Appeal on Merits in Commercial Arbitration?–An Overview

(authored by Chen Zhi, Wangjing & GH Law Firm, PhD Candidate at University of Macau)

Finality of tribunal's decision without any challenging system on merits issues has been well established and viewed as one of the most cited benefits of arbitration, which can be found in most influential legal documents such as 1958 New York Convention and UNCIITRAL Model Law on International Commercial Arbitration (issued in 1985, as revised in 2006).

Nevertheless, among all salient features of arbitration, finality of award is probably the most controversial one. In the investment arbitration, the question has been canvassed at length and has been serving as one of the central concerns in the ongoing reform of investment arbitration.[i] While in commercial arbitration, some practitioners and commentators are also making effort to advocate an appeal system. For example, a report by Singapore Academy of Law Reform Committee in February of 2020 strongly recommended introduction of appeals on question of law into international arbitration seated in Singapore,[ii] and has ignited a debate in this regard.

In legal practice, there are some legislations or arbitration institutions provide approaches allowing for the parties to apply for reconsideration of the award, which can be summarized into 3 categories: 1. The appellate mechanism conducted by state courts; 2. Appellate mechanism within the arbitration proceedings and; 3. Alternative to appellate mechanism by arbitration society.

This article will start by giving a brief introduction about the forgoing systems, and comment on the legitimacy and necessity of appellate mechanism in commercial arbitration.

1.Appealing mechanism before the court

1.1 Appellate Mechanism in England

When it comes to appellate mechanism conducted by state courts, the appeal

mechanism for question of law as set out in section 69 of 1996 English Arbitration Act(EAA) is one of the most cited exceptions. It is undeniable that Section 69 of EAA constitutes an appellate mechanism in respect of arbitration conducted by judicial institutions. Nevertheless, some clarifications shall be made in this regard:

(1) The appellate mechanism serves as a default rule rather than a mandatory one, which allows parties to contract out of it. Apart from an agreement which explicitly excludes the appellate system, such consensus can be reached by other means. One of the methods is the parties' agreement on dispensing with reasons for the arbitral award, which is overall a rare practice in the field of international commercial arbitration while frequently used within some jurisdictions and sectors. Another way is the designation of arbitration rules containing provisions eliminating any appeal system, such as arbitration rules of most world renowned arbitration institutions. For instance, Article 26.8 of London Court of International Arbitration Rules(The LCIA Rules) explicitly stipulates that parties waive "irrevocably" their right to appeal, review or recourse to any state court or other legal authority in any form.[iii] Therefore, parties may easily dispense with the right to appeal by reference of arbitration before The LCIA Rules or under its rules.

(2) Albeit parties fail to opt out of such appeals, the court is still afforded with discretion on rejection of a leave to commence such appeal. As provided by Section 69 (3) of EAA, such leave shall be granted only certain standards are satisfied, *inter alia*, the manifest error in the disputed award or raise of general public importance regarding the debating question.

(3) The competence of the appealing court is confined to review the question of laws and shall not impugned on the factual issue. In other words, any alleged errors in fact finding by tribunal is out of the court's remit. English courts are tended to reject efforts dressing up factual findings as questions of law, and have set up a high threshold regarding mixed questions of law and fact.[iv]

The abovementioned three factors have enormously narrowed down the scope of appellate system under Section 69 of EAA. Statistics in recent years also reveal the extreme low success rate in both granting of leave and overturning of the outcome. From 2015 to March 2018, more than 160 claims had been filed, while only 30 claims were permitted and 4 claims succeeded.[v] Hence, the finality of

arbitration award is overall enshrined in England. Parties can hardly count on the appeal proceedings set forth in Section 69.

1.2 Appellate Mechanism Outside England

Some other jurisdictions have embedded similar appellate system, Canada and Australia employed an opt-out model like Section 69 of EAA.[vi] Other jurisdictions have adopted stringent limits on such appeal. in Singapore, appeal on merits of award is only provided by Arbitration Act governing domestic arbitration and not available in arbitration proceedings under International Arbitration Act. The Arbitration Ordinance of Hong Kong SAR of China provides an opt-in framework which further narrows down the use of appellate mechanism.

Appeal in the court is somehow incompatible with the minimal intervene principle as set out in legislations like UNCITRAL Model Law. Further, it will not only enormously undermine efficiency of arbitration but also make the already-clogged state courts more burdensome. The important consideration about the appeal against question of law in the court is the development of law through cases,[vii] while it is not suitable for all jurisdictions.

2.Internal appellate of arbitration institution

Apart from state courts, some arbitration institutions may have the authority to act as appellate bodies under their institutional rules, which can be summarized as "institutional appellate mechanism". While such system can be observed in the arbitration concerning certain sectors such as the appeal board of The Grain and Feed Trade Association, it is rarely used by institutions open for all kinds of commercial disputes, with exceptions such as The Institute of Conflict Prevention and Resolution (CPR) and Judicial Arbitration & Mediation Services, Inc (JAMS).[viii]

Shenzhen Court of International Arbitration (SCIA) is the first arbitration institution in Mainland China who introduced optional appellate arbitration procedure into its arbitration rules published in December of 2018 (having come into effective since February 2019), enclosed with a guideline for such optional appellate arbitration procedure.

SCIA's Optional Appellate Arbitration Procedure provides an opt-in appellate system against the merits issue of an award where the below prerequisites are all

satisfied: (1) pre-existing agreement on appeal by parties; (2) such appeal mechanism is not prohibited by the law of the seat; (3) the award is not rendered under expedited procedure set out in SCIA Arbitration Rules.[ix]

If all the above conditions are satisfied and one of the dispute parties intend to appeal, the application of appeal shall be filed the appeal within 15 days upon receipt of the disputing award and an appealing body composed of 3 members will be constituted through the appointment of SCIA's chief. The appealing body is afforded with broad direction to revise or affirm the original award, of whom the decision will supersede the original award.[x]

The SCIA appellate mechanism is a bold initiative, while some uncertainties may arise under the current legal system in Mainland China:

First is the legitimacy of an internal appellate system under current legislation system. Though the current statutes do not contain any provision specifying the institutional legitimacy of an appellate mechanism, while legal risk may arise by breach of finality principle set out in the Article 9 of PRC Arbitration Law, which expressly stipulates that both state court and arbitration institution shall reject any dispute which has been decided by previous award. In this respect, any decision by an appealing system, regardless of whether it is conducted by state court, is likely to be annulled or held unenforceable subsequently. Apparently, SCIA was well aware of such risk and set forth the first prerequisite for the system such that parties may circumvent the risk through designation of arbitral seat.

The second is the risk brought by designation of arbitration seat other than Mainland China while no foreign-related factor is involved. Current law in PRC is silent on the term of arbitration seat, even though the loophole may be well resolved by the new draft of revised Arbitration Law which has been published for public consultation since late July 2021,[xi] it is still unclear whether parties to arbitration without foreign-related factors have the right to designate a jurisdiction other than Mainland China. As per previous cases, courts across the jurisdiction has been for a long time rejecting parties' right to agree on submission of case to off-shore arbitration institutions provided that no foreign-related factor can be observed in the underlying dispute.[xii]If the same stance keep unchanged in respect of parties' consent on arbitration seat, parties' agreement on designating an off-shore seat to avoid the scrutiny will be

invalidated and the SCIA appellate mechanism will thereby not be available.

Third is the possibility of contradictory results. In Mainland China, a domestic award is final upon parties and hence enforceable without any subsequent proceedings. With this regard, SCIA's appellate mechanism may create two contradictory outcomes in one dispute resolution proceeding under the current legal system. If the successful party seeks for enforcement of award by concealing the existence of appeal proceedings, the court will enforce it basing on its text. Even though the court is aware of the appeal proceedings in the course of enforcement, it is not obliged to stay the enforcement in absence of any legal basis. In other words, the appeal mechanism will be meaningless for all parties in case of the launch of enforcement proceedings .

3.Alternatives to appealing mechanism

As mentioned above, in Mainland China there is no room for a review on merits system in commercial arbitration under Article 9 of PRC Arbitration Law. This article has been verbatim transplanted into the most recent draft of revised Arbitration Law which has been published for public consultation since late July 2021. Therefore, the much-cited bill brings no assistance in this regard.

With all that said, a few institutions have set up a special system called "pre-decision notification"??????as an alternative to mirror the function of appeal mechanism, which is said to be credited to Deyang Arbitration Commission of Sichuan Province dated back to 2004, according to a piece of news in August 2005 reported by Legal Daily, a nationwide legal professional newspaper run by the Supreme People's Court.[xiii] Pre-decision notification allows for tribunal to notice parties their preliminary opinions about the case before rendering the final decision, and ask for parties' comments within fixed duration. Tribunal's preliminary opinions can be revised by the final award based on comments by parties, occurrence of new fact after deliberation, or merely on the tribunal's own initiative.

One notable case about the pre-decision notification mechanism is decided by Xi'an Intermediate Court of Shanxi Province dated 18 April of 2018.[xiv] The case concerns an arbitration proceeding administered by Shangluo Branch of Xi'an Arbitration Commission where the tribunal dispatched preliminary opinion to parties at the outset, whilst ruled on the contrary in the final decision. The

plaintiff (respondent of the arbitration proceeding) subsequently commenced an annulment proceeding against the award on the basis that the final decision is contradictory with the one set out in pre-decision notice (together with other reasons which were not relevant to the topic of this article), whilst the court refused to set aside the award by simply indicated that the reasons replied upon by plaintiff had no merits, without giving any further comment on such system.

In another noteworthy case which concerns the fact that tribunal ruled adversely after considering parties' comments on opinion set out in pre-decision notice, in the annulment proceeding, the Guiyang Intermediate Court of Guizhou Province explicitly endorsed the legitimacy of pre-decision notification, by stating that even though it is not regulated in any current legislation, pre-decision notice can be viewed as an investigation method by means of tribunal's query to the parties, instead of a decision by tribunal. Therefore, the discrepancy between pre-decision opinion and final award does not amount to annulment of the award.[xv]

The abovementioned court decisions are somehow problematic: the pre-decision notification is by no means a mere investigating tool for the tribunal. While the preliminary opinion is made and dispatched, it shall be deemed that the tribunal has taken the stance, which shall be distinguished from tribunal's query about facts or laws in a neutral and open minded manner which is widely accepted in commercial arbitration.[xvi] Therefore, subsequent comments by parties would constitute a *de facto* appealing mechanism before the same decision-making body, which will give rise to problems such as postponing the arbitral proceedings and the question of conflict of interest. Moreover, it probably produces unfairness for parties dissatisfying with the preliminary opinion may spare no effort to change the tribunal's mind by intervening tribunal's autonomy (even by taking irregular or illegal measures).

Overall, pre-decision notification is a highly controversial practice which received lots of criticisms, and hence does not constitute a mainstream system in China. None of the first-class arbitration institutions (including CIETAC, Beijing Arbitration Commission, Guangzhou Arbitration Commission, etc.) had ever embraced such system in the field of commercial arbitration. Some institutions are seeking to repeal or limit the use of such system. For example, Zunyi Arbitration Commission abolished such system in its rules released in 2018, while other arbitration commissions who are consistently strong champions of this system also opined that it is only used in rare cases with higher controversy and

complexity.

Despite of these pitfalls and controversies, the courts' decisions clearly reveal that pre-decision notification system *per se* is not necessarily a breach of finality principle set out in arbitration legislation and hence feasible for parties if it is explicitly set out in applicable arbitration rules.

Pre-decision notification has been introduced into investment arbitration in recent years, Beijing Arbitration Commission has incorporated such system into its investment arbitration which was finalized and published in September 2019, which provides that the tribunal shall provide parties with the draft of award and seek for their comments, and may give proper consideration to the parties' feedback.[xvii] By the language, pre-decision notification will act as a mandatory rule while any investor-state case is being administered by this institution.

4.Comments

Several pertinent issues have been raised with regard to appellate mechanism in arbitration, which can be boiled down to several sub-issues including legitimacy, efficiency and fairness, as well as preference of parties.

4.1 Legitimacy Perspective

According to leading legislations across the world, the competence of state court confined to procedural issues in respect of judicial review over arbitration award, with rare and narrow exceptions such as the public policy set out in UNCITRAL Model Law and New York Convention. With this respect, even though some commentators argue that an appeal on merits is not necessarily a breach of finality and minimal intervene principles set out in UNCITRAL Model Law,[xviii] a mandatory and all-catching appealing system encompassing both factual and legal issues conducted by state court is undeniably incompatible with modern arbitration legislation.

In this respect, an internal appealing mechanism conducted by arbitration institution seems to be less controversial in respect of legitimacy at first glance. While it may also be viewed as a breach of finality of award in the context of some specific legislations such as Article 9 of PRC Arbitration Law.

4.2 Efficiency and Fairness

Finality principle in commercial perceivably enhances the efficiency of dispute resolution by relieving both parties and states from endless and burdensome appealing and reconsidering proceedings, while efficiency is not free from problem while the fairness issue is concerned, giving rise to pertinent considerations about correction of error, enhancement of consistency and the increase of transparency.

Nevertheless, the fairness argument is less convincing in the context of international commercial arbitration in which parties are seeking for a neutral forum in avoidance of local protectionism.[xix] Further, consistency and transparency is less concerned in the context of arbitration which is viewed to be tailored for individual cases while less public concerns are involved, comparing with litigation.

4.3 Preference of Parties

It can be drawn from above analysis that there is no one-standard-fitting all approach for the appeal mechanism in commercial arbitration, in that scenario, parties' preference shall be taken into account by virtue of the autonomy nature of commercial.

An worldwide survey conducted by Queen Mary University in 2015 provides that 23% of the respondents were in favor of an appeal mechanism in commercial arbitration (compared to 36% approval rate in the same question about investment arbitration),[xx] which reveals a boost about 150% while compared with the rate in 2006 survey (around 9%).In 2018 survey, 14% of the respondents had selected "lack of appeal mechanism on the meritss" as one of the three worst characteristics of arbitration.[xxi]

In a nutshell, statics reveals the increasing demand for appeal system, while it is premature to say that preference for appeal mechanism has been the mainstream in commercial arbitration, it has given rise to concerns by arbitration practitioners and proper response shall be made accordingly.

[i]See Elsa Sardinha, *The Impetus for the Creation of an Appellate Mechanism*, in Meg Kinnear and Campbell McLachlan (eds), ICSID Review – Foreign Investment Law Journal, Oxford University Press 2017, Volume 32 Issue(3) pp. 503 – 527S https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2020%20Report%20on%20the%20Right%20of%20Appeal%20against%20International%20A

rbitration%20Awards%20on%20Questions%20of%20Law.pdf

[ii] See Singapore Academy of Law Reform Committee, *Report on the Right of Appeal against International Arbitration Awards on Questions of Law February 2020,* available at

[iii] Article 26.8 of LCIA Arbitration Rules?coming into effective since October 2020?,available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx

[iv] See Teresa Cheng, *The Search for Order Within Chaos in the Evolution of ISDS*, CIArb's 45th annual Alexander Lecture on 16 January 2020, available at https://www.doj.gov.hk/en/community_engagement/speeches/20200116_sj1.html

[v] Ben Sanderson et al.,*Appeals under the English Arbitration Act 199*6?available at https://www.dlapiper.com/en/uk/insights/publications/2018/05/appeals-under-the-english-arbitration-act-1996/#:~:text=Section%2069%2C%20meanwhile%2C%20is%20a%20non-*mandatory%20provision%20of,the%20English%20courts%20on%20a%20point%20of%20law.*

[vi]T. Dedezade, *Are You In or Are You Out? An Analysis of Section, 69 of the English Arbitration Act 1996: Appeals on a Question of Law*, 2 Intl. Arb. L.J. 56 (2006) available at http://corbett.co.uk/wp-content/uploads/Taner-s-69-article.pdf

[vii] Ibid.

[viii] See Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality*?, Journal of International Arbitration , Volume 30 Issue 5 p. 548?2013?

[ix] See Article 68 of SCIA Arbitration Rules(coming into effective since 2019),available at http://scia.com.cn/upload/20201027/5f97bf7833c8c.pdf

[x] See SCIA Guidelines for the Optional Appellate Arbitration Procedure, available at http://www.scia.com.cn/files/fckFile/file/SCIA%20Guidelines%20for%20the%20Optional%20Appellate%20Arbitration%20Procedure.pdf

[xi] See Anton Ware et al., *Proposed Amendments to the PRC Arbitration Law: A Panacea?*, available at http://arbitrationblog.kluwerarbitration.com/2021/09/09/proposed-amendments-to-the-prc-arbitration-law-a-panacea/

[xii] See a seminal case (2013)??????10670? by Beijing 2nd Intermediate Court in January of 2014, which concerns an award rendered in proceedings governed by KCAB, the court rejected enforcement of KCAB award by the reason that the underlying dispute did not have any foreign-related factor, despite of the fact that one party to the proceedings is an enterprise wholly subsidized by Korean citizens.

[xiii] See Li Yongli et al., Enhancing Arbitration Legislation through Pre-Decision Notification. Legal Daily, 16 August 2005, p,12???????????"????"??????????????????2005?8?16??12???

[xiv] 2018 Shan 01 Min Te No. 99?2018??01??99?

[xv] 2016 Qian 01 Min Te No. 48?2016??01??48?

[xvi] Per the common practice and well established principle, tribunals are free to delivery query to parties in respect of both factual finding and ascertaining law (Jura Novit Curia), while it shall be conducted in a manner that being prepared to consider legal positions advanced by the parties, irrespective of questions well known to the tribunal. See: Revista Brasileira de Arbitragem, *International Law Association Committee on International Commercial Arbitration Ascertaining the Contents of the Applicable Law in International Commercial Arbitration Report for the Biennial Conference in Rio de Janeiro*, August 2008,

[xvii] Article 42.4 of Beijing Arbitration Commission/Beijing International Arbitration Center Rules for International Investment Arbitration?available at https://www.bjac.org.cn/page/data_dl/touzi_en.pdf

[xviii] See Singapore Academy on Law Reform Committee: *Report of Appeal Against International Arbitration Awards on Questions of Law*, February 2020, available at https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2020%20Report%20on%20the%20Right%20of%20Appeal%20against%20International%20Arbitration%20Awards%20on%20Questions%20of%20Law.pdf

[xix] Noam Zamir ,Peretz Segal, *Appeal in International Arbitration—an efficient and affordable arbitral appeal mechanism*', in William W. Park (ed), Arbitration International, Oxford University Press 2019, Volume 35 Issue 1) p. 84.

[xx] See Queen Mary, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p,8 available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf

[xxi] See Queen Mary & White Case, 2018 International Arbitration Survey: The Evolution of International Arbitration, p,8 available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF

Virtual Hearing in China's Smart Court

By Zheng Sophia Tang, Wuhan University (China) and Newcastle University (UK)

Mr Ting Liao, PhD candidate at the Wuhan University Institute of International Law, published a note on the Chinese Smart Court, which attracted a lot of interest and attention. We have responded a few enquires and comments, some relating to the procedure and feasibility of virtual/remote hearing. Based on the questions we have received, this note provides more details on how the virtual hearing is conducted in China.

1. Background

The fast development of virtual hearing and its wide use in practice in China are attributed to the Covid-19 pandemic. The pandemic causes serious disruption to litigation. China is a country that has adopted the toughest prevention and controlling measures. Entrance restriction, lockdown, quarantine and social distancing challenge the court process and case management. In the meantime,

this challenge offers the Chinese courts a chance to reform and modernize their judicial systems by utilizing modern technology. Since suspending limitation period may lead to backlog and delay, more Chinese courts favour the virtual proceedings. This strategy improves judicial efficiency and helps parties' access to justice in the unusual circumstances.

Before the pandemic, Chinese courts have already started their exploration of online proceedings. In 2015, the Provisions of the SPC on Several Issues Concerning Registration and Filling of Cases provides the People's courts should provide litigation services including online filing.[1] In the same year, the SPC published the Civil Procedural Law Interpretation, which states that the parties can make agreement on the form of hearing, including virtual hearing utilizing visual and audio transfer technology. The parties can make application and the court can decide whether to approve.[2] Although online trial from filing to hearing is permitted by law, but it was rarely used in practice due to the tradition and social psychology. The adoption of virtual proceedings for cases with large value was even rarer. The relevant procedure and technology were also taking time to progress and maturase.

Because the pandemic and the controlling measures make serious disruption to traditional form of litigation, online trial becomes more frequently used and develops to a more advanced stage. The SPC provids macro policy instructions that Chinese courts should actively utilize online litigation platform, such as China Movable Micro Court, which allows the parties to conduct litigation through mobile, and Litigation Service Website to carry out comprehensive online litigation activities, including filing, mediation, evidence exchange, hearing, judgment, and service of procedure.[3] While more administrative and technological efforts have been put in, and the pandemic made no better alternatives, more trials were done online. For example, between Feb and Nov 2020, 959 hearings (16.42%) and 5020 mediations were carried out online in the Qianhai Court. Between Feb and July 2020, courts in Beijing conducted average 1,300-1,500 virtual hearings per day.

Some important cases were also tried online. For example, Boa Barges As v Nanjing Yichun Shipbuilding concerned a dispute worth nearly $50,000,000.[4] The contract originally included a clause to resolve disputes in London Court of International Arbitration (LCIA) and to apply English law. However, the pandemic outbroke in the UK in March 2020. The parties entered into a supplementary

agreement in May 2020 to submit the dispute to Nanjing Maritime Court and apply Chinese law. Chinese commentators believe the change of chosen forum and governing law demonstrates the parties' trust on Chinese international judicial system and courts' capacity. Nanjing Maritime Court followed the SPC instruction by allowing the foreign party to postpone submitting authorization notarization and authentication, and conducted online mediation. In China, mediation is part of the formal litigation procedure. The parties settled by mediation within 27 days.

In 2021, the SPC published the Online Litigation Regulations for the People's Courts, including detailed rules for how online litigation should be conducted.[5] This Regulations provides five principles for online litigation, including fairness and efficiency, freedom of choice, protection of rights, convenience and security.[6] This Regulations provides further clarification of certain key procedural issues and provide unified micro-guidance which helps the local courts to operate in the same standards and according to the same rule.

2. Initiation of virtual hearing

Virtual proceedings may lead to several controversies. Firstly, how are the virtual proceedings initiated? Could the court propose by its own motive, or should the parties reach agreement? What if a physical trial is not possible due to the pandemic control, both the court and the claimant want a virtual trial, but the defendant refuse to consent? In such a case, would a virtual trial in the absence of the defendant an infringement of the defendant's due process right and should not be enforced abroad? What if the defendant and the court agree to go ahead with a virtual trial, but the claimant refuses? Would a default judgment in the absence of the claimant infringe the claimant's due process right?

The Online Litigation Regulations provides clear guidance. Online litigation should follow the principle of freedom of choice. In other words, parties should give consent to the online procedure and cannot be forced by the court.[7] If a party voluntarily chooses online litigation, the court can conduct litigation procedure online. If all the parties agree on online litigation, the relevant procedure can be conducted online. If some parties agree on online litigation while others not, the court can conduct the procedure half online for parties who give consent and half offline for other parties.[8] However, what if a party cannot physically participate in the offline litigation because of the pandemic, and this

party also refuses online litigation? This party certainly can apply for suspension or postponement of procedure. However, if this party has no legitimate reason to refuse online litigation like technical problems or the lack of computer literacy, would not the court consider such a refusal unreasonable? Does it mean a person may use the refusal rights to delay otherwise legitimate procedure to the detriment of the other party? Would the refusal turn to be a torpedo action? Does this strict autonomy approach meet the purpose of good faith and judicial efficiency? Although the freedom of choice is important, would it necessary to provide some flexibility by allowing the court to assess special circumstances of a case? It seems that this strict consent condition is based on the traditional attitude against online litigation. This attitude makes offline litigation a priority and online litigation an exception, which will only be used by parties' choice. This approach does not provide online litigation true equal footing as offline litigation, and still reflect the social psychological concern over the use of modern technology in the court room. Although the pandemic speed the development of online litigation in China, it is treated as an exceptional emergency measure and the emphasis on it may fade away gradually after the pandemic is ending, unless the social psychology is also changed after a longer period of successful use of online litigation.

3. Public hearing

Would virtual hearing satisfy the standard of public hearing? Certainly, there is no legal restriction preventing public access to the hearing.[9] Furthermore, the Online Litigation Regulations provides that online litigation must be made public pursuant to law and judicial interpretation, unless the case concerns national security, state secrets, individual privacy, or the case concerns a minor, commercial secrets and divorce where the parties apply for the hearing not be made public.[10] However, how to make online hearing public is a technical question. If the virtual hearing is organised online, without an openly published "link", no public will be able to access the virtual court room and the trial is "secret" as a matter of fact. This may practically evade the public hearing requirement.

Chinese online litigation has taken into account the public hearing requirement. Both SPC litigation service website and the Movable Micro Court make open hearing an integral part of the platform. The public can register and create an account for free to log in the platform. After log in, the public can find all

available services in the webpage, including Hearing Livestream. After click in, the pubic can find the case that they want to watch by searching the court or browse the “Live Courtroom Today”. There are also recorded hearing for the public to watch. In contrast to traditional hearing, the only extra requirement for the public to access to the court is registration, which requires the verification of ID through triple security check: uploading the scan/photo of an ID card, verifying the mobile number via security code and facial recognition.

It shows that Chinese virtual hearing has been developed to a mature stage, which meets the requirement of due process protection and public hearing. Chinese virtue hearing has been systematically updated with the quick equipment of modern technologies and well-established online platform. This platform is made available to the local courts to use through the institutional power of the centre. Virtual hearing in China, thus, will not cause challenge in terms of public hearing.

4. Evidence

Although blockchain technology can prove the authenticity of digital evidence, many original evidence exists offline. The parties need to upload an electronic copy of those evidence through the “Exchange evidence and cross-examination” session of the smart court platform, and other parties can raise queries and challenges. During trial, the litigation parties display the original evidence to the court and other parties through the video camera. If the court and other parties raise no challenges in the pre-trial online cross-examination stage and in the hearing, the evidence may be admitted. It, of course, raises issues of credibility, because electronic copy may be tempered with and the image displayed by video may not be clear and cannot be touched, smelled and felt for a proper evaluation. Courts may adopt other measures to tackle this problem. For example, some courts require original evidence to be posted to the court if the court and other parties are not satisfied of the distance examination of evidence. Other courts may organise offline cross-examination of the evidence by convening a pre-trial meeting. However, in doing so, the value of the online trial will be reduced, making the trial process lengthier and more inefficient.

The practical difficulty also exists in witness sequestration. Article 74 of the “Several Provisions of the Supreme People’s Court on Evidence in Civil Litigations” provides witnesses in civil proceedings shall not be in court during

other witnesses' testimony, so they cannot hear what other witnesses say.[11] This is a measure to prevent fabrication, collusion, contamination and inaccuracy. However, in virtual hearings, it is difficult for judges to completely avoid witnesses from listening to other witnesses' testimony online. There is no proper institutional and technical measure to address this problem and it remains one of the fallbacks in the virtual litigation.

[1] Provisions of the SPC on Several Issues Concerning Registration and Filling of Cases, Fa Shi [2015] No8, Art 14.

[2] The SPC Interpretation of the Application of the PRC Civil Procedure Law, Art 295.

[3] Notice of the SPC about Strengthening and Regulating Online Litigation during the Prevention and Controlling of the Covid-19 Pandemic, Fa [2020] 49, Art 1.

[4] The Supreme People's Court issued the sixth of ten typical cases of national maritime trials in 2020: BOABARGESAS v Nanjing Yichun Shipbuilding Co., Ltd. Ship.

[5] SPC, Online Litigation Regulations for the People's Court, Fa Shi [2021] No 12.

[6] Art 2.

[7] Art 2(2).

[8] Art 4.

[10] Art 27.

[11] Fa Shi [2019] 19.

How Emerging Technologies Shape the Face of Chinese Courts?

Author: Ting LIAO, Ph.D. candidate, Wuhan University Institute of International Law

A. Technology in the Context of Judicial Reform

According to Max Weber, “the modern judge is a vending machine into which the pleadings are inserted together with the fee, and which then disgorges the judgment together with the reasons mechanically derived from the code.” [1]Max Weber’s conjecture is a metaphor for the vital connotation of intelligence. The key elements of intelligence are people, data and technology. So, how these elements are utilized in the judicial system?

Generally, a significant number of courts are experimenting with the use of internet, artificial intelligence and blockchain for case filling, investigation and evidence obtaining, trials and the initiation of ADR procedures. The so-called smart justice projects are commenced in many countries. China has also made significant progress in this domain. In addition to accelerating the use of the internet technology, the Supreme People’s Court of China has demonstrated its ambition to use AI and blockchain to solve problems in the judicial proceedings.[2]

B. Smart Court in China: An Overview

In China, the smart justice is a big project contains smart court, smart judicial administration and smart procuratorate. The smart court is the core of the entire smart justice project. “The Opinions of the Supreme People’s Court on Accelerating the Construction of Smart Courts” encourages people’s courts around the country to apply AI to provide smarter litigation and legal literacy services to the public, while reducing the burden of non-judicial matters for court staff as much as possible.

The construction of China's smart courts involves more than 3,000 courts, more than 10,000 detached tribunals and more than 4,000 collaborative departments, containing tens of thousands of information systems such as information infrastructure, application systems, data resources, network security and operation and maintenance, etc. The entire smart court information system is particularly big and complex.

The smart court is a functional service platform for the informatization of the people's courts. The platform integrates several cutting-edge technological capabilities, including face recognition identity verification, multi-way audio and video call functions, voice recognition functions and non-tax fee payment functions. These functions are tailor-made capability packages for courts, and they can be used in a variety of scenarios such as identity verification, online documents accessing, remote mediation, remote proceedings, enforcement, court hearing records and internal things. Through the smart platform, any court can easily access to the capabilities, and quickly get successful experiences from any other courts in China.

C. Examples of Good Practice

1. **Provide Litigation Information and Services**

Peoples' Courts in nine provinces or municipalities, including Beijing, Shanghai and Guangdong, have officially launched artificial intelligence terminals in their litigation service halls. Through these AI terminals, the public can access information about litigation and judicial procedures, as well as basic information about judges or court staff. The AI terminals can also automatically create judicial documents based on the information provided by the parties. More importantly, the AI can provide the parties risk analysis before filing a lawsuit. For example, artificial intelligence machines in courts in Beijing, Shanghai and Jiangsu can assess the possible outcome of litigation for the parties. The results are based on the AI's analysis of more than 7,000 Chinese laws and regulations stored in its system, as well as numerous judicial precedents. At the same time, the AI machine can also suggest alternative dispute resolution options. For example, when an arbitration clause is present, the system will suggest arbitration, in divorce cases, if one of the parties unable to appear in people's court, then the smart system shall advise online mediation.

In addition to parties, as to the service for the court proceeding itself, the new generation of technology[3] is used in the smart proceeding and is deeply integrated with it. These technologies provide effective support for judges' decision making, and provide accurate portraits of natural persons, legal persons, cases, lawyers and other subjects. They also provide fast, convenient and multi-dimensional search and query services and automatic report services for difficult cases.

2. **Transfer of Case Materials**

Some People's Courts in Shenzhen, Shanghai and Jiangsu have set up artificial intelligence service terminals for parties to scan and submit electronic copies of materials to the court. This initiative can speed up the process of evidence submission and classification of evidence. In addition, digital transmission can also speed up the handover of case materials between different courts, especially in appellate cases where the court of first instance must transfer the case materials to the appellate court.

3. **Evidence Collection and Preservation**

Technically speaking, the blockchain and its extensions can be used to secure electronic data and prevent tampering during the entire cycle of electronic data production, collection, transfer and storage, thus providing an effective means of investigation for relevant organizations. Comparing to traditional investigation methods, blockchain technology is suitable as an important subsidiary way to electronic data collection and preservation. This is because the blockchain's timestamp can be used to mark the time when the electronic data was created, and the signature from the person's private key can be used to verify the party's genuine intent. The traceable characteristics of blockchain can facilitate the collection and identification of electronic data.[4]

In judicial practice, for example, the electronic evidence platform is on the homepage of Court's litigation services website of Zhengzhou Intermediate People's. It is possible to obtain evidence and make preservation on judicial blockchain of the court. This platform providing services such as evidence verification, evidence preservation, e-discovery and blockchain-based public disclosure. The evidence, such as electronic contracts, can be uploaded directly via the webpage, and the abstract of electronic data can be recorded in the

blockchain in real time. Furthermore, this judicial blockchain has three tiers (pictured below). The first tier is the client side, which helps parties submit evidence, complaints and other services. The second tier is the server side, which provides trusted blockchain services such as real-name certification, timestamping and data storage. The third tier is the judicial side, which uses blockchain technology to form a consortium chain of judicial authentication, notaries and the court itself as nodes to form a comprehensive blockchain network of judicial proceedings.[5] In other words, people's court shall be regarded as the key node on the chain, which can solve the contradiction between decentralization and the concentration of judicial authority, and this kind of blockchain is therefore more suitable for electronic evidence preservation.

Secondly, for lawyers, the validity of electronic lawyer investigation orders can be verified through judicial blockchain, a technology that significantly enhances the credibility of investigation orders and the convenience of investigations. For example? in Jilin Province, the entire process of application, approval, issuance, utilization and feedback of an investigation order is processed online. Lawyers firstly apply for an investigation order online, and after the judge approves it, the platform shall create an electronic investigation order and automatically uploads it to the judicial blockchain for storage, while sending it to lawyers in the form of electronic service. Lawyers shall hold the electronic investigation order to target entities to collect evidence. Those entities can scan the QR code on the order, and login to the judicial blockchain platform to verify the order. Then they shall provide the corresponding investigation evidence materials in accordance with the content of the investigation order.[6]

In addition, it should be noted that Article 11 of the "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts", which came into force in 2018, explicitly recognizes data carriers on the blockchain as evidence in civil proceedings for the first time, but their validity needs to be verified by the courts.

The issue of blockchain evidence has already caused discussion among judges, particularly regarding the use of blockchain-based evidence in cases. For instance, what criteria should courts adopt to read such data? Approaches in judicial practice vary. Currently, there is no consistent approach in people's court as to whether blockchain evidence needs to be submitted as original evidence. In certain recent cases, such as (2019) Jing 0491 Min Chu No. 805 Case and (2020)

Jing 04 Min Zhong No. 309 Case, the court's considerations for the determination of blockchain evidence are inconsistent.

4. **Case Management**

People's Courts in Shanghai and Shenzhen are piloting an artificial intelligence-assisted case management system that can analyze and automatically collate similar judicial precedents for judges to refer to. The system is also able to analyze errors in judgments drafted by judges by comparing the evidence in current cases with that in precedent cases. This will help maintain uniformity in judicial decisions. Currently, the system for criminal cases has been put into use, while the system for civil and administrative cases is still being tested in pilot stage.

5. **Online Proceedings**

Chinese courts had already adopted online proceedings in individual cases before 2018. The Supreme People's Court had released the Provisions of the Supreme People's Court on Certain Issues Concerning the Hearing of Cases in Internet Courts. From 1 January 2020 to 31 May 2021, 12.197 million cases were filed online by courts nationwide, with online filing accounting for 28.3% of all cases filed; 6.513 million total online mediation, 6.142,900 successful mediation cases before litigation; 1.288 million online court proceedings 33.833 million electronic service of documents.[7]

Recently, the Supreme Court, some provincial courts and municipal courts have also issued rules on "online proceedings". The Supreme People's Court has issued the Online Litigation Regulations for the People's Court 2021 which stipulates online litigation should follow the five principles, namely fairness and efficiency, legitimate and voluntary principle, protection of rights, principle of safety and reliability. This regulation emphasizes the principles of application of technology, strictly adhere to technology neutrality, to ensure that technology is reliable. [8]Furthermore, in 2021 the Supreme People's Court has issued the Several Regulations on Providing Online Filing Services for Cross-border Litigants, relying on the provision of online filing for cross-border litigants through the China mobile micro court. Based on Tencent's cloud technology, the Micro Court can also be linked to the most used communication tool in China, namely WeChat. Using the micro courts mini programs allows for a dozen functions such as public

services, litigation, enforcement and personal case management.[9]

6. **Framework of the Litigation Services Network**

The litigation service network is an important carrier for the court to conduct business and litigation services on the Internet, providing convenient and efficient online litigation services for parties and litigation agents, greatly facilitating the public's litigation, while strengthening the supervision and management of the court's litigation services, enhancing the quality of litigation services and improving the standardization of litigation services. The picture shows the functioning and operation mechanism of a litigation services network.[10]

[1] See Max Weber, On Law in Economy and Society (Edward Shils and Max Rheinstein trans., Harvard University Press 1954).

[2] For example, in 2019, the Supreme People's Court of China approved several documents such as "The Report on the Promotion of China Mobile Micro Courts", "The Report on the Construction of the Smart Court Laboratory", and "The General Idea of Comprehensively Promoting the Construction of Judicial Artificial Intelligence".

[3] Including big data, cloud computing, knowledge mapping, text mining, optical character recognition (OCR), natural language processing (NLP) etc.

[4] See Trusted Blockchain Initiatives, White Paper on Blockchain Preservation of Judicial Evidence (2019).

[5] See Zhengzhou Court Judicial Service Website < http://www.zzfyssfw.gov.cn/zjy/> accessed 09 Nov. 2021; A consortium chain is a blockchain system that is open to a specific set of organizations, and this licensing mechanism then brings a potential hub to the blockchain, and The node access system in a consortium chain means that it already grants a certain level of trust to the nodes.. see also Internet court of Hangzhou < https://blockchain.netcourt.gov.cn/first>accessed 09 Nov. 2021.

[6] See e.g., a pilot project of the Supreme People's Court of China, the Jilin Intermediate People's Court proposed the Trusted Operation Application Scene: Full Process Assurance for Litigation Services (Electronic Lawyer Investigation Order); see also People's Court Daily, Piloting the "judicial chain" and multipions

practice of Jilin's smart court construction< http://legal.people.com.cn/n1/2020/1124/c42510-31942250.html>accessed 08 Nov. 2021.

[7] See Chinanews < https://www.chinanews.com/gn/2021/06-17/9501170.shtml>accessed 08 Nov. 2021.

[8] SPC of PRC, Report about Online Litigation Regulation for the People's Court< http://www.court.gov.cn/zixun-xiangqing-317061.html>accessed 08 Nov. 2021.

[9] See e.g., Xinhuanet < http://www.xinhuanet.com/legal/2020-05/07/c_1125953941.htm>accessed 08 Nov. 2021.

[10] Xu Jianfeng et.al., *Introduction to Smart Court System Engineering* (People's Court Press 2021).

Ducking the Ricochet: The Supreme Court of Canada on Foreign Judgments

Written by Stephen G.A. Pitel, Western University

The court's decision in *HMB Holdings Ltd v Antigua and Barbuda*, 2021 SCC 44 (available here) is interesting for at least two reasons. First, it adds to the understanding of the meaning of "carrying on business" as a test for being present in a jurisdiction. Second, it casts doubt on the application of statutory registration schemes for foreign judgments to judgments that themselves recognize a foreign judgment (the so-called ricochet).

In this litigation HMB obtained a Privy Council judgment and then sued to enforce

it in British Columbia. Antigua did not defend and so HMB obtained a default judgment. HMB then sought to register the British Columbia judgment in Ontario under Ontario's statutory scheme for the registration of judgments (known as *REJA*). An important threshold issue was whether the statutory scheme applied to judgments like the British Columbia one (a recognition judgment). In part this is a matter of statutory interpretation but in part it requires thinking through the aim and objectives of the scheme.

Regrettably for academics and others, the litigants conducted the proceedings on the basis that the scheme DID apply to the British Columbia judgment. Within the scheme, Antigua relied on one of the statutory defences to registration. The defence, found in section 3(b), requires that "the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court". Three of the elements of this defence were easily established by Antigua, leaving only the issue of whether Antigua could be said to have been carrying on business in British Columbia. If not, the decision could not be registered in Ontario.

On the facts, Antigua had very little connection to British Columbia. What it did have was "contracts with four 'Authorized Representatives' with businesses, premises and employees in British Columbia for the purposes of its Citizenship by Investment Program [which] … aims to encourage investments in Antigua's real estate, businesses and National Development Fund by granting citizenship to investors and their families in exchange for such investments" (para 7). HMB argued this was sufficient to be carrying on business in British Columbia. The courts below had disagreed, as did all five judges of the Supreme Court of Canada (paras 47-49, 52).

Confirming this result on these facts is not overly significant. What is of more interest is the court, in its decision written by Chief Justice Wagner, offering some comments on the relationship between how the meaning of carrying on business in the context of taking jurisdiction relates to the meaning of that same phrase in the context of determining whether to recognize or register a foreign judgment. Below, one judge of the Court of Appeal for Ontario had held the meanings to be quite different in those different contexts, with a much lower threshold for carrying on business in the latter (para 18). The Supreme Court of Canada rejects this view. When considering presence in a jurisdiction by means of carrying on

business there, the analysis is the same whether the court is assessing taking jurisdiction on that basis or is determining whether to give effect to a foreign judgment (and so engaging with the defence in section 3(b)) (paras 35, 41). This is welcome clarification and guidance.

One smaller wrinkle remains, not germane to this dispute. At common law the phrase "carrying on business" is used for two distinct aspects of taking jurisdiction: presence, where it grounds jurisdiction (see *Chevron*), and assumed jurisdiction, where it gives rise to a "presumptive connecting factor" linking the dispute to the forum (see *Club Resorts*). If you think that distinction seems odd, you are not alone (see para 39). Anyway, does the phrase also have the same meaning in these two contexts? The court expressly leaves that issue for another day, noting only that if there is a difference, the threshold for carrying on business would be lower in the assumed jurisdiction cases than the presence cases (para 40).

Returning to the issue not pursued by the parties: the status of ricochet judgments under registration schemes. The court could have said nothing on this given the position of the parties and the conclusion under section 3(b). However, Chief Justice Wagner and three of his colleagues expressly note that this is an "open question" and leave it for the future (paras 25-26). Saying the question is open is significant because there is *obiter dicta* in *Chevron* that these judgments are caught by the schemes (para 25). Indeed, Justice Cote writes separate reasons (despite concurring on all of the section 3(b) analysis) in order to set out her view that a recognition decision is caught by the scheme, and she points specifically to *Chevron* as having already made that clear (para 54). Her analysis of the issue is welcome, in part because it is a reasonably detailed treatment. Yet the other judges are not persuaded and, as noted, leave the matter open.

I find powerful the argument that the drafters of these statutory schemes did not contemplate that they would cover recognition judgments, and so despite their literal wording they should be read as though they do not. This would avoid subverting the purpose of the schemes (see para 25). On this see the approach of the Court of Appeal for England and Wales in 2020 in *Strategic Technologies Pte Ltd*, a decision Justice Cote criticizes for being "unduly focused" on what the statutory scheme truly intended to achieve and lacking fidelity to the actual language it uses (paras 67-68). I also find Justice Cote's distinctions (paras 60-64) between foreign recognition judgments (which she would include) and foreign

statutory registrations (which she would not include) unpersuasive on issues such as comity and judicial control.

In any event, unless this issue gets resolved by amendments to the statutory schemes to clarify their scope, this issue will require a conclusive resolution.

Indonesia deposits its instrument of accession to the HCCH 1961 Apostille Convention

Guest post by Priskila P. Penasthika, Ph.D. Researcher at Erasmus School of Law – Rotterdam and Lecturer in Private International Law at Universitas Indonesia.

Indonesian Accession to the HCCH 1961 Apostille Convention

After almost a decade of discussions, negotiations, and preparations, Indonesia has finally acceded to the HCCH 1961 Apostille Convention. In early January this year, Indonesia enacted Presidential Regulation Number 2 of 2021, signed by President Joko Widodo, as the instrument of accession to the HCCH 1961 Apostille Convention. The HCCH 1961 Apostille Convention is the first HCCH Convention to which Indonesia became a Contracting Party.

In its accession to the HCCH 1961 Apostille Convention, Indonesia made a declaration to exclude documents issued by the Prosecutor Office, the prosecuting body in Indonesia, from the definition of public documents whose requirements of legalisation have been abolished in accordance with Article 1(a) of the HCCH 1961 Apostille Convention.

In accordance with Article 12 of the Convention, Indonesia deposited its instrument of accession to the HCCH 1961 Apostille Convention with the Ministry of Foreign Affairs of the Netherlands on 5 October 2021. The ceremony was a very special occasion because it coincided with the celebration of the 60th

anniversary of the Convention. Therefore, the ceremony was part of the Fifth Meeting of the Special Commission on the practical operation of the HCCH 1961 Apostille Convention and witnessed by all Contracting Parties of the Convention.

The Minister of Law and Human Rights of the Republic of Indonesia, Yasonna H. Laoly, joined the ceremony and delivered a speech virtually via videoconference from Jakarta. Minister Laoly voiced the importance of the HCCH 1961 Apostille Convention for Indonesia and underlined Indonesia's commitment to continue cooperating with the HCCH.

Indonesia's accession to the HCCH 1961 Apostille Convention brings good news for the many parties concerned. The current process of public document legalisation in Indonesia still follows a traditional method that is highly complex, involves various institutions, and is time-consuming and costly. Because of the accession to the Convention, the complicated and lengthy procedure will be simplified to a single step and will involve only one institution – the designated Competent Authority in Indonesia. Referring to Article 6 of the HCCH 1961 Apostille Convention, in its accession to the Convention, Indonesia designated the Ministry of Law and Human Rights as the Competent Authority. When the HCCH 1961 Apostille Convention enters into force for Indonesia, this Ministry will be responsible for issuing the Apostille certificate to authenticate public documents in Indonesia for use in other Contracting Parties to the Convention.

A Reception Celebrating the 60th Anniversary of the HCCH 1961 Apostille Convention and Indonesian Accession

To celebrate the 60th anniversary of the HCCH 1961 Apostille Convention and Indonesia's accession to it, an evening reception was held on 5 October 2021 at the residence of the Swiss ambassador to the Kingdom of the Netherlands in The Hague. The reception was organised at the invitation of His Excellency Heinz Walker-Nederkoorn, Swiss Ambassador to the Kingdom of the Netherlands, His Excellency Mayerfas, Indonesian Ambassador to the Kingdom of the Netherlands, and Dr Christophe Bernasconi, Secretary-General of the HCCH. Representatives of some Contracting Parties to the HCCH 1961 Apostille Convention attended the reception; among other attendees were the representatives from recent Contracting Parties such as the Philippines and Singapore, as well as some of the earliest signatories, including Greece, Luxembourg, and Germany.

The host, Ambassador Walker-Nederkoorn, opened the reception with a welcome speech. It was followed by a speech by Ambassador Mayerfas. He echoed the statement of Minister Laoly on the importance of the HCCH 1961 Apostille Convention for Indonesia, especially as a strategy to accomplish the goals of Vision of Indonesia 2045, an ideal that is set to commemorate the centenary of Indonesian independence in 2045. Ambassador Mayerfas also emphasised that Indonesia's accession to the HCCH 1961 Apostille Convention marked the first important step for future works and cooperation with the HCCH.

Thereafter, Dr Christophe Bernasconi warmly welcomed Indonesia as a Contracting Party to the HCCH 1961 Apostille Convention in his speech at the reception. He also voiced the hope that Indonesia and HCCH continue good cooperation and relations, and invited Indonesia to accede to the other HCCH Conventions considered important by Indonesia.

The Entry into Force of the HCCH 1961 Apostille Convention for Indonesia

Referring to Articles 12 and 15 of the HCCH 1961 Apostille Convention, upon the deposit of the instrument of accession, there is a period of six months for other Contracting Parties to the Convention to raise an objection to the Indonesian accession. The HCCH 1961 Apostille Convention will enter into force for Indonesia on the sixtieth day after the expiration of this six-month period. With great hope that Indonesia's accession will not meet any objection from the existing Contracting Parties to the Convention, any such objection would affect only the entry into force of the Convention between Indonesia and the objecting Contracting Party. The HCCH 1961 Apostille Convention will therefore enter into force for Indonesia on 4 June 2022.

A more in-depth analysis (in Indonesian) concerning the present procedure of public document legalisation in Indonesia and the urgency to accede to the HCCH 1961 Apostille Convention can be accessed here. An article reporting the Indonesian accession to the HCCH 1961 Apostille Convention earlier this year can be accessed here.

United Kingdom Supreme Court confirms that consequential loss satisfies the tort gateway for service out of the jurisdiction

This post is written by Joshua Folkard, Barrister at Twenty Essex.

In *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 ("***Brownlie* II**"), the Supreme Court held as a matter of *ratio* by a 4:1 majority that consequential loss satisfies the 'tort gateway' in Practice Direction ("**PD**") 6B, para. 3.1(9)(a).

Background

PD 6B, para. 3.1(9)(a) provides that tort claims can be served out of the jurisdiction of England & Wales where "damage was sustained, or will be sustained, within the jurisdiction". *Brownlie* concerned a car accident during a family holiday to Egypt, which tragically claimed the lives of Sir Ian Brownlie (Chichele Professor of Public International Law at the University of Oxford) and his daughter Rebecca: at [1], [10] & [91]. On her return to England, however, Lady Brownlie suffered consequential losses including bereavement and loss of dependency in this jurisdiction: at [83].

The question whether mere consequential loss satisfies the tort gateway had been considered before by the Supreme Court in the very same case: *Brownlie v Four Seasons* [2017] UKSC 80; [2018] 2 All ER 91 ("***Brownlie* I**"). By a 3:2 majority expressed "entirely *obiter*" (*Brownlie II*, at [45]) the Court had answered affirmatively: [48]-[55] (Baroness Hale), [56] (Lord Wilson) & [68]-[69] (Lord Clarke). However, the *obiter* nature of that holding combined with a forceful

dissent from Lord Sumption (see [23]-[31]) had served to prolong uncertainty on this point.

Majority's reasoning

When asked the same question again, however, a differently-constituted majority of the same Court gave the same answer. Lord Lloyd-Jones (with whom Lords Reed, Briggs, and Burrows agreed: see [5] & [7])) concluded that there was "no justification in principle or in practice, for limiting 'damage' in paragraph 3.1(9)(a) to damage which is necessary to complete a cause of action in tort or, indeed, for according any special significance to a place simply because it was where the cause of action was completed": at [49]. The 'consequential' losses suffered in England were accordingly sufficient to ground English jurisdiction for the tort claims.

Three main reasons were given. First, Lord Lloyd-Jones held that there had been no "assimilation" of the tests at common law and under the Brussels Convention/Regulation, which would have been "totally inappropriate" given the "fundamental differences between the two systems": at [54]-[55]. Second, his Lordship pointed to what he described as an "impressive and coherent line" of (mostly first-instance) authority to the same effect: at [64]. Third, it was said that the "safety valve" of *forum conveniens* meant that there was "no need to adopt an unnaturally restrictive reading of the domestic gateways": at [77].

Economic torts?

What is now the position as regards pure economic loss cases? Although Lord Lloyd-Jones concluded that the term "damage" in PD 6B, para. 3.1(9)(a) "simply refers to actionable harm, direct or indirect, caused by the wrongful act alleged" (at [81]), his Lordship expressly stated that:

- “I would certainly not disagree with the proposition, supported by the economic loss cases, that to hold that the mere fact of any economic loss, however remote, felt by a claimant where he or she lives or, if a corporation, where it has its business seat would be an unsatisfactory basis for the exercise of jurisdiction”: at [76].

- “The nature of pure economic loss creates a need for constraints on the legal consequences of remote effects and can give rise to complex and difficult issues as to where the damage was suffered, calling for a careful analysis of transactions. As a result, the more remote economic repercussions of the causative event will not found jurisdiction”: at [75].

The status of previous decisions on the meaning of PD 6B, para. 3.1(9)(a) in economic tort cases appears to have been called into doubt by *Brownlie II* because (as noted by Lord Leggatt, dissenting: at [189]) those decisions had relied upon an “inference” that PD 6B, para. 3.1(9)(a) should be interpreted consistently with the Brussels Convention/Regulation. That approach was, however, rejected by both the majority and minority of the Supreme Court: at [74] & [189]. It therefore appears likely that the application of *Brownlie II* to economic torts will be the subject of significant future litigation.

Which law governs disputes involving corporations?

Guest post by Dr Sagi Peari, Senior Lecturer/Associate Professor at the University of Western Australia

When it comes to the question of the applicable law that governs disputes

involving corporations: one must make a sharp distinction between two principal matters: (1) matters relating to external interactions of corporation (such as disputes between a corporation and other external actors, such as other business entities or individuals); and (2) matters relating to the internal interactions of a corporation (such as disputes within the corporate structure or litigation between a corporation and its directors). A claim of a corporation against another in relation to a breach of contract between the two is an example of a dispute related to external affairs of a corporation. A claim of a corporate shareholder against a director in the firm is an example of a dispute concerning corporate internal affairs.

The division between external and internal affairs of corporation is an important one for the question of applicable law. A review of the case law suggests a strong tendency of the courts to apply the same choice-of-law rules applicable to private individuals. Thus, the general rule of the place of tort applies equally to corporations and private individuals.[1] In similar, the advancing principle of party autonomy[2] does not distinguish between corporations and other litigants on its operational level. The very fact that litigation involves a corporation does not seem *prima facie* to affect the identity of the applicable law rules.

The situation becomes dramatically different in cases concerning the internal affairs of a corporation. These are the situations involving claims between the corporate actors (i.e. executives, shareholders and directors) and claims between those actors and the corporation itself. Here, different considerations seem to apply. *First*, internal affairs of corporations tend to be excluded by the various international statutes aiming to harmonise the applicable law rules.[3] *Second*, there is a clear tendency of the rules to adhere to a single connecting factor (such as the place of incorporation or corporate headquarters with some further constitutional implications[4]) to determine the question of the applicable law. *Thirdly*, there is a clear tendency of rejecting the party autonomy principle in this sphere according to which corporate actors are not free to determine the applicable law to govern their dispute.[5]

One of the neglected frameworks for addressing the external/internal affairs distinction relates to the classical corporate law theory on the nature of corporations and the relationships within the corporate structure. Thus, the classical vision of corporations perceives a corporation as an artificial entity that places the state at the very centre of the corporate creation, existence and

activity.[6] Another, perhaps contradictory vision, challenges the artificial nature of corporation. It views corporation as an independent moral actor what dissects its existence from the originating act of incorporation.[7] Lastly, the third vision of corporation evaluates the corporate existence from the internal point of view by focusing on the bundle/nexus of contracts within the corporate structure.[8]

One could argue that an exercise of tackling the various theories of corporations could provide an invaluable tool for a better understanding of the internal/external division and subsequently shed light on the question of applicable law rules. Thus, for example, the traditional insistence of choice-of-law to equalise between corporations and private individuals seems to correlate with the 'personality' vision of corporation. On a related note, the insistence of the choice-of-law doctrine on a single connecting factor that denies party autonomy seems to be at odds with the nexus-contract theory and aligns with the traditional artificial entity theory of the corporation.

From this perspective, placing this question within the conceptual framework of corporate law could enable us to grasp the paradigmatic nature of the division and contemplate on whether the various suggestions for reform in the area of choice-of-law rules applicable to corporations do not just correlate with the underlying concerns and rationales of private international law/conflict of laws, but also those of corporate law.

I have tackled these (and other) matters in my recent article published in the 45 (3) *Delaware Journal of Corporate Law* 469-530 (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3905751.

[1] See eg Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC), art 4 (1).

[2] See eg Hague Principles on Choice of Law in International Commercial Contracts, 2015.

[3] See eg Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC), art 1 (2) (f).

[4] See eg Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999

E.C.R. I-1459, 2 C.M.L.R. 551 (1999).

[5] See eg Hague Principles, Commentaries, 1.27-1.29.

[6] See eg *Dartmauth College v Woodward* 17 U.S. 518, 636 (1819)

[7] See eg Peter A French, 'Responsibility and the Moral Role of Corporate Entities', in *Business as Humanity* (Thomas J Donaldson and RE Freeman eds, 1994) 90.

[8] Of course, the distinction between the above-mentioned three theories is not sharp and variations and overlaps have been suggested over the years in the corporate law literature.

Forum Selection Clauses, Afghanistan, and the United States

One Afghanistan-based company sues another in commercial court in Afghanistan. The plaintiff wins at trial. The Afghanistan Supreme Court reverses. It orders the parties to resolve their dispute in the United States. The plaintiff files suit in the United States. Chaos ensues.

This may sound like an unlikely scenario. It is, however, a concise description of the facts presented in Nawai Wardak Transportation Co. v. RMA Grp. Afghanistan Ltd, No. 350393 (Mich. Ct. App. 2021). This case is noteworthy for a number of reasons. It offers insights into best drafting practices for choice-of-court clauses. It illustrates how U.S. courts decide whether these clauses should be enforced. And it suggests that the Afghanistan Supreme Court takes the principle of party autonomy pretty seriously.

In July 2012, the United States Agency for International Development ("USAID") contracted with Aircraft Charter Solutions ("ACS") to perform aircraft flight

operations out of Kabul International Airport in Afghanistan. ACS entered into a contract with RMA Afghanistan ("RMA"), an Afghanistan-based company, to supply fuel to locations throughout Afghanistan. RMA, in turn, entered into a contract with Nawai Wardak Transportation Company ("NWTC"), another Afghanistan-based company, to supply fuel in support of the contract between USAID and ACS. The contract between RMA and NWTC contained the following provision:

> *The parties irrevocably agree that the courts of the United States of America shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).*

Roughly a year after the RMA-NWTC contract was signed, a dispute arose. NWTC demanded payment. RMA refused. NWTC brought a suit against RMA in commercial court in Afghanistan and won a judgment. The Supreme Court of Afghanistan reversed the judgment of the lower court. It concluded that the case should have been dismissed because the parties had previously agreed in their choice-of-court clause to litigate all disputes in the United States.

Undeterred, NWTC filed suit against RMA in state court in Michigan. RMA immediately moved to dismiss the Michigan lawsuit on the grounds that the state court lacked personal jurisdiction over it. It argued that it had only consented to suit in federal court via the choice-of-court clause. It pointed out that that clause referred to the courts "of" the United States of America. It then argued that this language necessarily excluded state courts because these courts were only "of" the State of Michigan. They were not courts of the United States as a whole.

NWTC responded to this argument by pointing out that the case could not be heard in federal court because those courts lacked subject-matter jurisdiction on the facts presented. If the clause were interpreted the manner suggested by RMA, the plaintiff contended, then the choice-of-court clause would be rendered a nullity because no court in the United States could hear the claim and it would be deprived of a remedy altogether.

The state trial court in Michigan ruled in favor of RMA and dismissed the case. This decision was then appealed to the Court of Appeals of Michigan. That court acknowledged that "the dictionary definition of 'of' supports that, while Michigan

courts may be in the United States, they are not of the United States." The court then went on to conclude, however, that dictionary definitions are not conclusive:

> *We are not constrained to follow dictionary definitions when interpreting a contract, and the effect of interpreting the forum-selection clause to refer exclusively to federal courts is to deprive both parties of a forum in which to resolve their contract disputes. In other words, for either party to have had a legal remedy for the other party's failure to perform under the subcontract, the parties must have intended "courts of the United States of America" as a geographical designation encompassing both federal and state courts. Any other reading of the forum-selection clause would render it nugatory, which is to be avoided when interpreting contracts.*

The court of appeals then considered the defendant's argument that if the clause was interpreted to refer to any state court in the United States, it would become so "overbroad and so lacking in specificity" that "enforcing it would be unreasonable and unjust." The court held that this argument had not been fully developed in the proceedings below. Accordingly, it remanded the case for further consideration by the lower court.

This case presents a number of interesting issues relating to choice-of-court clauses. The first has to do with contract drafting. As a matter of best practice, it is better to name a specific U.S. state in which a suit must be brought rather than the United States as a whole. If the clause selects the nation as a whole, however, it is better to select the courts "in" in the United States rather than courts "of" the United States to make clear that the suit may be brought in either state or federal court.

The second issue relates to clause enforcement. U.S. courts routinely decline to give effect to choice-of-court clauses selecting courts that lack subject-matter jurisdiction to hear the dispute. If the chosen forum lacks the power to resolve the case, these courts reason, the parties may sue wherever they want. The Court of Appeals of Michigan recognized this fact and rightly rejected the defendant's arguments that would have produced a contrary result.

The third issue relates to the need for specificity in identifying the chosen forum. Under ordinary circumstances, a clause selecting the courts of "any" U.S. state would not be enforceable because it does not clearly identify where the suit may

proceed. In the unique facts presented in the case described above, however, the lack-of-specificity argument is unlikely to carry the day because, if accepted, it would result in no court being able to hear the dispute.

Finally, it is important to note that the State of Michigan has adopted a statute that clearly spells out when its courts should and should not give effect to choice-of-court clauses. This is unusual. Only three other U.S. states—Nebraska, New Hampshire, and North Dakota—have adopted similar statutes based on the Model Choice of Forum Act. Judges in the remaining U.S. states apply judge-made common law to decide the issue of enforceability. The Michigan approach has a lot of recommend to it because it provides a clear, concise, and unchanging set of factors for the courts to consider when analyzing this issue.

Extraterritorial Application of Chinese Personal Information Protection Law: A Comparative Study with GDPR

Written by Huiying Zhang, PhD Candidate at the Wuhan University Institute of International Law

China enacted the Personal Information Protection Law (PIPL) at the 30th Session of the Standing Committee of the 13th National People's Congress on August 20, 2021. This is the first comprehensive national law in China concerning personal information protection and regulating the data processing activities of entities and individuals. PIPL, the Cyber Security Law (came into force on June 1, 2017) and Data Security Law (promulgated on September 1, 2021) constitute the three legal pillars of the digital economy era in China.

PIPL includes eight chapters and 74 articles, covering General Provisions, Rules for Processing Personal Information, Rules for Cross-border Provisions of

Personal Information, Rights of Individuals in Activities of Processing Personal Information, Obligations of Personal Information Processors, Departments Performing Duties of Personal Information Protection, Legal Liability and Supplementary Provisions. This note focuses on its extraterritorial effect.

1.Territorial Scope

Article 3 of the PIPL provides:

"This Law shall apply to activities conducted by organizations and individuals to control the personal information of natural persons within the territory of the People's Republic of China.

This Law shall also apply to activities outside territory of the People"s Republic of China to handle the personal information of natural persons within the territory of the People's Republic of China under any of the following circumstances:

a . personal information handling is to serve the purpose of providing products or services for natural persons within the territory of the People's Republic of China;

1. *personal information handling is to serve the purpose of analyzing and evaluating the behaviors of natural persons within the territory of the People' s Republic of China; or*
2. *having other circumstances as stipulated by laws and administrative regulations."*

According to paragraph 1 of Art 3, PIPL applies to all data processing activities of personal information carried out in China. If foreign businesses processes or handles the personal information within the territory of China, in principle, they shall comply with the PIPL. It indicates that this clause focuses on the activities of processing or handling personal information in the territorial of China, especially the physical link between the data processing or handling activities and Chinese territory.

According to paragraph 2 of Art 3, the PIPL shall be applicable to activities outside the territory of China in processing or handling the personal information

within China under some circumstances. As provided in Art 53, “personal information handlers outside the borders of the People’ s Republic of China shall establish a dedicated entity or appoint a representative within the borders of the People’ s Republic of China to be responsible for matters related to the personal information they handle”. Notably, this clause focuses on the physical location of the data processors or handlers rather than their nationality or habitual residence.

PIPL has extraterritorial jurisdiction to data processing or handling activities outside the territorial of China under 3 circumstances as provided in paragraph 2 of Art 3 of the PIPL. This is the embodiment of the effect principle, which derives from the objective territory jurisdiction and emphasizes the influence or effect of the behavior in the domain. If the purpose is to provide products or services to individuals located in China, or to analyze the behaviors of natural person in China, the PIPL shall be applicable. Crucially, the actual “effect” or “influence” of data processing or handling is emphasized here, i.e. when it is necessary to determine what extent or what requirements are met of the damage caused by the above-mentioned data processing or handling activities outside the territorial of China, Chinese courts may reasonably exercise the jurisdiction over the case. Obviously, it reflects the consideration of the element of “brunt of harm”. However, if the “effect” or “influence” is not specifically defined and limited, there will be a lot of problems. It is important to figure out exactly whether data processors or handlers outside the territorial of China are aware of the implications of their actions on natural person within China and whether the “effect” or “influence” of the data-processing behaviors are direct, intentional and predictable.

The PIPL explicitly states its purported extraterritorial jurisdiction for the first time and insists on the specific personal jurisdiction and the effect principle. It is mainly because the PIPL is formulated “in order to protect personal information rights and interests, standardize personal information handling activities, and promote the rational use of personal information”, but in the process of legal protection of personal information of natural person, there are a lot of challenges, such as the contradiction between the application of traditional jurisdiction, the virtual nature of personal information and so on. In this sense, all jurisdiction of the PIPL, whether territorial jurisdiction or personal jurisdiction or effect principle, are all further supplements for the existing personal information

protection regime previously provided.

2.PIPL and GDPR: a Comparative Study

The provisions on jurisdiction of GDPR are mainly concentrated in Art 3 and Art 23, 24, 25, 26, 27 of preambular 2. In Art 3, paragraph 1 and 2 identified "establishment principle" and "targeting principle" and paragraph 3 provides "This regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law".

A. Establishment Principle

Under paragraph 1 of Art 3, GDPR applies to "the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not." It set the "establishment criterion", which has the dual characteristics of territorial jurisdiction and extraterritorial jurisdiction.

Compared with establishment criterion in GDPR, the PIPL indicates that personal information handlers outside the territorial of China shall establish a dedicated entity or appoint a representative within China as previously mentioned. It highlights the significance and necessity of establishing an entity when foreign data handlers process the personal information of national persons outside China under circumstance in paragraph 2 of Art3 of PIPL.

B. Targeting Principle

Compared with targeting criterion in GDPR, PIPL has many differences. Paragraph 2 of Art 3 of the GDPR clearly states that for data processors and controllers that do not have an establishment in the EU, GDPR will apply in two circumstances. Firstly, as stated in Art 3 of GDPR, the processing activities relate to "the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union" (Art 2 GDPR). It seems too abstract to give the definition and processing method of data processor and controller' s behavior intention. Art 23 of the GDPR provides the clarification that "it should be ascertained whether it is apparent that the controller or

processor envisages offering services to data subjects in one or more Member States in the Union." The key factor to assess whether the processor or controller "targets" the EU is whether the behaviour of the offshore data processors or controllers indicates their apparent intention to provide goods or services to data subjects in the EU. This is an objective subjective test.

In contrast, Art 3 of the PIPL states that the law shall apply when the data processor processes personal information "to serve the purpose of providing products or services for natural persons within the territory of the People' s Republic of China". It indicates that the purpose of data processor or controller outside China is to provide a product or service to a domestic natural person in China. The key to the application is not only about whether it has purpose, but also about whether they have processed personal information of a natural person in China.

Secondly, the procession activities are in related to "the monitoring of their behaviour as far as their behaviour takes place within the Union". It requires both the data subject and the monitored activity be located within the EU. "Monitoring" shall be defined in accordance with Article 24 of the GDPR preamble. This provision does not require the data processors or controllers to have a corresponding subjective intent in the monitoring activity, but the European Data Protection Board (Hereinafter referred to as EDPB) pointed out that the use of the term "monitoring" implied that the data controllers or processors had a specific purpose, namely to collect and process the data. Similarly, Art 3 of the PIPL also applies to activities outside China dealing with personal information of natural persons within China, if the activities are to analyse and evaluate the acts of natural persons within China. The meaning of "analysis and evaluation" here is very broad and seems to cover "monitoring" activities under the GDPR.

Furthermore, paragraph 3 of Art 3 of the GDPR provides: "This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law." It suggests that the data processor or controller does not have an establishment in the territory of the EU and there is no circumstances under paragraph 2 of Art 3 of the GDPR. Due to that the international law applies EU member state law in the area where the numerical controller is located, this law shall apply. This condition is primarily aimed at resolving the issue of

extraterritorial jurisdiction over data processing or controlling that takes place in EU without an establishment. This condition is similar to Directive 95/46 of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The similar condition is not included in the PIPL, which instead shall apply to other circumstances "as stipulated by laws and administrative regulations".

C. Passive personality principle

Under the passive personality principle, a state has prescriptive jurisdiction over anyone anywhere who injures its nationals or residents. As previously mentioned, paragraph 2 of Art 3 of the GDPR states that although the personal data processors or controllers are not established in the EU, EU still applies the laws of member states in accordance with public international law. Art 25 of the preamble of GDPR provides examples of such situations which may include a Member State's diplomatic mission or consular post.

To some extent, GDPR includes all the personal data processing activities involving natural persons situated in the EU area into its jurisdiction, which is a variation of the passive nationality principle. It is because EU treats the individual data right as a fundamental human right and aims to establish a digital market of the unified level of protection. PIPL adopts the similar practice by adopting the passive nationality principle to protect Chinese citizens and residents.

3.Conclusion

The promulgation of PIPL shows that China recognizes the extraterritorial effect of data protection law. The exploration of legislation not only has the meaning of localization, but also contributes to the formulation of data rules for the international community. It marks an important step towards China' s long-term goal of balancing the preservation of national sovereignty, the protection of individual rights and the free flow of data across borders.

The Nigerian Court of Appeal recognises the Immunity of the President of the Commission of ECOWAS from being impleaded in Nigerian courts

This is a case note on the very recent Nigerian Court of Appeal's decision that recognised the immunity of the President of the Commission of ECOWAS (Economic Community of West African States) from being impleaded in Nigerian courts.[1]

In Nigeria, the applicable law in respect of diplomatic immunities and privileges is the Diplomatic Immunities and Privileges Act, which implements aspects of the Vienna Convention on Diplomatic Relations 1961 (the "Vienna Convention"). Under the Diplomatic Immunities and Privileges Act, foreign envoys, consular officers, members of their families, and members of their official and domestic staff are generally entitled to immunity from suit and legal process.[2] Such immunities may also apply to organisations declared by the Minister of External Affairs to be organisations, the members of which are sovereign powers (whether foreign powers or Commonwealth countries or the Governments thereof).[3]

Where a dispute arises as to whether any organisation or any person is entitled to immunity from suit and legal process, a certificate issued by the Minister stating any fact relevant to that question shall be conclusive evidence of that fact.[4]

In a very recent case the claimant/respondent who was a staff of the Commission of ECOWAS sued the defendant/appellant in the National Industrial Court in Nigeria for orders declaring his suspension from office by the Commission unlawful and a violation of ECOWAS Regulations, and damages from the defendant/appellant for publishing what the claimant/respondent considered a "libelous" suspension letter. The defendant/appellant responded to the suit with a statement of defence and equally filed a motion of notice objecting to the

jurisdiction of the National Industrial Court on grounds of diplomatic immunity he enjoys from proceedings in municipal courts of Nigeria by virtue of the Revised Treaty of ECOWAS, General Convention on Privileges and Immunities of ECOWAS and the Headquarters Agreement between ECOWAS and the Government of the Republic of Nigeria. He also placed reliance on Principles of Staff Employment and ECOWAS staff Regulations. In addition he attached a certificate from Nigeria's Minister of Foreign Affairs which acknowledged his diplomatic immunity.

The trial court (Haastrup J) held that it had jurisdiction and dismissed the preliminary objection of the defendant/appellant. It relied on Section 254C (2)[5] of the 1999 Constitution (as amended in 2011) and Order 14A Rule 1 (1)[6] of the National Industrial Court of Nigeria(Civil Procedure) Rules, 2017 to hold that the National Industrial Court had jurisdiction to resolve all employment matters in Nigeria, including cases that have an international element.

The Nigerian Court of Appeal unanimously allowed the appeal. Ugo JCA in his leading judgment held as follows:

"So this Certificate of the Minister of Foreign Affairs of Nigeria attached to the affidavit of Chika Onyewuchi in support of appellant's application/objection before the trial National Industrial Court for the striking out of the suit is sufficient and in fact conclusive evidence of the immunity claimed by appellant. That also includes the statement of the Minister in paragraph 2 of the same certificate that the ECOWAS Revised Treaty of 1993 was *"ratified by the Federal Republic of Nigeria on 1st July, 1994,"* thus, putting paid to the trial Judge's contention that appellant needed to prove that the said treaty was ratified by Nigeria for him to properly claim immunity.
Even Section 254C(2) of the 1999 Constitution of the Federal Republic of Nigeria which states that 'Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith,' does not by any means have the effect of conferring jurisdiction on the National Industrial Court over diplomats. In fact Section 254C(2) of the 1999 Constitution, as was correctly argued by Mr. Obi, only confers on the National Industrial Court power to apply international conventions, protocols and treaties

ratified by Nigeria relating to labour, employment, workplace, industrial relations and matters connected therewith while exercising its jurisdiction over persons subject to its jurisdiction. Diplomats who enjoy immunity from Court processes from municipal Courts in Nigeria like the Respondent are not such persons. Incidentally, the apex Court in *African Reinsurance Corporation v. Abate Fantaye* (1986) 3 NWLR (PT 32) 811 in very similar circumstances conclusively put to rest this issue of immunity from proceedings in municipal Courts enjoyed by persons like appellant. That case was cited to the trial Judge so it is surprising that she did not make even the slightest reference to it in expanding her jurisdiction to appellant who has always insisted, correctly, on his immunity. In truth, the lower Court did not simply expound its jurisdiction but attempted to expand it too. A Court is competent when, among others, the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction…
Appellant's diplomatic status and his consequent immunity from proceedings in the Courts of this country was such a feature that prevented the National Industrial Court from exercising jurisdiction over him and Suit No. NICN/ABJ/230/2019 of respondent; it was therefore wrong in holding otherwise and dismissing his preliminary objection…"[7]

Adah JCA in his concurring judgment held as follows:

"The Appellant, being an international organization enjoys immunity from suit and legal process, both by virtue of Section 11 and 18 of the 1962 Act, and Certificate issued by the Minister of External Affairs. Where a sovereign or International Organization enjoys immunity from suit and legal process, waiver of such immunity is not to be presumed against it. Indeed, the presumption is that there is no waiver until the contrary is established. Thus, waiver of immunity by a Sovereign or International Organization must be expressly and positively done by that Sovereign or International Organization.

In the instant case, the appellant from the record before the Court is an international organization. The Foreign Affairs Minister of Nigeria had given a certificate to indicate the immunity of the appellant. Exhibit CA issued by the Ministry of Foreign Affairs on 16th January, 2020 in paragraphs 2 and 3 thereof state as follows:

"2. The ministry of Foreign Affairs wishes to reaffirm the status of the ECOWAS

Commission as an international organization and the immunity and privileges of the Commission and its staff members with exception of Nigerians and holders of Nigeria permanent residency from Criminal, Civil and Administrative proceedings by virtue of ECOWAS Revised Treaty by of 1993, which was ratified by the Federal Republic of Nigeria on 1st July, 1994.
3. The Headquarters Agreement between the ECOWAS Commission and the Federal Republic of Nigeria also confers immunity on officials and other employees of ECOWAS by virtue of Article VII (3) (C) of the Agreement."

It is very clear therefore, that the appellant is covered by the Diplomatic Immunities and Privileges Act and is not amenable to the jurisdiction of the Municipal Courts. The fact that their base is in Nigeria or that Nigeria is the Host Country of the appellant does not make the appellant subserviate to the jurisdiction of Nigerian Courts. It is therefore, the law as stated lucidly in the leading judgment of my learned brother that the lower Court has no jurisdiction to entertain the claim against the appellant…"[8]

This is not the first time Nigerian courts have dealt with the issue of impleading a diplomat or foreign sovereign before the Nigerian court.[9] The decision of the trial judge was surprising in view of the weight of authorities from the Nigerian Supreme Court and Court of Appeal on the concept of diplomatic immunities in Nigeria. The claimant/respondent may have argued that matters of employment qualify as waiver of diplomatic immunity, but this position has never been explicitly endorsed by Nigerian courts. The Supreme Court of Nigeria has only accepted the concept of waiver in situations where the person claiming immunity entered into commercial transactions with the claimant.[10]

Looking at the bigger picture how does an employee who has been unfairly dismissed by a diplomatic organisation gain access to justice in Nigerian and African courts? Should the law be reformed in Nigeria and African countries to take into account the interest of employees as weaker parties?

[1] *President of the Commission of ECOWAS v Ndiaye* (2021) LPELR-53523(CA).

[2]Diplomatic Immunities and Privileges Act, Cap D9 LFN 2004 ss 1, 3-6.

[3]ibid, ss 11 and 12.

[4]ibid, s 18.

[5] 'Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.'

[6] It provides that:

1.—(1) Where an action involves a breach of or non-compliance with an international protocol, a convention or treaty on labour, employment and industrial relations, the Claimant shall in the complaint and witness statement on oath, include,

(a) the name, date and nomenclature of the protocol, convention or treaty ; and

(b) proof of ratification of such protocol, convention or treaty by Nigeria.

(2) In any claim relating to or connected with any matter, the party relying on the International Best Practice, shall plead and prove the existence of the same in line with the provisions relating to proof of custom in the extant Evidence Act."

[7] *President of the Commission of ECOWAS v Ndiaye* (2021) LPELR-53523(CA) 19-20.

[8] *Ibid* 24-26.

[9] See generally CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, Oxford, 2020) (chapter 7).

[10]*African Reinsurance Corporation v JDP Construction (Nig) Ltd* (2007) 11 NWLR 224, 234-5 (Akintan JSC)..