New Article published in American Journal of Comparative Law

On 11 August 2023, the *American Journal of Comparative* Law, published an article online titled: Jan Kleinheisterkamp, "The Myth of Transnational Public Policy in International Arbitration" The abstract reads as follows:

This Article traces the concept of transnational public policy as developed in the context of international arbitration at the intersection between legal theory and practice. The emergence of such a transnational public policy, it is claimed, would enable arbitrators to safeguard and ultimately to define the public interests that need to be protected in a globalized economy, irrespective of national laws. A historical contextualization of efforts to empower merchants and their practices in Germany and the United States in the nineteenth and early twentieth centuries highlights their reliance on the mythical lex mercatoria that shaped English commercial law. Further contextualization is offered by the postwar invocation of "general principles of law recognized by civilized nations," to keep at bay the application of supposedly less civilized, parochial legal orders, and by the consequent emergence of the "new" lex mercatoria as conceptualized especially in France. These developments paved the way, on the theory side, for later conceptualizations of self-constitutionalizing law beyond the state, especially by Gunther Teubner, and, on the practice side, for the notion of transnational public policy developed by arbitrators, especially by Emmanuel Gaillard, culminating in jurisprudential claims of an autonomous arbitral legal order with a regulatory dimension. In all these constructions, the recourse to comparative law has been a crucial element. Against this rough intellectual history, the Article offers a critique of today's construction of transnational public policy by probing into its constitutional dimension and the respective roles of private and public interests. This allows, in particular, to draw on parallels to historic U.S. constitutional debates on the allocation of regulatory powers in federalism.

The EU Sustainability Directive and Jurisdiction

The Draft for a Corporate Sustainable Due Diligence Directive currently contains no rules on jurisdiction. This creates inconsistencies between the scope of application of the Draft Directive and existing jurisdictional law, both on the EU level and on the domestic level, and can lead to an enforcement gap: EU companies may be able to escape the existing EU jurisdiction; non-EU companies may even not be subject to such jurisdiction. Effectivity requires closing that gap, and we propose ways in which this could be achieved.

(authored by Ralf Michaels and Antonia. Sommerfeld and crossposted at https://eapil.org/)

1. **The Proposal for a Directive on Corporate Sustainability Due Diligence**

The process towards an EU Corporate Sustainability Due Diligence Directive is gaining momentum. The EU Commission published a long awaited Proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD), COM(2022) 71 final, on 23 February 2022; the EU Council adopted its negotiation position on 1 December 2022; and now, the EU Parliament has suggested amendments to this Draft Directive on 1 June 2023. The EU Parliament has thereby backed the compromise textreached by its legal affairs committee on 25 April 2023. This sets off the trilogue between representatives of the Parliament, the Council and the Commission.

The current state of the CSDDD already represents a milestone. It not only introduces corporate responsibility for human rights violations and environmental damage – as already found in some national laws (e.g. in France; Germany; Netherlands; Norway; Switzerland; United Kingdom) – but also and in contrast (with the exception of French law – for more details see *Camy*) introduces civil liability. Art. 22 (1) CSDDD entitles persons who suffer injuries as result of a

failure of a company to comply with the obligations set forth in the Directive to claim compensation. It thereby intends to increase the protection of those affected within the value chain, who will now have the prospect of compensation; it also intends to create a deterrent effect by having plaintiffs take over the enforcement of the law as "private attorney generals". Moreover, the Directive requires that Member States implement this civil liability with an overriding mandatory application to ensure its application, Art. 22 (5) CSDDD. This is not unproblematic: the European Union undertakes here the same unilateralism that it used to criticize when previously done by the United States, with the Helms/Burton Act as the most prominent example.

That is not our concern here. Nor do we want to add to the lively discussion on the choice-of-law- aspects regarding civil liability (see, amongst others, *van Calster*, *Ho-Dac*, *Dias* and, before the Proposal, *Rühl*). Instead, we address a gap in the Draft Directive, namely the lack of any provisions on jurisdiction. After all, mandatory application in EU courts is largely irrelevant if courts do not have jurisdiction in the first place. If the remaining alternative is to bring an action in a court outside the EU, the application of the CSDDD civil liability regime is not, however, guaranteed. It will then depend on the foreign court's conflict-of-law rules and whether these consider the CSDDD provisions applicable – an uncertain path.

Nonetheless, no mirroring provisions on international jurisdiction were included in the CSDDD, although such inclusion had been discussed. Suggestions for the inclusion of a new jurisdictional rule establishing a *forum necessitatis* in the Brussels I Regulation Recast existed (see the Study by the European Parliament Policy Department for External Relations from February 2019, the Draft Report of the European Parliament Committee on Legal Affairs with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL) as well as the Recommendation of the European Groupe of Private International Law (GEDIP) communicated to the Commission on 8 October 2021). Further, the creation of a *forum connexitatis* in addition to a *forum necessitatis* had been recommended by both the Policy Department Study and the GEDIP. Nevertheless, the report of the European Parliament finally adopted, together with the Draft Directive of 10 March 2021, no longer contained such rule on international jurisdiction, without explanation. Likewise, the Commission's CSDDD draft and the Parliament's recent amendments lack such a provision.

2. **Enforcement Gap for Actions against Defendants Domiciled within the EU**

To assess the enforcement gap, it is useful to distinguish EU companies from non-EU companies as defendants. For EU companies, the Directive applies to companies of a certain size which are formed in accordance with the legislation of a Member State according to Art. 2 (1) CSDDD – the threshold numbers in the Commission's draft and the Parliament amendments differ, ranging between 250–500 employees and EUR 40–150 million annual net worldwide turnover, with questions of special treatment for high-risk sectors.

At first sight, no enforcement gap seems to exist here. The general jurisdiction rule anchored in Art. 4 (1) Brussels I Regulation Recast allows for suits in the defendant's domicile. Art. 63 (1) further specifies this domicile for companies as the statutory seat, the central administration or the principal place of business. (EU-based companies can also be sued at the place where the harmful event occurred according to Art. 7 (2) Brussels I Regulation Recast, but this will provide for access to an EU court only if this harmful event occurred within the EU.) The objection of *forum non conveniens* does not apply in the Brussels I Regulation system (as clarified in the CJEU's *Owusu* decision). Consequently, in cases where jurisdiction within the EU is given, the CSDDD applies, including the civil liability provision with its mandatory application pursuant to Art. 22 (1), (5).

Yet there is potential leeway for EU domiciled companies to escape EU jurisdiction and thus avoid the application of the CSDDD's civil liability. One way to avoid EU jurisdiction is to use an exclusive jurisdiction agreement in favour of a third country, or an arbitration clause. Such agreements concluded in advance of any occurred damage are conceivable between individual links of the value chain, such as between employees and subcontractors (in employment contracts) or between different suppliers along the chain (in purchase and supply agreements). EU law does not expressly prohibit such derogation. Precedent for how such exclusive jurisdiction agreements can be treated can be found in the case law following the *Ingmar* decision of the CJEU. In *Ingmar*, the CJEU had decided that a commercial agent's compensation claim according to Arts. 17 and 18 of the Commercial Agents Directive (86/653/EEC) could not be avoided through a choice of law in favour of the law of a non-EU country, even though the

Directive said nothing about an internationally mandatory nature for the purpose of private international law – as Art. 22 (5) CSDDD in contrast now does. The German Federal Court of Justice (BGH) extended this choice-of-law argument to the law of jurisdiction and held that jurisdiction clauses which could undermine the application of mandatory provisions are invalid, too, as only such a rule would safeguard the internationally mandatory scope of application of the provisions. Other EU Member State courts have shown a similar understanding not only with regard to exclusive jurisdiction agreements but also with regard to arbitration agreements (Austrian Supreme Court of Justice; High Court of Justice Queen's Bench Division).

Common to Arts. 17 and 18 Commercial Agents Directive and Art. 22 CSDDD is their mandatory nature for the purpose of private international law, which established by the ECJ for the former and is legally prescribed for the latter in Art. 22 (5) CSDDD. This suggests a possible transfer of the jurisdictional argument regarding jurisdiction. To extend the internationally mandatory nature of a provision into the law of jurisdiction is not obvious; choice of law and jurisdiction are different areas of law. It also means that the already questionable unilateral nature of the EU regulation is given even more force. Nonetheless, to do so appears justified. Allowing parties to avoid application of the CSDDD would run counter to its effective enforcement and therefore to the *effet utile*. This means that an exclusive jurisdiction agreement in favour of a third country or an arbitration clause will have to be deemed invalid unless it is clear that the CSDDD remains applicable or the applicable law provides for similar protection.

3. Enforcement Gap for Actions against Defendants Domiciled Outside the EU

While the enforcement gap with regard to EU companies can thus be solved under existing law, additional problems arise with regard to non-EU corporations. Notably, the Draft Directive applies also to certain non-EU companies formed in accordance with the legislation of a third country, Art. 2 (2) CSDDD. For these companies, the scope of application depends upon the net turnover within the territory of the Union, this being the criterion creating a territorial connection between these companies and the EU (recital (24)). The Parliament's amendments lower this threshold and thereby sharpen the scope of application of the Directive.

While application of the CSDDD to these companies before Member State courts is guaranteed due to its mandatory character, jurisdiction over non-EU defendants within the EU is not. International jurisdiction for actions against third-country defendants as brought before EU Member State courts is – with only few exceptions – generally governed by the national provisions of the respective Member State whose courts are seized, Art. 6 (1) Brussels I Regulation Recast. If the relevant national rules do not establish jurisdiction, no access to court is given within the EU.

And most national rules do not establish such jurisdiction. General jurisdiction at the seat of the corporation will usually lie outside the European Union. And the territorial connection of intra-EU turnover used to justify the applicability of the CSDDD does not create a similar basis of general jurisdiction, because jurisdiction at the place of economic activity ("doing business jurisdiction") is alien to European legal systems. Even in the US, where this basis was first introduced, the US Supreme Court now limits general jurisdiction to the state that represents the "home" for the defendant company (*BNSF Railroad Co. v. Tyrrell*, 137 S.Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)); whether the recent decision in *Mallory v. Norfolk Southern Railway Co.,* 600 U.S. (2023) will re-open the door to doing business jurisdiction remains to be seen (see *Gardner*).

Specific jurisdiction will not exist in most cases, either. Specific jurisdiction in matters relating to tort will be of little use, as in value chain civil liability claims the place of the event giving rise to damages and the place of damage are usually outside the EU and within that third state. Some jurisdictional bases otherwise considered exorbitant may be available, such as the plaintiff's nationality (Art. 14 French Civil Code) or the defendant's assets (Section 23 German Code of Civil Procedure). Otherwise, the remaining option to seize a non-EU defendant in a Member State court is through submission by appearance according to Art. 26 Brussels I Regulation Recast.

Whether strategic joint litigation can be brought against an EU anchor defendant in order to drag along a non-EU defendant depends upon the national provisions of the EU Member States. Art. 8 (1) Brussels I Regulation Recast, which allows for connected claims to be heard and determined together, applies only to EU-defendants – for non-EU defendants the provision is inapplicable. In some

Member States, the national civil procedure provisions enable jurisdiction over connected claims against co-defendants, e.g. in the Netherlands (Art. 7 (1) Wetboek van Burgerlijke Rechtsvordering), France (Art. 42 (2) Code de procédure civile) and Austria (§ 93 Jurisdiktionsnorm); conversely, such jurisdiction is not available in countries such as Germany.

Various Member State decisions have accepted claims against non-EU companies as co-defendants by means of joinder of parties. These cases have based their jurisdiction on national provisions which were applicable according to Art. 6 (1) Brussels I Recast Regulation: In *Milieudefensie* in December 2015, the Court of Appeal at the Hague held permissible an action against a Dutch anchor defendant that was joined with an action against a Nigerian company as co-defendant based on Dutch national procedural law, on the condition that claims against the anchor defendant were actually possible. The UK Supreme Court ruled similarly in its *Vedanta* decision in April 2019, wherein it found that English private international law, namely the principle of the *necessary or proper party gateway*, created a valid basis for invoking English jurisdiction over a defendant not domiciled in a Member State (with registered office in Zambia) who had been joined with an anchor defendant based in the UK. The claim was accepted on the condition that (i) the claims against the anchor defendant involve a real issue to be tried; (ii) it would be reasonable for the court to try that issue; (iii) the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) the claims against the foreign defendant have a real prospect of success; (v) either England is the proper place in which to bring the combined claims or there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place or the convenient or natural forum. The UK Supreme Court confirmed this approach in February 2021 in its *Okpabi* decision (for discussion of possible changes in UK decisions after Brexit, see *Hübner/Lieberknecht*).

In total, these decisions allow for strategic joint litigation against third-country companies together with an EU anchor defendant. Nonetheless, they do not establish international jurisdiction within the EU for isolated actions against non-EU defendants.

4. **How to Close the Enforcement Gap – *forum legis***

The demonstrated lack of access to court weakens the Directive's enforceability and creates an inconsistency between the mandatory nature of the civil liability and the lack of a firm jurisdictional basis. On a substantive level, the Directive stipulates civil liability for non-EU companies (Art. 22 CSDDD) if they are sufficiently economically active within the EU internal market (Art. 2 (2) CSDDD). Yet missing EU rules on international jurisdiction vis-à-vis third-country defendants often render procedural enforcement before an intra-EU forum impossible – even if these defendants generate significant turnover in the Union. Consequently, procedural enforcement of civil liability claims against these non-EU defendants is put at risk. The respective case law discussed does enable strategic joint litigation, but isolated actions against non-EU defendants cannot be based upon these decisions. At the same time, enforceability gaps exist with respect to EU defendants: It remains uncertain whether the courts of Member States will annul exclusive jurisdiction agreements and arbitration agreements if these undermine the application of the CSDDD.

This situation is unsatisfactory. It is inconsistent for the EU lawmaker to make civil liability mandatory in order to ensure civil enforcement but to then not address the access to court necessary for such enforcement. And it is inadequate that the (systemic) question of judicial enforceability of civil liability claims under the Directive is outsourced to the decision of the legal systems of the Member States. National civil procedural law is called upon to decide which third-country companies can be sued within the EU and how the *Ingmar* case law for EU domiciled companies will be further developed. This is a problem of uniformity – different national laws allow for different answers. And it is a problem of competence as Member State courts are asked to render decisions that properly belong to the EU level.

The CSDDD aims to effectively protect human rights and the environment in EU-related value chains and to create a level playing field for companies operating within the EU. This requires comparable enforcement possibilities for actions based on civil liability claims that are brought pursuant to Art. 22 CSDDD against all corporations operating within the Union. The different regulatory options the EU legislature has to achieve this goal are discussed in what follows.

Doing Business Jurisdiction

A rather theoretical possibility would be to allow actions against third-country

companies within the EU in accordance with the former (and perhaps revived) US case law on *doing business jurisdiction* in those cases where these companies are substantially economically active within the EU internal market. This would be consistent with the CSDDD's approach of stretching its scope of application based on the level of economic activity within the EU (Art. 2 (2) CSDDD). However, the fact that such jurisdiction has always been considered exorbitant in Europe and has even been largely abolished in the USA speaks against this development. Moreover, a *doing business jurisdiction* would also go too far: it would establish general jurisdiction, at least according to the US model, and thus also apply to claims that have nothing to do with the CSDDD.

Forum Necessitatis and Universal Jurisdiction

Another possible option would be the implementation of a *forum necessitatis* jurisdiction in order to provide access to justice, as proposed by the European Parliament Policy Department for External Relations, the European Parliament Committee on Legal Affairs and the GEDIP. However, such jurisdiction could create uncertainty because it would apply only exceptionally. Moreover, proving a "lack of access to justice" requires considerable effort in each individual case. Until now, EU law provides for a *forum necessitatis* only in special regulations; the Brussels I Regulation Recast does not contain any general rule for emergency jurisdiction. Member State provisions in this regard generally require a certain connection with the forum to establish such jurisdiction – the exact prerequisites differ, however, and will thus not be easily agreed upon on an EU level (see *Kübler-Wachendorff*).

The proposal to enforce claims under Art. 22 CSDDD by means of universal civil jurisdiction for human rights violations, which could be developed analogously to universal jurisdiction under criminal law, appears similarly unpromising; it would also go further than necessary.

Forum connexitatis

It seems more promising to implement a special case of a *forum connexitatis* so as to allow for litigation of closely connected actions brought against a parent company domiciled within the EU together with a subsidiary or supplier domiciled in a third country, as proposed by the European Parliament Policy Department for External Relations and the GEDIP. This could be implemented by means of a

teleological reduction of the requirements of Art. 8 (1) Brussels I Regulation Recast with regard to third-country companies, which would be an approach more compatible with the Brussels Regulation system than the implementation of a *forum necessitatis* provision (such a solution has, for instance, been supported by *Mankowski*, in: Fleischer/Mankowski (Hrsg.), LkSG, Einl., para. 342 and the GEDIP). This would simultaneously foster harmonisation on the EU level given that joint proceedings currently depend upon procedural provisions in the national law of the Member States. Moreover, this could avoid "blame games" between the different players in the value chain (see *Kieninger*, RW 2022, 584, 589). For the implementation of such a *forum connexitatis*, existing Member State regulations and related case law (*Milieudefensie, Vedanta*, and *Okpabi*) can serve as guidance. Such a forum is not yet common practice in all Member States; thus, its political viability remains to be seen. It should also be borne in mind that the implementation of a *forum connexitatis* on its own would only enable harmonised joint actions that were brought against EU domiciled anchor defendants together with non-EU defendants; it would not enable isolated actions against third-country companies – even if they are economically active within the EU and fall within the scope of application of the CSDDD.

Forum legis

The best way to close the CSDDD enforcement gap would be introducing an international jurisdiction basis corresponding to the personal scope of application of the Directive. The EU legislature would need to implement a head of jurisdiction applicable to third-country companies that operate within the EU internal market at the level specified in Art. 2 (2) CSDDD. Effectively, special jurisdiction would be measured on the basis of net turnover achieved within the EU. This would procedurally protect the Directive's substantive regulatory objectives of human rights and environmental protection within EU-related value chains. Moreover, this would ensure a level playing field in the EU internal market.

Other than a forum premised on joint litigation, this solution would allow isolated actions to be brought – in an EU internal forum – against non-EU companies operating within the EU. The advantage of this solution compared to a forum of necessity is that the connecting factor of net turnover is already defined by Art. 2 (2) CSDDD, thus reducing the burden of proof, legal uncertainty and any unpredictability for the parties. Moreover, this approach would interfere less with

the regulatory interests of other states than a *forum necessitatis* rule, which for its part would reach beyond the EU's own regulatory space.

A *forum legis* should not be implemented only as a subsidiary option for cases in which there is a lack of access to justice, because this would create legal uncertainty. The clear-cut requirements of Art. 2 (2) CSDDD are an adequate criterion for jurisdiction via a *forum legis*. On the other hand, it should not serve as an exclusive basis of jurisdiction, because especially plaintiffs should not be barred from the ability to bring suit outside the EU. The risk of strategic declaratory actions brought by companies in a court outside the EU seems rather negligeable, and this can be avoided either by giving preference to actions for performance over negative declaratory actions, as is the law in Germany or through the requirement of recognisability of a foreign judgment, which would not be met by a foreign decision violating domestic public policy by not providing sufficient protection.

This leaves a problem, however: The CSDDD does not designate which Member State's court have jurisdiction. Since a *forum legis* normally establishes adjudicatory jurisdiction correlating with the applicable law, jurisdiction lies with the courts of the country whose law is applied. This is not possible as such for EU law because the EU does not have its own ordinary courts. The competent Member State court within the EU must be determined. Two options exist with regard to the CSDDD: to give jurisdiction to the courts in the country where the highest net turnover is reached, or to allow claimants to choose the relevant court. The first option involves difficult evidentiary issues, the second may give plaintiffs an excessive amount of choice. In either case, non-EU companies will be treated differently from EU companies on the question of the competent court – for non-EU companies, net turnover is decisive in establishing the forum, for EU-companies, the seat of the company is decisive. This difference is an unavoidable consequence resulting from extension of the scope of application of the Directive to third-country companies on the basis of net turnover.

5. Implementation

How could this *forum legis* be achieved? The most straightforward way would be to include a rule on jurisdiction in the CSDDD, which would then oblige the

Member States to introduce harmonised rules of jurisdiction into national procedural law. This would be a novelty in the field of European international civil procedure law, but it would correspond to the character of the special provision on value chains as well as to the mechanism of the CSDDD's liability provision. An alternative would be to include in the Brussels I Regulation Recast a sub-category of a special type of jurisdiction under Art. 7 Brussels I Regulation Recast. This as well would be a novelty to the Brussels system, which in principle requires that the defendant be seated in a Member State (see also *Kieninger*, RW 2022, 584, 593, who favours reform of the Brussels I Regulation Recast for the sake of uniformity within the EU). This second option would certainly mesh with current efforts to extend the Brussels system to non-EU defendants (see *Lutzi/Piovesani/Zgrabljic Rotar*).

The implementation of such a *forum legis* is not without problems: It subjects companies, somewhat inconsistently with the EU legal scheme, to *de facto* jurisdiction merely because they generate significant turnover in the EU's internal market. Yet such a rule is a necessary consequence of the extraterritorial extension of the Directive to third-country companies. The unilateral character of the CSDDD is problematic. But if the CSDDD intends to implement such an extension on a substantive level, this must be reflected on a procedural level so as to enable access to court. The best way to do this is by implementing a *forum legis*. The CSDDD demonstrates the great importance of compensation of victims of human rights and environmental damage, by making the cicil liability rule internationally mandatory. Creating a corresponding head of jurisdiction for these substantive civil liability claims is then necessary and consistent in order to achieve access to court and, thus, procedural enforceability.

The Arab Yearbook of Public and Private International Law – Call for

Submission

Finally!!! A yearbook dedicated to public and private international law in the Arab world has recently been established by BRILL and is expected to be launched in the fall of 2024 called **"The Arab Yearbook of Public & International Law"** (the Yearbook).

One can only warmly welcome this initiative. It will certainly provide a space for fruitful discussions and a forum where experts from the Arab world and abroad can exchange views, all for the sake of the further development of these areas of law in the Arab region.

The Yearbook's official website provides the following description:

The Arab Yearbook of Public & Private International Law is dedicated to exploring questions of public international law and private international law throughout the Arab World. The Yearbook has a broad intellectual agenda. It publishes high-quality scholarship submitted by authors both from the Arab region and across the world. The Yearbook publishes articles on any questions that relate to general public international law and its sub-fields, such as the law governing the use of force, international humanitarian law, human rights law, international economic law, the law of the sea, environmental law, and the law and practice of international organizations. The Yearbook also welcomes submissions on any topic of private international law, conflicts of laws, investor-state arbitration, and commercial arbitration.

The Yearbook publishes scholarship that applies various jurisprudential and methodological perspectives. In addition to doctrinal scholarship, the Yearbook publishes research that explores legal questions from economic, critical, historical, feminist, and sociological perspectives, or that uses a diverse range of methodologies, such as empirical research and inter-disciplinary approaches that explore intersections between law & political science, law & international relations, and law & religion.

The Yearbook publishes primary materials on international law in the Arab World. It provides a forum to preserve a permanent record of official positions of Arab governments, Arab inter-governmental and sub-regional organizations,

international organizations active in the Arab region, in addition to materials, reports, and documents prepared by civil society and non-governmental organizations on questions of international law. In addition, the Yearbook publishes judicial materials that relate to international law in the region, including judgments of international courts and quasi-judicial bodies, such as human rights monitoring bodies, decisions of arbitral tribunals, including from investor-state and commercial arbitration panels, and judgments of national courts.

For its inaugural volume, the Yearbook has issued a **call for submission**:

Submission Deadline: October 1st.

Word limits: 10,000-15,000 words for articles;

7,000-10,000 words for notes or comments;

2,000-3,000 words for book or case reviews

(all word counts are inclusive of footnotes).

Submission Address: helal.18@osu.edu

For details, please check the Yearbook's website here and here.

Best wishes and good luck to the initiators of this wonderful project.

Conference Report: Global Law

and Sustainable Development; Medellín, Colombia. 26-27 April, 2023

(authored by Verónica Ruiz Abou-Nigm)

Global Law and Sustainable Development. Conference Report.

On 26-27 April 2023 at the University of Medellín, Colombia, private international law scholars organised and hosted a conference that pushed the boundaries of the discipline and engaged with interdisciplinary and comparative perspectives around the theme of Global law and Sustainable Development. The conference, in Spanish, was organised by the University of Medellín and the Antioquian Institute of Private International Law (IADIP), and supported by D.E.C. Consultores, Edinburgh Law School, the Centre for C

ontemporary Latin American Studies of the University of Edinburgh (CCLAS), the Law School of University of Los Andes, and the Max Planck Institute for Comparative and International Private Law.

The conference opened with a warm welcome by José Luis Marín Fuentes and the Dean of the Law School of the University of Medellín, Alvaro García Restrepo, followed by an *in memoriam* honouring Professor Jürgen Basedow (1949-2023). Professor Basedow was highly admired by the Latin American Private International Law community, many of whom gathered at this conference.

The keynote address by Ralf Michaels and Verónica Ruiz Abou-Nigm on Law and Sustainability beyond the SDGs 2030 set the scene on the role of private law and private international law in the quest for sustainability and provided insightful threads for broader reflection that were revisited by the conference participants throughout the discussions during this two-day conference.

The keynote address was followed by a first panel on Global Supply Chains and Global Law, chaired by Ruiz Abou-Nigm with presentations from María Mercedes Albornoz (Mexico); Jeannette Tramhel (OAS), and Juan Amaya (Colombia). Albornoz explored conceptual issues around global supply and global value chains, exploring the role of private international law in enabling the contractual web that supports these. Tramhel focused on the agricultural sector and international private law issues relevant to SDG 2: Cero Hunger. She noted the governance gap in relation to urgent issues around food security, raising awareness of the critical need for immediate intervention in this sector and highlighting the importance of transnational law developments for social, economic and environmental sustainability in the food industry. In turn, Amaya explained the importance of traceability, and conceptualised social traceability, with illustrations based on interesting judicial cases pending resolution in the Global North in relation to alleged unsustainable practices in the Global South by Global North MNCs.

The first afternoon panel on Comparative Law Perspectives on Sustainable Development was chaired by Nuria González Martín (Mexico) with presentations from Eleonora Lozano (Colombia); Laura Carballo Piñeiro (Spain) and Alberto Alonso (Spain). Lozano shared her research on tax law and sustainable development, with very enlightening results based on her work on fiscal sustainability from a law and economics perspective. Carballo focused on the role of private international law in relation to some of the objectives in SDGs 10 and 8, particularly focusing on labour migration, and sharing the work of a research group that is currently working on sustainable circular labour migration at the crossroads of private international law, labour law and migration law

perspectives. The final speaker in this panel, Alonso, explored criminal law issues connected to SDG 16.

The final session on the first day was a round-table discussion on the new challenges for private international law in Latin America coordinated by Albornoz with the participation of Ignacio Goicoechea (HCCH-ROLAC), Maria Julia Ochoa (Colombia/Spain), Claudia Madrid Martínez (Colombia) and Marcos Dotta (Uruguay). Undoubtedly this was a great way to conclude the first day with a lively discussion about the several challenges facing the region, as well as the importance of capacity building in private international law tailored to the needs of the region, reflecting on the role of institutions like the HCCH, national authorities, academia and the private sector in this endeavour.

The second day opened with an interactive presentation of Karen Leiva Chavarría from the Justice Department of Costa Rica, presented by Goicoechea. Costa Rica has been a pioneer in the inclusion of markers of transnational access to justice in its annual reporting on SDG 16, and a leader in the region in relation to the work of judicial authorities in connection with the UN Agenda 2030. The presentation emphasised the role of the profession, and addressed, in particular, the soon-to-be-lawyers in the audience, from the University of Medellín and other local universities.

The next panel on the SDGs and International Dispute Resolution, chaired by Carballo Piñeiro, included the presentations of Lenin Moreno Navarro (Ecuador), Eugenio Hernández Bretón (Venezuela), Lidia Mercado (Panamá) and Nuria González Martín (Mexico). The panellists discussed issues around international commercial litigation, arbitration and mediation, and reflected upon the tensions inherent in pursuing sustainability in relation to the needs for development in the region, particularly in relation to dispute resolution services.

A panel on International Contracts and Sustainable Development followed in the afternoon. This panel was chaired by Madrid Martínez and included the presentations of Rosario Espinosa Calabuig (Spain), Nestor Londoño (Colombia), Maria Blanca Noodt Taquela (Argentina) and Anabela Sousa Gonçalves (Portugal). The panellists tackled a wide range of issues around sustainability in a variety of international contracts, from contractual issues in the cruise industry in shipping, to case studies of sustainability costs in extractive industries in Argentina, to more general private international law methodologies relevant to international

contracts including issues of applicable law and jurisdiction clauses.

The final round-table brought to the conference enlightening interdisciplinary perspectives on applied research in sustainable development and urbanism. Medellín is well-known worldwide for the transformative role that social urbanism has had in the past decades. This round-table, chaired by Ruiz Abou-Nigm, included a team of researchers from Medellín, who work in a collaborative project with the CCLAS (University of Edinburgh). Wilmar Castro Mere, Françoise Coupe de Restrepo, Ani Zapata Berrio and Carlos Velásquez shared their experiences of co-production of applied research on risk management in local communities. This was a truly insightful discussion bringing to life many of the issues that had been discussed in theory throughout the conference, particularly in relation to the role of different actors, norms, and communities in governance, as well as key considerations of social inclusion, capacity building, and the key role of cooperation between academia and the public and private sectors as well as civil society in the UN Agenda 2030.

The conference ended with a warm farewell from our fantastic local host, José Luis Marín Fuentes, who spared no efforts to make this conference a truly remarkable international event that provided much food for thought and opened new avenues for international collaboration in pursuance of the SDGs.

Out Now: Fabrizio Marrella, "Diritto del commercio internazionale / International

Business Law", 3rd edition 2023

The third edition of Fabrizio Marrella's textbook on international business law has recently published by Wolters Kluwers/Cedam.

The author (Vice-Rector and Chair of International Law at "Cà Foscari" University of Venice, Italy) has kindly provided the following summary for our readers:

> *After an historical introduction and a clear systematic analysis of key actors and sources of International Business Law, the book focuses on transnational contracts and commercial relationships of companies by deepening international sales (including the first applications of Incoterms ® 2020), contracts of international transport, insurance, commercial distribution, payments and bank guarantees. The leading methodology used by the Author is that of private international law and best operational practices.*
>
> *The book also sets out the regulation of foreign direct investment in the light of the latest new regulatory and case-law developments. In the final part, the work examines, in one section, ADR mechanisms together with international arbitration and, in the final section, the most relevant international civil*

procedure rules for businesses.

The book can be found at the publisher's website here.

Reappreciating the Composite Approach with Anupam Mittal v Westbridge II

Written by: Aditya Singh, *BA.LL.B. (Hons) student at the National Law School of India University(NLSIU), Bengaluru and line editor at the National Law School Business Law Review (NLSBLR)*

I. INTRODUCTION

The debate surrounding the composite approach i.e., the approach of accommodating the application of both the law applicable to the substantive contract and the *Lex Fori* to the arbitration clause has recently resurfaced with *Anupam Mittal v Westbridge Ventures II* ("Westbridge"). In this case, the Singapore Court of Appeal paved way for application of both the law governing substantive contract and the *Lex Fori* to determine the arbitrability of the concerned oppression and mismanagement dispute. The same was based on principle of comity, past precedents and s 11 of the International Arbitration Act. The text of s 11 (governing arbitrability) does not specify and hence limit the law determining public policy to *Lex Fori*. In any event, the composite approach regardless of any provision, majorly stems from basic contractual interpretation that extends the law governing substantive contract to the arbitration clause unless the presumption is rebuttable. For instance, in the instant case, the dispute would have been rendered in-arbitrable with the application of Indian law (law governing substantive contract) and hence the Singapore law was inferred to be the implied choice.[1]

The test as initially propounded in *Sulamérica CIA Nacional de Seguros v Enesa Engenharia* ("Sulamerica") by the EWCA and later also adopted in Singapore[2] states that the law governing the substantive contract will also govern the arbitration clause unless there is an explicit/implicit choice inferable to the contrary. The sequence being 1) express choice, 2) determination of implied choice in the absence of an express one and 3) closest and the most real connection. The applicability of *Lex Fori* can only be inferred if the law governing the substantive contract would completely negate the arbitration agreement. There have been multiple criticisms of the approach accumulated over a decade with the very recent ones being listed in (footnote 1). The aim of this article is to highlight the legal soundness and practical boons of the approach which the author believes has been missed out amidst the rampant criticisms.

To that end, the author will *first* discuss how the composite approach is the only legally sound approach in deriving the applicable law from the contract, which is also the source of everything to begin with. As long as the arbitration clause is a part of the main contract, it is subject to the same. To construe it as a separate contract under all circumstances would be an incorrect application of the separability doctrine. Continuing from the first point, the article will show how the various nuances within the composite approach provide primacy to the will and autonomy of the parties.

II. TRUE APPLICATION OF THE 'SEPARABILITY' PRINCIPLE

The theory of separability envisages the arbitration clause to be separate from the main contract. The purpose of this principle is to immunize the arbitration clause from the invalidity of the main contract. There are various instances where the validity of a contract is contested on grounds of coercion, fraud, assent obtained through corruption, etc. This, however, does not render the arbitration clause inoperable but rather saves it to uphold the secondary obligation of resolving the dispute and measuring the claims arising out of the breach.[3]

It is imperative to note from the context set above that the doctrine has a specific set purpose. What was set as its purpose in seminal cases such as *Heyman v Darwins Ltd* has now been cemented into substantive law with Article 16 of the UNCITRAL Model law which has further been adapted by multiple jurisdictions such as India, Singapore and the UK also having a version in s 7. The implication of this development is that separability cannot operate in a vague and undefined

space creating legal fiction in areas beyond its stipulated domain. Taking into consideration this backdrop, it would be legally fallacious to strictly follow the *Lex Fori* i.e., applying the substantive law of the seat to the arbitration clause as a default or the other extreme of the old common law approach of extending the law applicable to the substantive contract as a default. The author submits that the composite approach which was first taken in *Sulamerica* and recently seen in *Westbridge* to determine the law applicable to arbitrability at a pre-award stage, enables the true application and effectuation of the separability doctrine.

A. Lex Fori

To substantiate the above made assertion, the author will first look at the *Lex Fori* paradigm. Any legal justification for the same will first have to prove that an arbitration clause is not subject to the main contract. This is generally carried out using the principle of separability. However, when we examine the text of article 16, Model law or even the provisions of the impugned jurisdictions of India and Singapore (in reference to the Westbridge case), separability can only be operationalised when there is an objection to the validity or existence of the arbitration clause. It would be useful to borrow from Steven Chong, J's reading of the doctrine in *BCY v BCZ*, which is also a case of the Singapore High Court that applied the composite approach of *Sulamerica*. Separability according to them serves a vital and narrow purpose of shielding the arbitration clause from the invalidity of the main contract. The insulation however does not render the clause independent of the main contract for all purposes. Even if we were to examine the severability provision of the UK Arbitration Act (Sulamerica's jurisdiction), the conclusion remains that separability's effect is to make the arbitration clause a distinct agreement only when the main contract becomes ineffective or does not come into existence.

To further buttress this point, it would be useful to look at the other contours of separability. For instance, in the landmark ruling of *Fiona Trust and Holding Corp v Privalov* (2007), both Lord Hoffman and Lord Hope illustrated that an arbitration clause will not be severable where it is a part of the main contract and the existence of consent to the main contract in itself is under question. This may be owing to the fact that there is no signature or that it is forged, etc. To take an example from another jurisdiction, arbitration clauses in India seize to exist with the novation of a contract and the position remains even if the new contract does

not have an arbitration clause. In these cases, the arbitration clause seized to be operational when the main contract turned out to be non-est. However, the major takeaway is that as a general norm and even in specific cases where the arbitration clause is endangered, it is subject to the main contract and that there are limitations to the separability doctrine. Hence, it would be legally fallacious to always detach arbitration clauses from the main contract and apply the law of the seat as this generalizes the application of separability, which in turn is contrary to its scheme. It is also imperative to note that the Sulamerica test does not impute the law governing the substantive contract when the arbitration clause is a standalone one hence treating it as a separate contract where ever necessary.

B. Compulsory Imposition of Law of Substantive Contract

Having addressed the Lex Fori approach, the author will now address the common law approach of imputing the law governing the main contract to the arbitration clause. The application and reiteration of which was recently seen in *Enka v Chubb* and *Kabab-ji v Kout Food Group.* If we were to just examine the legal tenability of a blanket imposition of the governing law on the main contract, the author's stand even at this end of the spectrum would be one that the approach is impeding the true effectuation of separability. While it is legally fallacious to generalize the application of separability, the remark extends when it is not operationalized to save an arbitration clause. There may be circumstances as seen in *Sulamerica* and *Westbridge* wherein the arbitration clause will be defunct if the law of the main contract is applied. In such circumstances the arbitration clause should be considered a distinct contract and the law of the seat should be applied using a joint or even a disjunctive reading of prongs 2 and 3 of the *Sulamerica* test i.e., 'implied choice' and 'closest and most real connection'. Although, in the words of Lord Moore-Bick, J, the two prongs often merge in inquiry as "*identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law*" [para 25]. In any event, when the law governing substantive contract is adverse, the default implication rendered by this inquiry is that the parties have impliedly chosen the law of the seat and the arbitration clause in these circumstances has a more real connection to the law of the seat. This is because the reasonable expectation of the parties to have their dispute resolved by the stipulated mechanism and the secondary obligation of resolving the dispute as per the contract (apart from the

primary obligation of the contract) can only be upheld by applying the law of the seat.

When we specifically look at *Enka v Chubb* and *Kabab-ji,* it is imperative that these cases have still left room for the 'validation principle' which precisely is saving the arbitration clause in the manner described above. While the manner in which the principle was applied in Kabab-ji may be up for criticism, the same is beyond the scope of this article. A narrow interpretation of the validation principle is nonetheless avoidable using the second and third prongs of the *Sulamerica* test as the inquiry there gauges the reasonable expectation of the parties. Irrespective, Kabab-ji is still of the essence for its reading of Articles V(I)(a) of the New York Convention("NYC") r/w Article II of the NYC. Arguments have been made that the composite approach (or the very idea of applying the law governing substantive contract) being antithetical to the NYC. However, the law of the seat is only to be applied to arbitral agreements referred to in Article II, 'failing any indication'. This phrase is broad enough to include not just explicit choices but also implicit choices of law. The applicability of *Lex Fori* is only mentioned as the last resort and what the courts after all undertake is finding necessary indications to decide the applicable law. Secondly, statutory interpretation should be carried out to give effect to international conventions only to the extent possible (para 31, *Kabab-ji*). An interpretation cannot make redundant the scheme of separability codified in the statute. Lastly, even if the approach were to be slightly antithetical to NYC, its domain of operation is at the enforcement stage and not the pre-arbitration stage. Hence, it can never be the sole determining factor of the applicable law at the pre-arbitral stage. While segueing into the next point of discussion, it would be imperative to mention amidst all alternatives and criticisms that the very creation of the arbitral tribunal, initiation of the various processes, etc is a product of the contract and hence its stipulation can never be discarded as a default.

III. PLACING PARTY AUTONOMY & WILL ON A PARAMOUNT PEDESTAL

The importance of party autonomy in international arbitration cannot be reiterated enough. It along with the will of the parties constitute the very fundamental tenets of arbitration. As per Redfern and Hunter, it is an aspiration to make international arbitration free from the constraints of national laws.[4] There will always be limitations to the above stated objective, yet the aim should

be to deliver on it to the most possible extent and it is safe to conclude that the composite approach does exactly that. Darren Low at the Asian International Arbitration Journal argues that this approach virtually allows party autonomy to override public policy. Although they state this in a form of criticism as the chronology in their opinion is one where the latter overrides the former. However, even they note that the arbitration in *Westbridge* was obviously not illegal. It is imperative to note that the domain of various limitations to arbitration such as public policy or comity needs to be restricted to a minimum. When the parties are operating in a framework which provides self-determining authority to the extent that parties the freedom to decide the applicable substantive law, procedure, seat, etc, party autonomy is of paramount importance. The Supreme Court of India in *Centrotrade Minerals v Hindustan Copper* concluded party autonomy to be the guiding principle in adjudication, in consideration of the abovementioned rationale.

As stated in *Fiona Trusts,* the insertion of an arbitration clause gives rise to a presumption that the parties intend to resolve all disputes arising out of that relation through the stipulated mechanism. This presumption can only be discarded via explicit exclusion. An arbitration clause according to Redfern and Hunter gives rise to a secondary obligation of resolving disputes. Hence, as long as the parties intend to and have an obligation to resolve a dispute, an approach that facilitates the same to the most practicable extent is certainly commendable.

This can be further elucidated by taking a closer look at the line of cases on the topic. The common aspect in all these cases is that they have paved way for the application of laws of multiple jurisdictions which in turn has opened the gates to a very pro-validation approach. For instance, the SCA in *Westbridge* applied Singapore's law as the application of Indian law would have rendered the dispute in-arbitrable. There may also be circumstances wherein the *Lex Fori* may be rendering a dispute in-arbitrable. While the court in *Westbridge* stated that owing to the parallel consideration of the law of the seat, the dispute would be in-arbitrable, using the composite approach one could also pave the way for the arbitration of that dispute. This can be done by construing the place of the forum as a venue and not a seat. There are multiple reasons for parties to choose a particular place for arbitration, including but not limited to neutrality, quality of adjudication, cost, procedure applicable to arbitration, etc. And while it may be true that an award passed by a following arbitration may not be enforceable in

the venue jurisdiction, it can still be enforced in other jurisdictions. There are 2 layers to be unravelled here – the first one being that it is a well settled principle in international arbitration that awards set aside in one jurisdiction can be enforced in the others as long as they do not violate the public policy of the latter jurisdiction. This was seen in *Chromalloy Aeroservices v Arab Republic of Egypt,* wherein the award was set aside by the Egyptian Court of Appeal yet it was enforced in the U.S.A. The same principle although well embedded in other cases was recently reiterated in *Compania De Inversiones v. Grupo Cementos de Chihuahua* wherein the award for an arbitration seated in Bolivia was annulled there but enforced by the Tenth Circuit in the U.S.A. The second ancillary point to this is the practicality aspect. The parties generally select the law governing the substantive contract to be one where the major operations of the company, its assets related to the contract are based and hence that is also likely to be the preferred place of enforcement. This is a good point to read in Gary Born's proposal of imputing the law of a jurisdiction that has "*materially closer connections to the issue at hand*".[5]

Apart from the pro-validation approach which upholds the rational expectation of the parties, there are other elements of the composite approach that ensure the preservation of party autonomy and will. For instance, the courts will *firstly*, not interfere if it can be construed that the parties have expressly stipulated a law for the arbitration clause. *Secondly*, as has been mentioned above, the courts will impute the law governing the substantive contract as the applicable law when the arbitration clause is a standalone one. What can be observed from here is that the approach maintains a proper degree of caution even while inferring the applicable law. And *lastly*, the very idea of maintaining a presumption of the same law being applicable to both the main contract and the arbitration clause also aligns with upholding the will and autonomy of the parties. Various commentators have observed that parties in practice rarely stipulate a separate clause on the substantive law applicable to the arbitration clause. As observable, model clauses of the various major arbitral institutions do not contain such a stipulation and certain commentators have even gone as far as to conclude that the inclusion of such a clause would only add to the confusion. In light of this background, it was certainly plausible for Steven Chong, J in *BYC v BCZ* to conclude that "*where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law. If the intention is otherwise, I do not think it*

is unreasonable to expect the parties to specifically provide for a different system of law to govern the arbitration agreement" [para 59]. However, it has been shown above that the composite approach has not left any presumption irrebuttable in the presence of appropriate reasoning, facts and will trigger separability if necessary to avoid the negation of the arbitration agreement.

IV. CONCLUDING REMARKS

In a nutshell, what can be inferred from this article is that the composite approach keeps at its forefront principles and characteristics of party autonomy and pro-arbitration. The approach is extremely layered and well thought out to preserve the intention of the parties to the most practicable extent. It delivers on all of this while truly effectuating the principle of separability and ensuring its correct application. Hence, despite all the criticisms it is still described as a forward-looking approach owing to its various characteristics.

FOOTNOTES:

[1] For recent literature and more detailed facts, See Darren Jun Jie Low, 'The Composite Approach to Issues of Non-Arbitrability at the Pre-Award and Post-Award Stage: Anupam Mittal v. Westbridge Ventures II Investment Holdings [2023] SGCA 1', in Lawrence Boo and Lucy F. Reed (eds), *Asian International Arbitration Journal* (Kluwer Law International 2023, Volume 19, Issue 1), 83 – 94; Khushboo Shahdapuri and Chelsea Pollard, 'Dispute over Matrimonial Service Website: Singapore Adopts Composite Approach in Declaring Dispute to be Arbitrable', *(Kluwer Arbitration*, 2023) < Dispute over Matrimonial Service Website: Singapore Adopts Composite Approach in Declaring Dispute to be Arbitrable – Kluwer Arbitration Blog>; Nisanth Kadur, 'Determining Arbitrability at the Pre-Award Stage: An Analysis of the Singapore Court of Appeal's "Composite Approach"', (*American Review of International Arbitration*, 2023) <Determining Arbitrability at the Pre-Award Stage: An Analysis of the Singapore Court of Appeal's "Composite Approach" – American Review of International Arbitration (columbia.edu)>

[2] See *BCY v BCZ* [2016] SGHC 249; *BNA v BNB* [2019] SGHC 142; *Anupam Mittal v Westbridge II* [2023] SGCA 1.

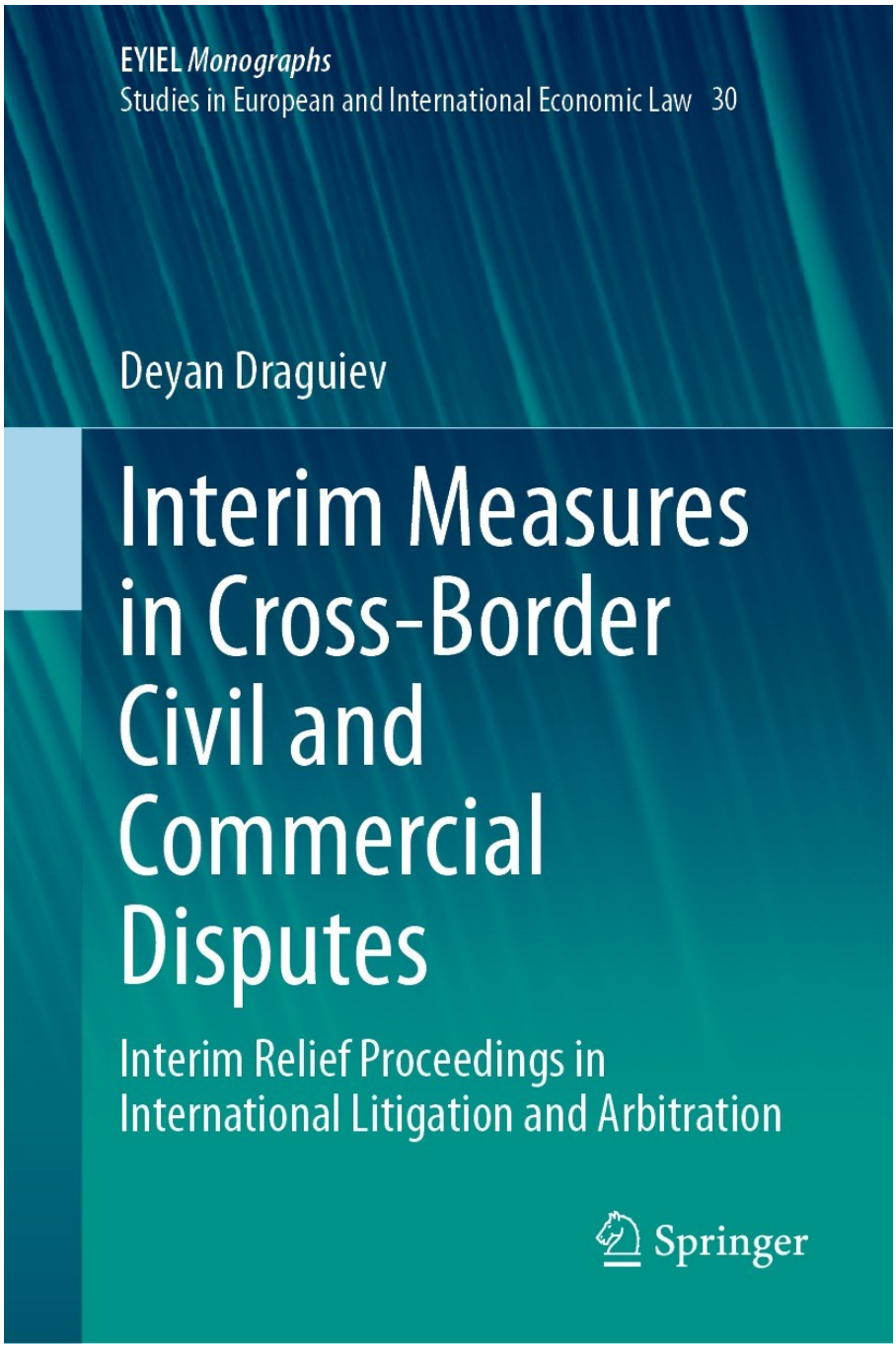
[3] Martin Hunter and others, *Redfern and Hunter on International Arbitration, (6th edn, 2015 OUP) [2.101 – 2.104].*

[4] Redfern and Hunter (n 1) [1.53].

[5] Gary Born, *International Commercial Arbitration*, (3rd Ed, Kluwer Law International 2021) §4.05 [C] [2].

Out Now: Interim Measures in Cross-Border Civil and Commercial Disputes

A new volume by Deyan Draguiev on Interim Measures in Cross-Border Civil and Commercial Disputes, based on his PhD thesis supervised by Peter Mankowski, has just been published with Springer.



The blurb reads as follows:

> *The book focusses on applying a holistic overview of interim measures and associated procedures in the context of cross-border private law (civil and commercial) disputes that are the subject of international litigation and arbitration proceedings. It reexamines key features of said problem and outlines novel findings on interim relief in the area of international dispute resolution. The book analyses the rules of EU law (EU law regulations such as the Regulation Brussels Ibis and the rest of the Brussels regime) as the single system of cross-border jurisdictional rules, as well as the rules of international arbitration (both commercial and investment). In the process, it conducts a*

complete mapping of interim measures problems and explores the criteria for granting relief under national laws. For this purpose, it includes an extensive comparative law overview of many jurisdictions in Europe, Asia, Africa, the Americas, etc., to reveal common standards for granting interim relief.

Interim relief is a salient problem in dispute resolution, and serious international disputes usually require requests for such measures. This makes a more complete understanding all the more important. For scholars and practitioners alike, there are various ways to seek relief; precisely this complexity calls for a more complex and multilayered analysis, which does not (as is usually the case) adopt the perspective of either litigation or arbitration, but instead weighs the pros and cons and considers the viability and reliability of the different options, viewed from all angles.

Save the Date! Talk on BRICS Private International Law on 18 July 2023

On 18 July 2023, The Max Planck Institute for Comparative and International Private Law, Hamburg, will host a 'Talk' on '**The Role of Private International Law in the Adjudication of Cross-Border Civil and Commercial Disputes in BRICS: Some Reciprocal Lessons'** from 11 AM – 12.30 PM (CEST) as a part of their 'Conflict Club' which is scheduled every Tuesday. The talk will be delivered virtually by Professor Saloni Khanderia, who, as many may know, is the co-author of the leading commentary on Indian Private International Law that was published in 2021 by Hart/Bloomsbury Publications.

The talk will highlight some of the findings of a project being co-coordinated by Dr Stellina Jolly from South Asian University, Delhi (India) and Prof Saloni Khanderia, which analyses the role of private international law in achieving the

aims of the BRICS (Brazil, Russia, India, China and South Africa) as an economic bloc. The findings of this project will be published in 2024 by Hart/Bloomsbury: Oxford, UK and will comprise insights provided by approximately 20 leading scholars and practitioners from the BRICS region – many of whom are also editors of this blog. The project has currently received funding from the Max Planck Institute, Hamburg and the OP Jindal Global Univesity, Sonipat, India, in the form of a short-term scholarship and a research grant conferred upon Prof Saloni Khanderia.

While the project endeavours to engage in a holistic analysis of the convergences and divergences in the private international laws of BRICS – concerning jurisdiction, arbitration, the identification of the governing law, the recognition and enforcement of foreign judgments and arbitral awards, as well as the regulation of family matters, the 'talk' in the Conflicts Club on the 18th of July will chiefly focus on the impact of the principles of private international law in civil and commercial matters in fostering economic cooperation among these nations. In doing so, the talk will touch upon some areas where the BRICS governments, courts and arbitral tribunals may share reciprocal lessons to foster trade and commerce not merely among the bloc but also with non-members.

Interested participants may contact Prof Saloni Khanderia for the Zoom link using the contact details available here. The talk will be for 30 minutes followed by one hour of discussion. Hope to see many of you on 18 July at 11 AM!

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2023: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

B. Heiderhoff: **Care Proceedings under Brussels IIter – Mantras, Compromises and Hopes**

Against the background of the considerable extension of the text of the regulation, the author asks whether this has also led to significant improvements. Concerning jurisdiction, the "best interests of the child" formula is used a lot, while the actual changes are rather limited and the necessary compromises have led to some questions of doubt. This also applies to the extended possibility of choice of court agreements, for which it is still unclear whether exclusive prorogation is possible beyond the cases named in Article 10 section 4 of the Brussels II ter Regulation. Concerning recognition and enforcement, the changes are more significant. The author shows that although it is good that more room has been created for the protection of the best interests of the child in the specific case, the changes bear the risk of prolonging the court proceedings. Only if the rules are interpreted with a sense of proportion the desired improvements can be achieved. All in all, there are many issues where one must hope for reasonable clarifications by the ECJ

G. Ricciardi: **The practical operation of the 2007 Hague Protocol on the law applicable to maintenance obligations**

Almost two years late due to the COVID-19 pandemic, in May 2022 over 200 delegates representing Members of the Hague Conference on Private International Law, Contracting Parties of the Hague Conventions as well as Observers met for the First Meeting of the Special Commission to review the practical operation of the 2007 Child Support Convention and the 2007 Hague Protocol on Applicable Law. The author focuses on this latter instrument and analyses the difficulties encountered by the Member States in the practical operation of the Hague Protocol, more than ten years after it entered into force at the European Union level. Particular attention is given to the Conclusions and Recommendations of the Applicable Law Working Group, unanimously adopted by

the Special Commission which, in light of the challenges encountered in the implementation of the Hague Protocol, provide guidance on the practical operation of this instrument.

R. Freitag: **More Freedom of Choice in Private International Law on the Name of a Person!**

Remarks on the Draft Bill of the German Ministry of Justice on a Reform of German Legislation on the Name of a PersonThe German Ministry of Justice recently published a proposal for a profound reform of German substantive law on the name of a person, which is accompanied by an annex in the form of a separate draft bill aiming at modernizing the relevant conflict of law-rules. An adoption of this bill would bring about a fundamental and overdue liberalization of German law: Current legislation subjects the name to the law of its (most relevant) nationality and only allows for a choice of law by persons with multiple nationalities (they max designate the law of another of their nationalities). In contrast, the proposed rule will order the application of the law of the habitual residence and the law of the nationality will only be relevant if the person so chooses. The following remarks shall give an overview over the proposed rules and will provide an analysis of their positive aspects as well as of some shortcomings.

D. Coester-Waltjen: **Non-Recognition of "Child Marriages" Concluded Abroad and Constitutional Standards**

The Federal Supreme Court raised the question on the constitutionality of one provision of the new law concerning "child marriages" enacted by the German legislator in 2017. The respective rule invalidated marriages contracted validly according to the national law of the intended spouses if one of them was younger than 16 years of age (Art. 13 ss 3 no 1 EGBGB). The Federal Supreme Court requested a ruling of the Federal Constitutional Court on this issue in November 2018. It took the Federal Constitutional Court nearly five years to answer this question.

The court defines the structural elements principally necessary to attain the

constitutional protection of Art. 6 ss 1 Basic Law. The court focuses on the free and independent will of the intended spouses as an indispensable structural element. The court doubts whether, in general, young persons below the age of 16 can form such a free and independent will regarding the formation of marriage. However, as there might be exceptionally mature persons, the protective shield of Art. 6 ss 1 Basic Law is affected (paragraphs 122 ff.) and their "marriage" falls under the protective umbrella of the constitution. At the same time, the requirement of a free and meaning ful will to form a marriage complies with the structural elements of the constitutionally protected marriage. This opens the door for the court to examine whether the restriction on formation of marriage is legitimate and proportionate.

After elaborating on the legitimacy of the goal (especially prevention and proscription of child marriages worldwide) the court finds that the restriction on the right to marry is appropriate and necessary, because comparable effective other means are missing. However, as the German law does not provide for any consequence from the relationship formed lawfully under the respective law and being still a subsisting marital community, the rule is not proportionate. In addition, the court demurs that the law does not provide for transformation into a valid marriage after the time the minor attains majority and wants to stay in this relationship. In so far, Art. 13 ss 3 no 1 affects unconstitutionally Art. 6 ss 1 Basic Law. The rule therefore has to be reformed with regard to those appeals but will remain in force until the legislator remedies those defects, but not later than June 30, 2024.

Beside the constitutional issues, the reasoning of the court raises many questions on aspects of private international law. The following article focuses on the impact of this decision.

O.L. Knöfel: **Discover Something New: Obtaining Evidence in Germany for Use in US Discovery Proceedings**

The article reviews a decision of the Bavarian Higher Regional Court (101 VA 130/20), dealing with the question whether a letter rogatory for the purpose of obtaining evidence for pre-trial discovery proceedings in the United States District Court for the District of Delaware can be executed in Germany. The Court

answered this question in the affirmative. The author analyses the background of the decision and discusses its consequences for the long-standing conflict of procedural laws (Justizkonflikt) between the United States and Germany. The article sheds some light on the newly fashioned sec. 14 of the German Law on the Hague Evidence Convention of 2022 (HBÜ Ausführungsgesetz), which requires a person to produce particular documents specified in the letter of request, which are in his or her possession, provided that such a request is compatible with the fundamental principles of German law and that the General Data Protection Regulation of 2018 (GDPR) is observed.

W. Wurmnest/C. Waterkotte: **Provisional injunctions under unfair competition law**

The Higher Regional Court of Hamburg addressed the delimitation between Art. 7(1) and (2) of the Brussels Ibis Regulation after Wikingerhof v. Book ing.com and held that a dispute based on unfair competition law relating to the termination of an account for an online publishing platform is a contractual dispute under Art. 7(1) of the Brussels Ibis Regulation. More importantly, the court considered the requirement of a "real connecting link" in the context of Art. 35 of the Brussels Ibis Regulation. The court ruled that in unfair competition law disputes of contractual nature the establishment of such a link must be based on the content of the measure sought, not merely its effects. The judgment shows that for decisions on provisional injunctions the contours of the "real connecting link" have still not been conclusively clarified.

I. Bach/M. Nißle: **The role of the last joint habitual residence on post-marital maintenance obligations**

For child maintenance proceedings where one of the parties is domiciled abroad, Article 5 of the EuUnterhVO regulates the – international and local – jurisdiction based on the appearance of the defendant. According to its wording, the provision does not require the court to have previously informed the defendant of the possibility to contest the jurisdiction and the consequences of proceeding without contest – even if the defendant is the dependent minor child. Article 5 of the EuUnterhVO thus not only dispenses with the protection of the structurally

weaker party that is usually granted under procedural law by means of a judicial duty to inform (such as Article 26(2) EuGVVO), but is in contradiction even with the other provisions of the EuUnterhVO, which are designed to achieve the greatest possible protection for the minor dependent child. This contradiction could already be resolved, at least to some extent, by a teleological interpretation of Article 5 of the EuUnterhVO, according to which international jurisdiction cannot in any case be established by the appearance of the defendant without prior judicial reference. However, in view of the unambiguous wording of the provision and the lesser negative consequences for the minor of submitting to a local jurisdiction, Article 5 of the EuUnterhVO should apply without restriction in the context of local jurisdiction. De lege ferenda, a positioning of the European legislator is still desirable at this point.

C. Krapfl: **The end of US discovery pursuant to Section 1782 in support of international arbitration**

The US Supreme Court held on 13 June 2022 that discovery in the United States pursuant to 28 U.S.C. § 1782 (a) – which authorizes a district court to order the production of evidence "for use in a proceeding in a foreign or international tribunal" – only applies in cases where the tribunal is a governmental or intergovernmental adjudicative body. Therefore, applications under Section 1782 are not possible in support of a private international commercial arbitration, taking place for example under the Rules of the German Arbitration Institute (DIS). Section 1782 also is not applicable in support of an ad hoc arbitration initiated by an investor on the basis of a standing arbitration invitation in a bilateral investment treaty. This restrictive reading of Section 1782 is a welcome end to a long-standing circuit split among courts in the United States.

L. Hübner/M. Lieberknecht: **The Okpabi case — Has Human Rights Litigation in England reached its Zenith**

In its Okpabi decision, the UK Supreme Court continues the approach it developed in the Vedanta case regarding the liability of parent companies for human rights infringements committed by their subsidiaries. While the decision is formally a procedural one, its most striking passages address substantive tort law.

According to Okpabi, parent companies are subject to a duty of care towards third parties if they factually control the subsidiary's activities or publicly convey the impression that they do. While this decision reinforces the comparatively robust protection English tort law affords to victims of human rights violations perpetrated by corporate actors, the changes to the English law of jurisdiction in the wake of Brexit could make it substantially more challenging to bring human rights suits before English courts in the future.

Notifications:

H. Kronke: Obituary on Jürgen Basedow (1949–2023)

C. Rüsing: Dialogue International Family Law on April 28 and 29, 2023, Münster

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U.S. Supreme Court Renders Personal Jurisdiction Decision

This post is by Maggie Gardner, a professor of law at Cornell Law School. It is cross-posted at Transnational Litigation Blog.

The U.S. Supreme Court yesterday upheld the constitutionality of Pennsylvania's corporate registration statute, even though it requires out-of-state corporations registering to do business within the state to consent to all-purpose (general) personal jurisdiction. The result in *Mallory v. Norfolk Southern Railway Co.* re-opens the door to suing foreign companies in U.S. courts over disputes that arise in other countries. It may also have significant repercussions for personal jurisdiction doctrine more broadly.

The Case

Robert Mallory worked for Norfolk Southern for nearly twenty years in Ohio and

Virginia. He has since been diagnosed with cancer, which he alleges was caused by the hazardous materials to which he was exposed while in Norfolk Southern's employ. Although he currently lives in Virginia, he sued Norfolk Southern (a company then incorporated and based in Virginia) in state court in Pennsylvania, asserting claims under the Federal Employers' Liability Act (FELA).

Norfolk Southern contested personal jurisdiction. But Mallory argued that by registering to do business in Pennsylvania, it had agreed to appear in Pennsylvania courts on any cause of action. While the Pennsylvania Supreme Court agreed with that interpretation of Pennsylvania's corporate registration statute, it held that the statute violated the Due Process Clause of the Fourteenth Amendment in light of the Supreme Court's caselaw since *International Shoe Co. v. Washington* (1945).

The Holding

A majority of the Supreme Court disagreed. Justice Alito joined Justice Gorsuch's plurality (with Justices Thomas, Sotomayor, and Jackson) to hold that the question was controlled by a pre-*International Shoe* decision, *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.* (1917). *Pennsylvania Fire* approved a Missouri statute that required out-of-state insurance companies to appoint a state official as an agent for service of process for any suit. In *Pennsylvania Fire*, that Missouri statute was invoked to establish jurisdiction over a Pennsylvania insurance company regarding a contract formed in Colorado to insure a Colorado facility owned by an Arizona company. The five Justices agreed that the Supreme Court has never overruled *Pennsylvania Fire* and that it thus controls this case.

There is another, broader point on which the five Justices also seem to agree: *Pennsylvania Fire* does not conflict with *International Shoe* because *International Shoe* only addressed jurisdiction over *non-consenting* defendants. As Alito put it, "Consent is a separate basis for personal jurisdiction"—or as Gorsuch put it, "*International Shoe* simply provided a 'novel' way to secure personal jurisdiction that did nothing to displace other 'traditional ones.'" An entirely separate avenue for establishing personal jurisdiction exists outside of *International Shoe*'s framework, which includes (according to the plurality) "[f]ailing to comply with certain pre-trial court orders, signing a contract with a forum selection clause, accepting an in-state benefit with jurisdictional strings attached," or making a

general appearance. And in this consent-based track, the five Justices also seem to agree that federalism concerns are no longer applicable.

Points of Disagreement

Alito wrote separately, however, to argue that Pennsylvania's statute runs afoul of the dormant Commerce Clause. Even if the statute didn't discriminate against out-of-state businesses, Alito explained, it significantly burdens interstate commerce, and it does so without any legitimate local interest. While a state "certainly has a legitimate interest in regulating activities conducted within its borders," and while it "also may have an interest 'in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors,'" a state "generally does *not* have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State."

It is not particularly surprising that Alito was alone in elaborating this dormant Commerce Clause concern, given the split opinions earlier this Term in *National Pork Producers Council v. Ross*. As I discussed in a preview of the *Mallory* decision, Gorsuch and Thomas in that case found the balancing approach required by the dormant Commerce Clause jurisprudence to simply be infeasible. (Perhaps Alito hoped he might win them over if he could establish a *complete* lack of legitimate local interest, which would obviate the need for balancing). And if Sotomayor was unconvinced by the plaintiffs' showing of a substantial burden on interstate commerce in *National Pork Producers*, she was unlikely to sign onto Alito's rather vague paragraph about how statutes like Pennsylvania's could burden small companies.

But why did Alito not join more of the plurality opinion? The plurality embraced a framing of the case that emphasized Norfolk Southern's significant and permanent presence in Pennsylvania, including its 5,000 employees, 2,400 miles of track, and three locomotive shops (including the largest in North America). That framing is reminiscent of Sotomayor's emphasis on fairness in her prior personal jurisdiction writings, as well as her questions at oral argument last fall. The plurality opinion also begins by contrasting this case with Mallory's ability to "tag" an individual employee of Norfolk Southern in Pennsylvania, asking why Mallory shouldn't be able to assert personal jurisdiction as easily over Norfolk Southern itself. That framing recapitulates a key point in Gorsuch's concurrence

in *Ford Motor Co. v. Montana Eighth Judicial District Court* (2021).

But neither of those framings resonates with Alito's prior writings, to say the least. He tends to be more skeptical of litigation and court access policies, and he notably did not join Gorsuch's concurrence in *Ford*. Further, both framings would have undermined Alito's argument that Pennsylvania lacked any legitimate local interest in this case.

Jackson also wrote a brief concurrence that emphasized that personal jurisdiction is a waivable right, focusing on the Court's opinion in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* (1982). Her invocation of "waiver" rather than "consent" was clearly purposeful (and a distinction that Robin Effron and John Coyle have recently explored).

The Dissent

Justice Barrett's dissent (joined by Chief Justice Roberts and Justices Kagan and Kavanaugh) staunchly defended the *International Shoe* paradigm. "For 75 years," it begins, "we have held that the Due Process Clause does not allow state courts to assert general jurisdiction over [out-of-state] defendants merely because they do business in the State." The Court's decision in *Mallory*, Barrett explains, invites states to evade *International Shoe*'s limits on personal jurisdiction by simply rewording their long-arm statutes to include implied consent. Indeed (she notes), this case is remarkably like *BNSF Railway Co. v. Tyrrell* (2017), another FELA suit involving out-of-state parties and a cause of action that arose out of state as well. In *Tyrell*, the Court rejected the state's assertion of personal jurisdiction in light of the Court's recent decisions in *Daimler AG v. Bauman* (2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011). Approving Pennsylvania's statute effectively robs all three of those precedents of meaning.

Foreign Defendants in U.S. Courts

The dissent is at least right about the practical implications of the Court's holding: states that are inclined to do so now have a roadmap for evading the limits on general personal jurisdiction that the Court staked out in *Goodyear*, *Daimler*, and *BNSF*. While the mere fact of doing business is still not enough to subject a "non-consenting" business to jurisdiction in a forum, the mere fact of

doing business plus a broadly worded statute might be. Indeed, it's possible that Sotomayor joined the majority precisely because of her consistent concern that the Roberts Court has gone too far in paring back both general and specific jurisdiction under *International Shoe*. As the lone justice who refused to join the Court's opinion in *Daimler*, she has now helped reclaim some of that state power.

Daimler, itself a case involving a foreign defendant, made it much harder for plaintiffs to hale non-U.S. companies into U.S. courts. After *Daimler*, plaintiffs have had to establish specific jurisdiction over foreign defendants, which can be hard to do even when the plaintiff resides in the U.S. forum and was injured there, as in *J. McIntyre Machinery, Ltd. v. Nicastro* (2011). *Mallory* gives states a different avenue for protecting their citizens' ability to sue foreign defendants. As the plurality asserts, "all *International Shoe* did was stake out an *additional* road to jurisdiction over out-of-state corporations," separate from the consent-based road upon which states can now rely.

It will be interesting to see how many states take up this invitation. My prediction is that we will see few open-ended statutes like Pennsylvania's, but that we will see some more tailored statutes, for example asserting all-purpose jurisdiction over any claims brought by in-state residents against companies doing business in the state.

Broader Implications for Personal Jurisdiction Doctrine

It will also be interesting to see how much of a sea change *Mallory* makes in personal jurisdiction doctrine more broadly. While the holding may appear narrow, five Justices have agreed to limit the ambit of *International Shoe*'s paradigm to *non-consenting* defendants—a rather significant restriction. And given how broadly the Court construes "consent" in the age of forum selection clauses and compelled arbitration (and now corporate registration statutes), that could render *International Shoe* largely obsolete.

The approach of the plurality may also signal that there is more to come. Gorsuch's opinion focuses on history and tradition and encourages reliance on pre-*International Shoe* cases. He has found a way to wind back the clock without having to directly overrule *International Shoe*—but would a future case encourage

these Justices to wind back the clock even further?

I do worry that Gorsuch and his like-minded colleagues are too sanguine about the challenges that a return to broad general jurisdiction would entail. As I have written with others, there are real systemic costs to a paradigm of general jurisdiction—precisely the costs that *International Shoe* was written to address. A fundamental flaw in the plurality's approach is its syllogism that because the Court approved tag jurisdiction over individuals in *Burnham v. Superior Court* (1990), it should also continue to recognize broad general jurisdiction over corporations. First, *Burnham* was a splintered decision, and a majority of the Justices did *not* agree that tag jurisdiction was completely unmoored from *International Shoe*'s framework. But second, why isn't *Burnham* itself the mistake? Why not level up the protections for individual defendants, requiring some connection between the forum, the dispute, and the defendant greater than the defendant's fleeting physical presence?

Conclusion

I have started wondering if the binary distinction between general and specific jurisdiction might have outlived its usefulness as a legal construct. Perhaps registration statutes and tag jurisdiction (and some modified forum of doing business jurisdiction?) belong in an intermediate category—but one that must still satisfy *International Shoe*'s overarching command that the defendant have minimum contacts with the forum such that notions of fair play and substantial justice will not be offended.