a *prima facie* standard of review when hearing a stay application) (Court of Appeal of Singapore, decided on 26 October 2015). Fiona Trust & Holding Corp. v. Privalov [2007] UKHL 40 para. 13, (Arbitration clause shall be construed in accordance with the presumption that parties are likely to have intended any dispute arising out of the underlying contract to be decided by the same body.) (House of Lords of the UK, decided on 17 October 2007).

[xiii] "[W]here the parties have evinced a clear intention to settle any dispute by

arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars…" Insigma Technology Co Ltd v Alstom Technology Ltd [2009] 3 SLR(R) 936, para. 31, as quoted in HKL Group Co Ltd v Rizq International Holdings Pte Ltd, [2013] SGHCR 5, para. 13 (Singapore High Court, decided on 19 February 2013). See also ?????? and ??? v. Ace Lead Profits Ltd and another, [2022] HKCFI 3342? para. 53 (Arbitration clause is not nullified by the non-existence of putative arbitration institution) (Hong Kong Court of First Instance, decided on 4 November 2022).

[xiv] BNA v. BNB and another, [2019] SGCA 84, para. 95. (Court of Appeal of Singapore, decided on 27 December 2019).

[xv] *Ibid*., at para. 102.

[xvi] See BNA v. BNB, [2019] SGHC 142, para. 101(agreement referring to Shanghai instead of PRC is not a reference to seat) (Singapore High Court, decided on1 July 2019). Ironically, contrary to the plaintiff's assertion and the Singapore court's wariness, the validity arbitration clause at issue was subsequently confirmed by the Chinese court following the conclusion of judicial review proceedings before the Singapore Court of Appeal, as set out in Daesung Industrial Gases Co Ltd v. Praxair (China) Investment Co Ltd (2020) Hu 01 Min Te No.83 (Shanghai No.1 Intermediate People's Court, decided on 29 June 2020). See also José-Antonio Maurellet, Helen Shi, et al., *PRC Court Confirms Validity of "SIAC-Shanghai" Clause*, available at https://dvc.hk/en/news/cases-detail/prc-court-confirms-validity-of-siac-shanghai-clause/ last visited on 21 November 2022.

[xvii] Kabab-Ji SAL v. Kout Food Group, [2021] UKSC 48, para. 51 ([Validation principle] is not a principle relating to the formation of contracts which can be invoked to create an agreement which would not otherwise exist.) (Supreme Court of UK, decided on 27 October 2021).

[xviii] Andrew Tweeddale, *The Validation Principle and Arbitration Agreements: Difficult Cases Make Bad Law*, The International Journal of Arbitration, Mediation and Dispute Management, Volume 88, Issue 2 (2022), p. 248.

[xix] The restrictive approach emerges from the Peterson Farms v. CM Farming Ltd., [2004] EWHC 121, as cited in Andrea Marco Steingruber, Consent in

International Arbitration (UK: Oxford University Press, 2012), p. 156.

[xx] Uber Technologies Inc. v. Heller, 2020 SCC 16, paras. 93 – 94(Federal Supreme Court of Canada, decided on 26 June, 2020).

[xxi] *Ibid.,* at para. 97.

[xxii] George A. Bermann, *What Does it Mean to be 'Pro-Arbitration'?,* Arbitration International, Volume 34 (2018), pp. 343-353.

[xxiii] AQZ v. ARA, [2015] SGHC 49 (2015) (Singapore High Court, decided on 13 February 2015).

[xxiv] Noble Resources International Pte Ltd v. Good Credit International Trade Co Ltd, (2016) Hu 01 Xie Wai Ren No. 1 (Shanghai No.1 Intermediate People's Court, decided on 11 August 2017).

[xxv] Like India, see Aditya Singh Chauhan and Aryan Yashpal, *Change to Improve, Not to Unhinge—A Critique of the Indian Approach to International Arbitration*, Indian Journal of Arbitration Law, Volume X, Issue 2 (2021), pp. 1-11.

[xxvi] See Helen Shi, *Have Chinese Courts Adopted an Arbitration- Friendly Approach Towards International Arbitration?*, in Neil Kaplan, Michael Pryles, et al. (eds), International Arbitration: When East Meets West: Liber Amicorum Michael Moser(Netherlands: Kluwer Law International, 2020), pp. 235-244.

[xxvii] Luck Treat Limited v. Zhongyuancheng Co, Ltd, 2019 Zui Gao Fa Min Te No.1(Supreme People's Court of China, decided on 18 September 2019).

[xxviii] Terence Wong et al, *China: Draft Revised Arbitration Law of PRC Published for Comments*, available at https://www.mondaq.com/china/arbitration-dispute-resolution/1104356/draft-revised-arbitration-law-of-prc-published-for-comments- last visited on 4 December 2022. See also Weina Ye et al, *Key Changes under Revised Draft of PRC Arbitration Law,* available at https://hsfnotes.com/arbitration/2021/08/11/key-changes-under-revised-draft-of-pcr-arbitration-law/, last visited on 4 December 2022.