Colonialism and German PIL (1) – Colonial Structures in Traditional PIL

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

As mentioned in the introduction, this series **does not intent to automatically pass judgment** on a norm or method influenced by colonialism **as inherently negative** (I emphasise this because my experience shows that the impression quickly arises). Instead, the aim is to reveal these influences and to initiate a first engagement with and awareness of this topic and to stimulate a discussion and reflection.

The first category, to be discussed today, relates to the (sometimes unconscious) implementation and later continuation of the colonial structure in PIL – now and then.

1. The Origins

a) Savigny's approach

One if not the core value of Private International Law is its neutrality and equality among legal systems. The main goal of German conflict of laws rules is to achieve "international justice" by associating legal matters with the most fitting law, independent of substantive legal values. These foundational principles are commonly attributed to Savigny, who shaped the basic structure of German conflict of laws rules by associating legal matters with their "seat". Savigny supposedly treated all legal systems as equal and of the same value. The supposed neutrality of PIL might suggest that it is devoid of, or at least shows minimal traces of, colonialism due to its fundamental structures and values.

However, examining Savigny's "neutrality" towards potential applicable laws reveals that it is only respected from the perspective of "law" as defined by Savigny. This definition includes only legal systems that share the same

“Christian” values. This, in essence, results in a devaluation of other legal systems deemed less valuable. Typically, these legal systems today would be those classified as “Western,” sharing the same value system as German law.

b) Conflict of laws and internal conflicts in relation to colonial states

In determining the applicable law between colonial states and colonies, usually the rules on conflict of laws did not apply but a conflict was regarded as an internal one. German colonies, for instance, were not considered part of the German Reich, yet not treated as a separate state, but as “protectorates.” Similar ambiguity existed for other colonies. This unclear legal status allowed different treatment of the colonies under conflict of laws rules, separating local laws in the colonies from the “mother system” and placing them in a hierarchical inferiority. The indigenous population was “allowed” to handle internal, especially family-related disputes through their pre-colonial customs. However, they were not allowed to determine on their own what constituted part of this legal framework or in which cases which rule applied. Colonial authorities decided which cultural elements of various groups seemed fitting as applicable. Furthermore, inter-local conflict of laws rules often only applied local laws when they did not conflict with the colonial legal system or its core values and did not involve members of the “mother system”. Thus, the legal system of the colonizers took precedence in cases of doubt, and the affected individuals from these local legal orders were not involved in the decisions. Consequently, the colonial authorities decided what was classified as “local law,” its scope and application, favoring their own legal system in cases of uncertainty. The decision regarding which law should prevail was unilaterally made by the colonial authorities.

c) The concept of “state“

Furthemore, an indirect colonial influence on the concept of state within conflict laws is notable. Non-state law, particularly religious or tribal law, was not considered law, neglecting the various communities or identities of individuals in the colonies. Norms within the framework of Savigny’s conflict laws referred exclusively to state law, assuming a state based on Western understanding. This reference indirectly affirmed the concept of the state attributed to Jellinek and the often arbitrarily drawn colonial state boundaries through these conflict norms. Simultaneously, by referring exclusively to state law, it marginalized or ignored other forms of legal orders since they did not represent “law” according

to the references. Again, this particularly affected religious or indigenous law.

d) Citizenship as connecting factor

Citizenship serves as a core connecting point, especially for personal matters in Continental European PIL, including Germany (even though it is not based in Savigny's PIL thinking but is usually attributed to Mancini or the reception of his doctrines). This connection to citizenship has roots in colonial thinking: Granting citizenship has historically expressed and continues to express exclusive affiliations that consciously exclude others. In cross-border private law relations, PIL perpetuates this citizenship policy, reserving certain rules of German law for German citizens.

This method of connecting legal matters to citizenship had implications in the determination of applicable law in colonial contexts. For instance, in the German Reich colonies, distinctions were made between *Reichsdeutsche* (Germans from the Reich), European foreigners (foreigners but non-natives), and natives. The latter had no citizenship, thus could not fall under a conflict of laws rule referring to citizenship. Similar categorizations and unequal treatment between French citizens, indigenous colony residents, and European foreigners living in colonies were present in French colonial law concerning inter-local private law and naturalization law. The differentiation's backdrop was the idea that natives were not entitled to French citizen rights. The (non-)granting of citizenship was generally associated with the notion of preventing equal treatment with supposedly inferior cultures or denying the legal guarantees of the colonial state to natives. Comparable exclusionary thoughts existed in "white" British colonies (Canada, New Zealand, etc.) that introduced their own citizenship, consciously isolating themselves from other (non-white) British colonies (e.g., India). The connecting factor citizenship was therefore also intented to exclude.

Additionally, in common law, domicile serves as a connection point with similar intent: The establishment of a domicile was intentionally tied to the requirement of the intent to remain and not to want to return to the original domicile (*animus manendi et non revertendi*). This was to prevent individuals of English descent, residing in colonial territories for long periods, from solely accessing English law while also enabling others to access this law.

2. Current German PIL Rules

Wondering whether the outlined principles under traditional PIL persist until today, it's now generally accepted that there's fundamental neutrality towards all legal systems without formal differentiation based on Christian or "Western" values. Therefore, Savigny's approach of solely recognizing Christian or "Western" legal systems is outdated. Although, in court rhetoric, some expressions hint that certain legal systems are considered unequal or "alien" to German law, particularly in cases involving non-Christian religious law, like Islamic legal institutes. Moreover, in migration law cases where PIL relates to preliminary issues, a stricter standard seems to be applied to individuals from "Global South" countries compared to those from the "Global North". These are trends and nuances that luckily occasionally, not systematically, appear.

In modern German PIL, traces of colonialism persist methodologically in the insistence on referring to a state legal order while deciding when such an order exists. This presents challenges concerning the law of states not recognized under international law. While the prevailing opinion emphasizes that recognition by international law is not decisive, certain parts of legal practice and literature still assume this recognition as a prerequisite. Moreover, the status of non-state law, especially religious or tribal law, remains weak. Whether such laws qualify as "law" according to conflict of laws rules generally relies on territorially bounded jurisdictions and the corresponding state according to a European-Western understanding of state law. Non-state law becomes relevant within German PIL only when referred to by the state legal order, e.g. by interlocal or interpersonal conflict laws. Similarly, the acknowledgment of foreign decisions and the recognition of foreign institutions as "courts" under German International Procedural Law depend on their incorporation within the (foreign) state's legal framework.

Additionally, the use of citizenship as a basis in PIL has shifted away from the exclusion of individuals from German rights. Nevertheless, the question of who can obtain citizenship remains politically contentious. Citizenship continues to serve as a core basis for many classical conflict of laws rules (such as capacity, names, celebration of a marriage) and is gradually being replaced by habitual residence.

3. Room for Improvement or Decolonialisation – the Treatment of Local Law

The reference to state law, which excludes other non-state law unless there is interlocal or interpersonal referral, unconsciously continues colonial thinking. It can be seen in the tradition of colonial rulers and post-colonialism, overriding indigenous law in favor of one's own legal order. However, abandoning the basic structure of conflict law that refers to a state legal system seems impractical. One could consider introducing a separate (German) conflict norm for tribal or religious law, thus bypassing the reference to the state legal order. However, if interlocal or interpersonal referral is abandoned within a state legal system, and local law is applied based on domestic principles, German PIL ignores the foreign state's decision to which legal order reference is made, applying local law only under specific circumstances or not at all. This approach would also be colonialist, as German conflict law would then presume to know better than the state how to apply its internal law.

An exception may apply if the state deciding against a referral to local law is domestically or internationally obligated to apply this law and fails to fulfill this obligation adequately.

Some national constitutions recognize and protect indiginous rights, e.g. Canada, as a North American country, South Africa and Kenya, as African countries, just to name a few. In Nigeria, the inheritance rights of the firstborn son of the Igiogbe tradition are qualified as internationally mandatory norms and are therefore always applied (critically assessed here).

An international legal basis could be the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries from 1989. The convention includes provisions to consider and respect the customary rights of indigenous peoples (Article 8). E.g. the Inter-American Court of Human Rights, in her evolutionary interpretation of the Inter-American Human Rights Convention, elevated tribal and customary law partly to human rights within the scope of the Inter-American Human Rights Convention (e.g. Yakye Axa vs. Paraguay, 17.6.2005; Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 31.8.2001; Sawhoyamaxa Indigenous Community v. Paraguay, 29.3.2006; Xucuru Indigenous People and its members v. Brasil, 5.2.2018; Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, 24.11.2020; Moiwana Community v. Suriname, 15.6.2005). See also this article by Ochoa.

Also, the African Commission on Human and Peoples' Rights, interpreting the

African Charter on Human and Peoples' Rights, has protected indigenous law through the charter (Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (Endorois), 4.2.2014 – 276 / 2003). However, it is disputed whether the commission's interpretation results are binding (see a discussion here).

Thus, although there may be a state obligation to respect local rights, there may have been a failure on the national side to refer to this right. For example, in judgments of the Inter-American Court of Human Rights, it can be observed that implementation into national law is only partially carried out. Also, regarding the interpretation results by the African Commission on Human and Peoples' Rights, it has been shown that states are not always willing to implement recommendations despite official commitment to it. In these cases, while the state has the obligation to apply non-state law, the referral needed by conflict law is missing. In this case, indigenous law should not be ignored by a German court.

As a result, the basic technique of PIL, referring to state law, should remain untouched. Nevertheless, courts might include foreign local law at least when the state in whose territory the affected community lives is internationally or constitutionally obligated to respect indigenous or religious law, or has obligated itself to do so. Methodologically, recourse can be made to giving "effect" or "consideration" to foreign law in substantive legal application, known particularly in institutes such as foreign mandatory law (Art. 9 para 3 Rome I or Art. 17 Rome II) but also in substitution, transposition, or adaptation. German courts usually give foreign non-applicable law effect within the application of substantive law, such as the interpretation of norms, especially general clauses (good faithc, bonos mores etc.).

A court typically has discretion on whether to "consider" non applicable foreign law, as it is not a classic application of law. Therefore, the discretion to give effect to non-state foreign law should only be used exceptionally when the state law to which it belongs does not apply it, although there is a state obligation to apply it.

Guiding the discretion should be (in my opinion):

- whether the application of non-state law is in the party's interest (1),
- whether there is a foreign state obligation to give effect to this non-state law (2),

- the role of non-state law in the home state (3),
- and whether there is an international obligation on the German side to integrate or not integrate the law, perhaps because it may violate fundamental values of German law (4).

Particularly in the third point, it would be desirable for more anthropological-legal comparative work to be done so that integration into legal practice can work without leading to ruptures with the state from whose territory the law originally comes.

This has been a long post, the next three will be shorter. As writen in the introduction, these are some initial thoughts and I welcome (constructive) feedback from the whole international community!

Colonialism and German Private International Law – Introduction to a Post Series

In March 2023 I gave a talk at the conference of the German Society of International Law. The conference had the title "Colonial Continuities in International Law" and my presentation focused on "Continuation of colonialism in contemporary international law? – Foundations, structures, methods from the perspective of PIL". Thus, I was exploring those foundations, basic structures, and fundamental methods of mainly German Private International Law (PIL) and whether and how they have been influenced by colonialism.

Even though the perspective is mainly one of German PIL one, some of my thoughts might be of interest for a more global community. Therefore, in some upcoming posts I will share some of my findings that will also be published in the book to the conference (in German).

My general – not surprising – finding ist that the existing PIL, much like the broader German legal system, has been impacted by colonialism. T**he aim is to reveal these influences without automatically pass judgment on a norm or method influenced by colonialism as inherently negative**. The primary goal is to initiate an first engagement with and awareness of this topic and to stimulate a discussion and reflection.

1. State of the Discussion

"Colonialism" I will understand broadly, referring not only to colonialism in a strict sense, but also including postcolonialism and forms of neocolonialism. Until now, the discussion regarding colonialism, coloniality, or decolonialism within German PIL remains limited. Initial discussions tend to arise within specific areas of PIL, such as migration law, cultural heritage protection law, investment protection law, occasional considerations of supply chain responsibility/human rights protection, and climate change litigation. The broader discussion around fundamental questions and structures within German PIL remains relatively sparse. Initiatives such as the project by the Max Planck Institute for Comparative and International Private Law in Hamburg drive the discourse on "decolonial comparative law" which is not the same but in practise overlapping with the PIL discourse.

2. Categories of Colonialism in the Upcoming Posts

The attempts to systematize the colonial imprints lead to different categories.

- The **first** relates to the (sometimes unconscious) implementation and later continuation of the colonial structure in PIL – now and then.
- Another **second** category deals with structures and values inherent in German or European law, implicitly resonating within the PIL and, thus, expanding those values to people and cases from other parts of the world.
- The **third** category reveals an imagined hierarchy between the laws of the Global North and Global South.
- Finally, **fourth,** conflict of laws rules may lead to or at least contribute to exploiting actual North-South power asymmetries.

3. Intention of the Series

In the next four posts, I would like to present some thoughts on colonial imprints I

found in German PIL and sometimes EU PIL. I will not focus on other country's PIL rules, but I am happy to learn about other systems and similar or very different approaches.

As aforementioned, I only want to **start a discussion** and reveal some forms of colonialism in German PIL. I do not want to abolish all norms that are influenced by colonialism or judge them as inherently "bad". Colonialism might only be one of many influences that shape the rule. Furthermore, I believe we are still at the very very beginning of the debate. Therefore, I **welcome any (objective and substantive) discussion** about the topic. I especially welcome comments, experiences and ideas from other countries and **particularly from countries that are former colonies.**

French Cour de cassation rules (again) on duty of domestic courts to apply European rules of conflict on their own motion

Written by Hadrien Pauchard (assistant researcher at Sciences Po Law School)

In the *Airmeex* case (Civ. 1re 27 septembre 2023, n°22-15.146, available here), the French Cour de cassation (première chambre civile) had the opportunity to rule on the duty of domestic courts to apply European rules of conflict on their own motion. The decision is a great opportunity to discuss the French approach to the authority of conflict-of-laws rules.

The case concerns allegations of anticompetitive behaviour following a transfer of corporate control. The dispute broke out after two shareholders of the French corporation *Airmeex* transferred the sole control of the company to the Claimant. The latter, joined by *Airmeex*, alleged several anti-competitive behaviors on the

part of his ex-business partners and seized French courts against the two former shareholders and their related corporations in Turkey. The claim was based on general tort law and on French rules regarding “unfair competition”. The claim covered the Defendants’ acts in Turkey as well as possible infractions in Algeria.

As it happened, none of the parties ever put the question of the applicable law in the debates and neither the trial nor the appeal judges did raise the potential conflict of laws. Indeed, both were content with the straightforward application of the *lex fori*, *i.e.* French law on “unfair competition”. The lower court hence dismissed the claim by application of French law. The Claimants then petitioned to the Cour de cassation arguing a violation of the applicable rule of conflict, namely article 6 of the Rome II regulation.

By its decision of September 27, 2023, the French Cour de cassation (première chambre civile) ruled in favour of the petitioners. Upholding its previous *Mienta* decision (available here in English), it decided that Article 6 of the Rome II regulation was of mandatory application and was applicable to the alleged anticompetitive behaviours. Under these circumstances, the Cour de cassation held that the lower court should have enforced the mandatory rule of conflict of Article 6 Rome II on its own motion. As a consequence it censored the appeal decision insofar as it had applied the *lex fori* without going through the relevant conflictual reasoning.

Following the *Mienta* precedent, the *Airmeex* decision illustrates the renewal of the issue of the authority of conflict-of-laws rules.

The authority of the rule of conflict in French law

The key question in *Airmeex* concerned the obligation of domestic judges to apply, if necessary on their own motion, European conflict-of-laws rules.

The *ex officio* powers of national judges belong to the sphere of Member States’ procedural autonomy. However, uncertainty remains as to the scope of this autonomy in relation to European rules of conflict, particularly when the said rules leave no room to parties’ autonomy.

Tackling this issue in *Airmeex*, the French Court of Cassation upheld *in extenso* its previous *Mienta* ruling and stated that “if the Court is not obliged, except in the case of specific rules, to change the legal basis of the claims, it is obliged,

when the facts before it so justify, to apply the rules of public order resulting from European Union law, such as a rule of conflict of laws when it is forbidden to derogate from it, even if the parties have not invoked them".

The *Airmeex* ruling confirms the existence of French judge's double hat in relation to conflict-of-laws rules, depending on the source of it.

On the one hand, for European rules of conflict, judges' obligation is subject to the criterion of imperativeness laid out in *Mienta* and *Airmeex*. If the European rule is not mandatory, an *a contrario* reading of the decision leads to conclude that the French judge does not have an obligation to apply it on its own motion. In the present case, the Cour de cassation deduced the imperative character of the rule of conflict of Article 6 Rome II from the prohibition of derogatory agreements set out in the 4th paragraph of the text (according to which "[t]he law applicable under this Article may not be derogated from by an agreement pursuant to Article 14"). Then, noticing the existence of a conflict in that the disputed facts were notably committed in Algeria and Turkey, the Cour de cassation sanctioned the cour d'appel for not having applied the relevant mandatory provisions of Article 6 of the Rome II regulation.

On the other hand, for French rules of conflict, the classical *Belaid–Mutuelle du Mans* system (established by case law) remains positive law, distinguishing between the rights which the parties can freely dispose of (*droits disponibles*, in which case judges are not obliged to apply French conflict-of-laws rules) and the rights which the parties cannot freely dispose of (*droits indisponibles*, in which case judges are obliged to apply French conflict-of-laws rules, on their own motion if necessary). In any case, courts retain the power to raise the conflict *ex officio* where the foreign element is flagrant, but their obligation to do so varies according to the nature of the rights disputed – a criterion often criticized for its imprecision.

In both *Mienta* and *Airmeex* cases, the derogatory regime of European rules of conflict is justified by a direct reference to the principles of primacy and effectiveness of EU law. Thus, for the Cour de cassation, the European conflict-of-laws rule does not enjoy a special status because it is a conflict-of-laws rule but rather because it is a (mandatory) European rule. Moreover, the criterion of the free disposability of rights was enforced on several occasions after *Mienta*, confirming that, in the eyes of the Cour de cassation, French judges have two

quite distinct “offices”.

While the *Airmeex* ruling does not innovate in relation to the authority of the European rules of conflict, compared to Mienta, the Cour de cassation has nevertheless slightly modified its motivation. By adding a reference to Article 3 of the French Code civil to those to Article 12 of French Code de procédure civile and the principles of primacy and effectiveness of EU law, the court connects its solution with the general theory of French private international law. It also allows convergence of regimes between the authority of the rule of conflict and the status of foreign law, contemporary case law in the latter domain developing on the ground of the same Article 3.

Despite being two distinct issues, strengthening the status of foreign law is the corollary of reinforcing the authority of conflict-of-laws rules. In France, foreign law is formally considered as a “rule of law” and the establishment of its content is still regulated by the *Aubin–Itraco* system (also established on case law). This case law imposes a “duty of investigation” according to which the judge who recognizes the applicability of foreign law must “investigate its content, either on its own motion or at the request of the party who invokes it, with the assistance of the parties and personally if necessary, and give the disputed question a solution consistent with positive foreign law”. However, this apparent automaticity in applying foreign law shall not obscure the fundamental difficulties raised by the encounter with “otherness” in its legal form. Critical approaches to comparative law teach that there is an irreducible space separating *foreign-law-as-it-is-lived-in-its-country-of-origin* and *foreign-law-as-it-is-apprehended-by-the-national-judge*. This literature could fortunately inspire private international law in developing a procedural framework of hospitality for applying foreign law in its own terms.

Conclusion

The *Airmeex* and *Mienta* decisions will only partially content those who advocate for the general obligation of domestic judges to systematically enforce every single European rule of conflict. It will satisfy even less French’ majority scholarship, which considers that any rule of conflict should be obligatory for the judge. Nevertheless, it is in line with the traditional approach of the Cour de cassation that elaborates the authority of conflict-of-laws rules on the basis of substantive considerations.

The draft French Code de droit international privé runs counter to this current trend of the case law. Its Article 9 would impose the mandatory application of every rule of conflict, whatever their source or the nature of the rights in dispute. This question of the "office du juge" in the draft Code renders the pitfalls inherent in the codification process all the more apparent. Despite the generic principle enshrined in Article 9, the project multiplies special norms and exceptions in a quite scattered manner. We can express some reservations as to the interest of rigidifying a matter in which case law has, in spite of repeated resistance from the scholarship, chosen a pragmatic position grounded on substantial considerations, especially when such ossification is based on the hypertrophy of special regimes. Similar flaws appear to jeopardize the draft Code's provisions on the proof of foreign law (namely Articles 13 and 14).

Although the attempt at codification is commendable and the actual result much honourable, the complex status of conflict-of-laws rules and foreign law seem intrinsically irreconcilable with the simplification and systematization approach inherent in the exercise. It might be fortunate to recognize that, when it comes to foreign law, "*l'essentiel est là entre les mains du juge*".

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

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

Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck) [2021] 1 SLR 1102, [2021] SGCA 14 ("*Merck*"), noted previously, is a landmark case in Singapore private international law, being a decision of a full bench of the Court of Appeal setting out for the first time in

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

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

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

> *"whether the decision of a seat court enjoys a special status within the framework for the judicial supervision and support of international arbitration,*

> *that is established by the body of law including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards …, legislation based on the UNCITRAL Model Law on International Commercial Arbitration …, and case law."*

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

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

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

Mance IJ in a concurring judgment agreed that transnational issue estoppel applied to preclude the appellant from raising the challenges in this case. The application of issue estoppel principles to the international arbitration context is relatively uncontroversial from the perspective of private international law. There was one important distinction, however, between the majority and the concurring judgment on this point. The majority confined its ruling on transnational issue

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

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

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

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

The Primacy Principle may be invoked if the case falls outside transnational estoppel principles. It may also be invoked even if the case falls within the

transnational estoppel principles, if the party relying on it prefers to avoid the technical arguments relating to the application of transnational issue estoppel. However, the principle is only applicable if there is a prior judgment from the court of the seat; parties are not expected proactively to seek declarations from that court.

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

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

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

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

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

Under the obligation theory, *in personam* judgments from a foreign court are recognised because the party sought to be bound has conducted himself in a certain manner in relation to the foreign proceedings leading to the judgment. On this basis, it is difficult to justify the special status of a judgment from the seat court within the principles of recognition or outside it. However, it would appear that, after *Merck*, while the obligation theory may not have been rejected *in toto*, it has not been accepted as the exclusive explanation for the recognition of *in personam* judgments under the common law. On the basis of transnational comity and reciprocal judicial respect, there is much that exists in the current common law that may be questioned, and much more unexplored terrain as far as the legal effect of foreign judgments not falling within the traditional common law rules of recognition is concerned. For example, the UK Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, [2012] UKSC 46 had rejected that there were any special rules that apply to *in personam* judgments arising out of the insolvency context. This line of thinking has already been rejected in Singapore in the light of its adoption of the UNCITRAL Model Law on Cross-Border Insolvency (*Re Tantleff, Alan* [2022] SGHC 147; [2023] 3 SLR 250), but it remains to be seen

what new rules or principles of recognition will be developed.

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

Amendment of Chinese Civil Procedure Law Concerning Foreign Affairs

by Du Tao*/Xie Keshi

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

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

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

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

Add provisions on parallel litigation

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

Second, this revision adds a new suspension and restoration mechanism for civil and commercial cases accepted by foreign courts after being accepted by Chinese courts. After a people's court accepts a case in accordance with the provisions of the preceding article, if a party applies to the people's court in writing for suspending the proceedings on the ground that the foreign court has accepted the case before the people's court, the people's court may render a ruling to suspend the proceedings, except under any of the following circumstances: (1) The parties, by an agreement, choose a people's court to exercise jurisdiction, or the dispute is subject to the exclusive jurisdiction of a people's court. (2) It is evidently more convenient for a people's court to try the case. If a foreign court fails to take necessary measures to try the case or fails to conclude the case within a reasonable time limit, the people's court shall resume proceedings upon the written application of the party. If an effective judgment or ruling rendered by a foreign court has been recognized, in whole or in part, by a people's court, and

the party institutes an action against the recognized part in the people's court, the people's court shall rule not to accept the action, or render a ruling to dismiss the action if the action has been accepted.

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

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

Revise relevant regulations on service of foreign-related documents

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

accept service, so as to curb the phenomenon of parties evading service.

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

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

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

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

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

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

Add provisions on extraterritorial investigation and evidence collection

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

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

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

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

Conclusion

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

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The Inter-American Court of Human Rights: first judgment on international child abduction

Guest post by Janaína Albuquerque, International Lawyer and Mediator

The Inter-American Court of Human Rights (IACtHR) has just published their first ever judgment on an international child abduction case in *Córdoba v. Paraguay*, which concerns the illicit removal of a child who was habitually resident in Argentina. The applicant and left-behind parent, Mr. Arnaldo Javier Córdoba, claimed that Paraguay violated his human rights by failing to enforce the return order and ensuring the maintenance of contact with his son. At the time of the abduction, the child was about to reach 2 years of age and the taking parent relocated, without the father's consent, to Paraguay.

Both Argentina and Paraguay are Contracting States to the American Convention on Human Rights (or Pact of San José) and the American Declaration of the Rights and Duties of Man, which are the main instruments assessed by the Inter-American Court and Commission. Paraguay has also accepted the Court's jurisdiction in 1993. Differently from the European Court of Human Rights (ECtHR), applicants cannot present a request directly to the Inter-American Court. The petition must be firstly examined by the Inter-American Commission on Human Rights (IACHR), which will, then, issue recommendations or refer the case to the Court.

Apart from the abovementioned human rights instruments, the Inter-American framework also comprises the 1989 Convention on the International Return of Children. In accordance with Article 34, the referred treaty prevails over the 1980 Hague Convention on the Civil Aspects of International Child Abduction where the States involved are both Members of the Organisation of American States (OAS), unless otherwise stipulated by a bilateral agreement.

Although similar in content, the Inter-American Convention differs substantially from the Hague mechanism, particularly regarding jurisdiction. For instance, Article 6 states that it is the Contracting State in which the child was habitually resident before the removal or retention that has jurisdiction to consider a

petition for the child's return, indicating that the Contracting State in whose territory the abducted child is or is thought to be only has jurisdiction if the left-behind parent choses so and in urgent cases. Another core change is found in Article 10, which prescribes that, if a voluntary return does not take place, the judicial or administrative authorities shall forthwith meet with the child and take measures to provide for his or her temporary custody or care. The exceptions to the return are in a different order than the Hague Convention, but remain relatively the same in practice, with minor changes to the wording of the provisions.

In *Córdoba v. Paraguay*, the applicant filed the petition on 30 January 2009. During the time that the merits were being assessed by the Commission, the applicant presented two requests for precautionary measures and only the second one was adopted by the *Resolución nº 29/19* on 10 May 2019. The case was finally referred to the Court 13 years after it was initiated, on 7 January 2022. Public hearings were held on 28 April 2023 and Reunite (United Kingdom), as well as the legal clinics of the Catholic University Andrés Bello (Venezuela) and the University of La Sabana (Colombia) participated in the proceedings as Amicus Curiae.

Restitution efforts in Paraguay

As regards the restitution efforts, the left-behind parent seized the Argentinian Central Authority on 25 January 2006, 4 days after the abduction took place. The dossier was received by the Paraguayan counterpart on 8 February 2006. Thereafter, judicial cases were brought both to the Juvenile Courts of Buenos Aires, in Argentina, and of Caacupé, in Paraguay. The return proceedings were carried out in the latter.

The taking parent argued the grave risk exception due to a history of physical and psychological domestic violence. Nevertheless, the Caacupé court ordered the return of the child. The taking parent appealed, claiming, furthermore, that the child suffered from a permanent mental condition. The Court of Appeal and the Supreme Court of Paraguay confirmed the first judgment. A 'restitution hearing' was scheduled to take place on 28 September 2006, but the taking parent did not attend.

Paraguayan authorities conducted searches for the taking parent and the child

between the remainder of 2006 and 2009, which were unsuccessful. The child was eventually located by INTERPOL on 22 May 2015, still in Paraguay, at the city of Atyrá. The taking parent was preventively detained and custody was granted to the maternal aunt. The Juvenile court also ordered a protective measure in order to establish a supervised and progressive contact arrangement with the father and the paternal family. The child refused to go near the left-behind parent, and the psychological team of the court concluded that it would be impossible to enforce the return order.

On 7 March 2017, the Public Defender's Office filed a request to establish the child's residence in Paraguay, which was accepted by the Juvenile court under the argument that 11 years had passed since the return order was issued and that other rights had originated in the meantime. Additionally, it was decided that, given the outcomes of the previous attempts, no contact would be established between the left-behind parent and the child. The Paraguayan Central Authority appealed and reverted the decision in regard to visitation, where it was stipulated that the left-behind parent should come to Paraguay to meet with the child. This arrangement was, then, confirmed by the Court of Appeal and, subsequently, by the Supreme Court.

In 2019, the Ministry of Childhood and Adolescence of Paraguay asked for an evaluation of the situation of the child. It was informed that the child had been receiving monthly psychological treatment; that he was living with his aunt and her husband; and that the mother visited him daily. Contrastingly, between 2015 and 2018, 4 visits had been organised with the father, in which 3 were accompanied by the paternal grandmother. A hearing was finally held on 23 May 2019, where the child expressed to the court that he did not want to be 'molested' by his father nor did he desire to maintain a bond with him.

Merits

On the merits, the IACtHR (hereinafter, 'the Court') noted that it would assess potential violations to Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 11 (Right to Privacy), 17 (Rights of the Family), 19 (Rights of the Child) and 25 (Right to Judicial Protection) of the Pact of San José ('the Pact') in light of the application of the 1989 Inter-American Convention. References were also made to the complementary incidence of the United Nations Convention on the Rights of the Child, the 1980 Hague Child Abduction Convention and the 1996 Hague Child

Protection Convention, as well as the General Comments nº 12 and 14 of the Committee on the Rights of the Child.

Initially, the Court remarked that, at the time of the case's referral by the Commission, the child was about to turn 18 and that both the Inter-American and Hague Conventions were only applicable until the child reached the age of 16. It was noted, with concern, that the child had not been heard during most of the proceedings and that Article 12 of the UNCRC had been disregarded. As the child manifested that he did not feel like a victim and had no interest in pursuing his father's claim, the Court decided to only assess the human rights violations suffered by Mr. Córdoba.

Regarding the violations of judicial guarantees and protection, the Court analysed the right to a reasonable timeframe and the State's obligation to enforce judgments issued by competent authorities, accentuated by the particular condition of urgency required in proceedings involving children. An explicit reference was made to *Maumousseau and Washington v. France* inasmuch as the ECtHR concluded that, in international child abduction cases, the *status quo ante* must be re-established as quickly as possible to prevent the consolidation of illegal situations.

As the judicial proceedings for the return were concluded within 8 months, the Court did not find that there had been a violation of Article 8.1 of the Pact. However, Article 25.2.c prescribed that the State's responsibility did not end when a judgment had been reached and that public authorities may not obstruct the meaning nor the scope of judicial decisions or unduly delay their enforcement (*Mejía Idrovo v. Ecuador* and *Federación Nacional de Trabajadores Marítimos y Portuarios v. Perú*). References to *Maire v. Portugal* and *Ignaccolo-Zenive v. Romania* from the ECtHR were also made to reinforce that such delays brought irreparable consequences to parent-child relationships. It had not been reasonable that the State of Paraguay, for 9 years, was not able to locate a child that regularly attended school and received care from the public health services. After the child was found, custody was immediately granted to the maternal aunt and contact with the father was hindered throughout the subsequent proceedings. Furthermore, the precautionary measures awarded by the Commission to instate a detailed visitation plan had not been enforced as a result of the COVID-19 pandemic, which contributed to the permanent deterioration of paternal bonds. Hence, the lack of diligence and morosity of the Paraguayan authorities resulted

in a violation of Article 25.2.c of the Pact of San José.

In relation to the personal integrity, private and family life, and family protection, the Court focused on the assessment of Articles 11.2 and 17.1. It was firstly stated that arbitrary or abusive interferences to family life from third parties or the State are strictly forbidden, and that the latter must take positive and negative actions to protect all persons from this kind of conduct, especially if they affect families (*Ramírez Escobar y otros v. Guatemala* and *Tabares Toro y otros v. Colombia*). Secondly, it was asserted that the separation of children from their families should be exceptional and, preferably, temporary (*Opinión Consultiva OC-17/02*, *Opinión Consultiva OC-21/14*, *Fornerón e hija v. Argentina* and *López y otros v. Argentina*), emphasizing that the child must remain in their family nucleus as parental contact constitutes a fundamental element of family life (*Dial et al. v. Trinidad y Tobago* and *Personas dominicanas y haitianas expulsadas v. República Dominicana*). The Court clarified that effective family protection measures favour the development and strengthening of the family nucleus and that, in contexts of parental separation, the State must guarantee family reunification to prevent unduly estrangement (*K. and T. v. Finland*, *Jansen v. Norway* and *Strand Lobben and Others v. Norway*).

The Court concluded that the lack of diligence and exceptional promptness required by the circumstances resulted in a rupture of paternal bonds. Moreover, the reconnection efforts were excessively delayed without providing significant advances or conditions to enable the improvement of the family relationship on the paternal side. Therefore, Paraguay had not only breached Articles 11.2 and 17, but also Article 5 for putting the applicant in a permanent state of anguish that resulted in a violation of his personal integrity.

Lastly, the Court stated that States are encouraged to adopt all necessary provisions in their legal systems to ensure the adequate implementation of international treaties and improve their operation. Even though it was observed that Paraguay had enacted internal regulations, they had not yet entered into force when the facts of the case unravelled. Consequently, Articles 1.1 and 2 of the Pact of San José had also been violated.

Reparations

One of the keys aspects of the Inter-American Court’s judgments is that they

thoroughly establish resolution points that must be individually satisfied. The State will send periodic reports to the Court specifying what measures have been taken to fulfil the decision, for as long as it takes, until the case is considered to be fully resolved.

In *Córdoba v. Paraguay*, the Court determined:

1. The payment of psychological and/or psychiatric treatment to Mr Córdoba;
2. The publication of the summary of the judgment in the officialgazette and in a media outlet with wide national circulation;
3. The adaptation of the domestic framework through the adoption of legislation that incorporates the standards set out in the judgment;
4. The establishment of a database to cross-reference information on internationally abducted children, which comprises all public systems that record data on people, such as social security, education, health and reception centres;
5. The creation of a communication network to process entries of internationally abducted children whose whereabouts are unknown and send search alerts for institutions involved in their care;
6. The accreditation of a training aimed at public servants of the judicial system and officials of the Ministry of Childhood and Adolescence on the issues appertaining to internationally abducted children and the need to safeguard their right to family life. The State must also indicate to which officials such training was addressed, the number of persons who effectively participated, and whether it was instituted as a permanent programme; and
7. The payment of the amounts set out in the judgement in terms of material and moral damages, costs and expenses, and reinstatement of the costs to the Court's victims' legal aid fund.

Final observations

International child abduction has been a long-awaited addition to the Inter-American portfolio in its intersection between international human rights law and international family law. The fact that *Córdoba* is the first decision to reach the

Court does not mean that human rights violations seldom happen within American States in such cases, but it undoubtedly reveals that the pathway to reach an international judgment is long. Because the Commission must refer the cases to the Court, it will take time before extensive case-law is developed on the topic. Nonetheless, the decision represents an advance in many aspects, especially for establishing a set of standards amongst Caribbean and Latin American countries, which are the ones who majorly ratified the Pact of San José and accepted the Court's jurisdiction.

It must also be noted that, despite there being allegations by the taking parent against the left-behind parent of domestic violence, little was mentioned in regard to the evaluation of grave risk of harm to the physical and psychological well-being of the child by the Paraguayan authorities and if this interfered in any way with the applicant's rights. Many references were made to the Guide of Good Practice of the 1980 Hague Conventions and the ECtHR case-law, yet this assessment seems to have been ignored by the IACtHR. As remarked in *X. v. Latvia*, "*the [ECtHR] reiterates that while Article 11 of the [1980] Hague Convention does indeed provide that the judicial authorities must act expeditiously, this does not exonerate them from the duty to undertake an effective examination of allegations made by a party on the basis of one of the exceptions expressly provided for, namely Article 13 (b) in this case*". Additionally, the HCCH Guide to Good Practice on Article 13 (1) (b) states in paragraph 37 that "(…) *past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists*". The exceptions displayed on Article 13 (1) (b) and (2) of the 1980 Hague Convention are both reflected on Article 11 of the 1989 Inter-American Convention, which arguably means that more attention could have been granted to the analysis of potential situations of danger and the vehement refusal of the child to maintain any sort of contact with the father.

Even though the Court decided to respect the child's wishes and refrained from examining the human rights violations that affected him, it must not be disregarded that the *Córdoba* judgment lacks a best interests assessment and that it might take some time before another international child abduction case gets a Commission referral. Apart from the grave risk analysis, it would have been enlightening to better understand how the Court perceived a potential violation of the child's right to be heard, including an assessment of *how* the child was heard,

as well as the other children related rights safeguarded by the Inter-American normative instruments, including the protection of private and family life, that were afflicted.

Moroccan Supreme Court on the HCCH 1996 Child Protection Convention

Among all Arab and Muslim-majority countries, Morocco stands out as the only State to have ratified seven (7) HCCH Conventions. This number of ratifications, comparable to that of other prominent countries such as United States or Japan, speaks volumes about Morocco's commitment to being an integral part of the global network of jurisdictions benefiting from the work of the HCCH on the harmonisation of private international and fostering mutual legal cooperation. The decisions of the Moroccan Supreme Court also reflect these efforts as the Court has shown its willingness to oversight the proper application of the HCCH Conventions (on the application of the 1980 HCCH Convention, see here). The Supreme Court Ruling No. 71 of 7 February 2023 briefly commented on here is another notable example related to the application of the 1996 HCCH Child Protection Convention. The case is also particularly interesting because it concerns the establishment of a *kafala* under Moroccan law for the purpose of relocating the child in another Contracting State (France *in casu*).

The case

The petitioner, a single woman living and working in France (seemingly Moroccan but it is not clear whether she has dual citizenship status), submitted a petition on 31 January 2020 to the Family Division of the First Instance Court (hereafter 'FIC') of Taroudant, in which she expressed her intention to undertake guardianship of an abandoned child (A) – born on 13 May 2019 – by means of *kafala*. The FIC approved the petition by a decree issued on 12 March 2020.

Subsequently, the Public Prosecutor filed an appeal against the FIC's decree with the Court of Appeal of Agadir. On 20 January 2021, the Court of Appeal decided to overturn the FIC's decree with remand on the ground that the FIC had failed to comply with the rules laid down in article 33 of the 1996 HCCH Child Protection Convention, in particular the obligatory consultation in case of cross-border placement of the child.

The petitioner appealed to the Supreme Court arguing that:

1) The petitioner satisfied all the stipulated requirements under Moroccan law for the *kafala* of an abandoned child (notably the Law No. 15.01 of 13 June 2002 on the *kafala* of abandoned children, in particular article 9);

2) The Public Prosecutor failed to invoke the 1996 HCCH Convention during the proceedings before the FIC;

3) While article 33 might be applicable to countries such as Belgium and Germany, where *kafala* is not recognized, the situation differs in France, making the application of article 33 irrelevant in this context;

4) the Moroccan legislature, through the Law of 2002, has established the procedure for monitoring the well-being of children placed under *kafala* abroad, along with the ensuring the fulfilment of the caregiver's o obligations. Additionally, the 2002 Law on *kafala* was adopted within an international context dedicated to the protection of children, as reflected in the ratification by Morocco in 1993 of UN Child Convention of 1989.

The Ruling

The Supreme Court dismissed the appeal by ruling as follows:

"Pursuant to article 33 of the HCCH 1996 Child Protection Convention – ratified by Morocco on 22 January 2003 […]:

(1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the

Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

(2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Therefore, since, according to the Constitution, the provisions of the [HCCH] Convention take precedence over the provisions of domestic law, including Law No. 15. 01 […], the Court of Appeal provided a sound justification for its decision when it relied on [Article 33] [which] mandates prior consultation with the central authority or other competent authority in France where the appellant resides and works, and considered that the failure of the FIC's decree to comply with the requirements of [Article 33] constituted a violation of the law leading to its decision to overturn the *kafala* decree".

Comment

The case is particularly important because, to the author's knowledge, it is the first Supreme Court's decision to apply the 1996 HCCH Child Protection Convention since its ratification by Morocco in 2002 (Royal Decree [Dhahir] of 22 January 2003 published in the Official Gazette of 15 May 2003). The Convention is often given as an example of successful accommodation of religious law in cross-border situations, since it not only specifically mentions *kafala* as a measure of protection of children, but also it "makes it possible for children from countries within the Islamic tradition to be placed in family care in Europe, for example, under controlled circumstances. (H van Loon, "The Accommodation of Religious Laws in Cross-Border Situations: The Contribution of the Hague Conference on Private International Law", *Cuadernos de Derecho Transnacional* (2010) Vol. 2(1) p. 264).

In this regard, article 33 of the Convention plays a central role as it establishes a specific procedure for an obligatory prior consultation between the authorities of

the State of origin and the authorities of the receiving State, the failure of which is sanctioned by refusal to recognise the *kafala* decree (Explanatory Report, para. 143, p. 593). The Practical Handbook on the Operation of the HCCH 1996 Child Protection Convention qualifies the rules under article 33 as "*strict* rules which *must be complied* with before th[e] placement [of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution] can be put into effect" (para. 13.33, p. 151. Emphasis added).

In the case commented here, the Supreme Court meticulously adhered to the aforementioned guidelines. Firstly, the Court stood by its case law underscoring the primacy of international conventions, and in particular the HCCH Conventions, over domestic law (see e.g., Ruling No. 283 of 2 June 2015 (Case No. 443/2/1/2014), Ruling No. 303 of 28 July 2020 (Case No. 629/2/2/2018), both dealing with the HCCH 1980 Child Abduction Convention. On these cases, see here). Secondly, the Supreme Court upheld the Court of Appeal's decision, asserting that the failure to use the procedure under article 33 of the 1996 HCCH Child Protection Convention warranted the overturning of the FIC's *kafala* decree.

This aspect of the ruling holds particular significance as lower courts have not always consistently demonstrated sufficient awareness of Morocco's obligations under the1996 HCCH Conventions. Indeed, some lower court decisions show that, sometimes, *kafala* decrees involving cross-border relocation of the child have been issued without mentioning or referring to the 1996 HCCH Convention (see *e.g.* Meknes Court of Appeal, Ruling No. 87 of 14 January 2013 granting *kafala* of a child to a Franco-Moroccan couple and allowing the couple to take the child out of Morocco. See also, the decision of Antwerp Court of Appeal of 16 May 2016 recognizing and declaring enforceable under Belgian domestic law a Moroccan *kafala* decree despite the fact that the procedure mandated by article 33 was not used in the State of origin). Moreover, Moroccan lower court decisions further indicate that the courts' main concern has often centred around whether the child's Islamic education and belief would be affected by the relocation of the child abroad (e.g. Meknes Court of Appeal, Ruling No. 87 of 14 January 2013 (*ibid*); *idem*, Ruling No. 19 of 7 January 2013 granting *kafala* of a Moroccan child to an American couple of Pakistani origins. On this issue in general, see Katherine E. Hoffman, "Morocco" *in* N. Yassari et al. (eds.), *Filiation and Protection of Parentless Children* (T.M.C. Asser, 2019) pp. 245ff).

Therefore, in deciding as it did, the Supreme Court emphasises the importance of

respecting the procedure prescribed by article 33 before issuing a *kafala* decree involving cross-border placement. Compliance with this procedure ensures the recognition and enforcement of *kafala* decrees in all other Contracting States, thereby safeguarding the best interests of the child (The Practical Handbook, para. 13.33, p. 151).

The New Zealand Court of Appeal on the cross-border application of New Zealand consumer and fair trading legislation

The New Zealand Court of Appeal has just released a judgment on the cross-border application of New Zealand consumer and fair trading legislation (*Body Corporate Number DPS 91535 v 3A Composites GmbH* [2023] NZCA 647). The Court held that local consumer legislation – in the form of the Consumer Guarantees Act 1993 (CGA) – applies to foreign manufacturers. It also clarified that fair trading legislation – in the form of the Fair Trading Act 1986 (FTA) – applies to representations made to recipients in New Zealand. The decision is of particular interest to New Zealand consumers and manufacturers of goods that are supplied in New Zealand, as well as traders advertising their products to New Zealanders. More generally, the judgment provides a useful analysis of the interrelationship between statutory interpretation and choice of law, and lends weight to the proposition that product liability is properly governed by the law of the place of supply (or injury).

Facts

The defendant, 3A Composites GmbH (3AC), was a German manufacturer of a cladding product installed on the plaintiffs' buildings. The plaintiffs alleged that the product was highly flammable because it contained aluminium composite panels with a polyethylene core. Panels of this kind were the main reason why the

fire at Grenfell Tower in London had spread so rapidly. The plaintiffs brought proceedings against 3AC, as well as the importers and distributors of the cladding in New Zealand. They alleged negligence, breach of s 6 of the CGA and breaches of the FTA. In response, 3AC protested the New Zealand court's jurisdiction.

The High Court

The High Court upheld 3AC's protest in relation to the CGA and FTA causes of action, on the basis that they fell outside of the territorial scope of the Acts: *Body Corporate Number DP 91535 v 3A Composites GmbH* [2022] NZHC 985, [2022] NZCCLR 4.

In relation to the CGA, the plaintiffs claimed that 3AC's cladding was not of acceptable quality in accordance with the statutory guarantees in the CGA. Section 6 of the CGA provides for a right of redress against a manufacturer where goods supplied to a consumer are not of acceptable quality. The Court held that the Act did not apply to 3AC because it was a foreign manufacturer.

Referring to the Supreme Court's decision in *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300, the Court concluded that there was "neither express language nor any necessary implication which would lead the Court to interpret the CGA as being intended to have extraterritorial reach" (at [45]). The CGA therefore did not apply to an overseas manufacturer like 3AC that did not have a presence in New Zealand (see [38]-[47]). The Court pointed to the definition of the term "manufacturer" in s 2 of the Act, which includes "a person that imports or distributes" goods that are manufactured outside New Zealand where the foreign manufacturer does not have an ordinary place of business in New Zealand. According to the Court, the clear inference to be drawn from this definition was that the Act did not have extraterritorial effect, because otherwise there would be no need to impose the obligations of the manufacturer's statutory guarantee upon a New Zealand-based importer of goods (at [42]-[44]).

In relation to the FTA, the plaintiffs argued that 3AC had engaged in misleading or deceptive conduct by making available promotional material on their website that was intended to have global reach and that specifically contemplated New Zealand consumers (at [107]), and by authorising publication of promotional and technical information through their exclusive distributor in New Zealand (at

[108]).

The Court held that the Act did not apply to 3AC's allegedly misleading or deceptive conduct. It referred to s 3(1), headed "application of Act to conduct outside New Zealand". The section extends the Act to conduct outside New Zealand by any person carrying on business in New Zealand to the extent that such conduct relates to the supply of goods in New Zealand. It was clear that 3AC had never engaged in carrying on business in New Zealand (at [117]). Moreover, there was no evidence to show that 3AC had made any representations to the plaintiffs relating to supply of their product in New Zealand (at [120]).

The Court of Appeal

The Court of Appeal, in a judgment by Goddard J, disagreed with the High Court's conclusion that the claims fell outside of the territorial scope of the Acts. In relation to the CGA, it held that the Act applies "to an overseas manufacturer of goods that are supplied in New Zealand" (at [61]). This interpretation was "consistent with [the] text and purpose [of the Act]", with "broader principles of private international law" and "with the approach adopted by the Australian courts to corresponding legislation" (at [61]). The relevant "territorial connecting factor", or "hinge", was the supply of goods in New Zealand (at [64], [65]).

As a matter of statutory interpretation, the Court of Appeal considered that "[o]n its face the Act applies, and there is no good reason to read it more narrowly" (at [76]). The concept of extraterritoriality was irrelevant in this context (at [70]). In particular, it was inaccurate "to describe the availability of relief in respect of a supply of goods to a consumer in New Zealand against a person outside New Zealand as an 'extraterritorial' application of the Act" (at [64]). The Act imposed strict liability, in relation to the products supplied in New Zealand to New Zealand consumers, and did not depend on the conduct of the supplier or manufacturer in New Zealand (at [71]).

In relation to the definition of "manufacturer", the Court accepted that its purpose was to provide a New Zealand consumer with the option of seeking redress against an importer or distributor of goods manufactured outside New Zealand, in light of the potential difficulties faced by a consumer when suing an overseas manufacturer (at [66]). However, this did not mean that the

manufacturer should be excused from liability (at [67]). The Act essentially provided for concurrent liability on the part of the overseas manufacturer and the New Zealand-based importer or distributor (at [69]), which was consistent "with the focus of the legislation on providing meaningful remedies to consumers of goods supplied in New Zealand" (at [69]). This approach was consistent with Australian authority (at [72]).

The application of "established private international law choice of law principles" led to the same result (at [77]). For claims in tort in relation to goods that have caused personal injury, the relevant choice of law rules favoured application of the law of the place of injury. Applying the law of the place of manufacture "would produce the unsatisfactory result of different products on the same shelf" being governed by different liability regimes (at [77], referring to *McGougan v DePuy International Ltd* [2018] NZCA 91, [2018] 2 NZLR 916 at [59]). There was "broad support for a similar approach to product liability claims (at [77]). Thus, there was "a strong argument that the applicable law, where a consumer brings a product liability claim in respect of goods supplied in New Zealand, is New Zealand law" (at [78]), which included the Consumer Guarantees Act.

The Court left open the question whether a different approach might apply where an overseas manufacturer did not know its products were being sold in New Zealand, or where it had consciously chosen not to sell its products here. These concerns did not arise on the facts of the case, so the Court did not need to determine "whether such a result would go beyond the purpose of the Act, or whether private international law principles provide a solution to any apparent injustice in such a case" (at [80]).

In relation to the FTA, the Court accepted that the relevant issue was whether 3AC engaged in conduct in New Zealand that breached the Act, so the fact that s 3 (on the extraterritorial application of the Act) did not apply was not decisive (at [103]). The Act applied to false and misleading conduct in New Zealand, "regardless of where the defendant is incorporated and where it carries on business" (at [102], referring to *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754). This included communications made from outside New Zealand to recipients in New Zealand.

Comment

The Court of Appeal's judgment is to be welcomed. The principle of extraterritoriality has been responsible for causing considerable confusion in the past (see Maria Hook "Does New Zealand consumer legislation apply to a claim against a foreign manufacturer?" [2022] NZLJ 201). In treating the principle as irrelevant to this case, the Court laid the path for a clear and nuanced analysis of the issues. Not only did the Court refuse to adopt the lens of extraterritoriality, it was also prepared to rely on general choice of law rules, in addition to statutory interpretation, and treated both as relevant.

Courts often approach statutory interpretation and choice of law as exclusive methodologies. At the outset of the case, they identify whether the issue is one of statutory interpretation or choice of law, and then proceed with their analysis accordingly. Here, in relation to the CGA, the Court of Appeal applied both methodologies and found that the relevant connecting factor was the place of supply, regardless of which methodology applied. The implication seemed to be that there was a shared rationale for the place of supply as the most appropriate connecting factor and that, if the two methodologies had pointed in different directions, this *might* have been evidence that things had gone awry.

In this way, the judgment lends support to the proposition that statutory interpretation and choice of law are not engaged in any kind of "competition". There is a reason why product liability is typically governed by the law of the place of injury (or the place of supply, where liability is for pure economic loss). Why should this reason not also be determinative for claims under the CGA specifically? The more difficult question would be whether a statute should be given a wider scope of application than it would receive under bilateral choice of law. But here, too, it would be unhelpful to think of the conflict of laws as a kind of jilted discipline. The goal should be to identify the cross-border considerations that bear upon the scope of the particular statute, when compared to the rationale underpinning the choice of law rule that would otherwise be applicable. How else can a court decide whether a statute is intended to fall outside of general rules of choice of law? Statutory interpretation, and characterisation, are necessarily intertwined. It remains to be seen whether future courts will build on the Court of Appeal's judgment to engage more explicitly with the interrelationship between statutory interpretation and choice of law.

China’s New Foreign State Immunity Law: Some Foreign Relations Aspects

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On September 1, 2023, the Standing Committee of China’s National People’s Congress (NPC Standing Committee) passed the Law of the People’s Republic of China on Foreign State Immunity (FSIL) (English translation here). The FSIL will enter into force on January 1, 2024.

This law heralds a fundamental shift of China’s attitude towards foreign state immunity, from strict adherence to the absolute theory to adoption of the restrictive theory. According to Article 1 of the law, the FSIL aims to “to protect the lawful rights and interests of litigants, to safeguard the equality of state sovereignty, and to promote friendly exchanges with foreign countries.” A report on the draft law also suggests that it is intended to build China’s foreign-related legal system and to promote China’s Belt and Road Initiative.

The FSIL borrowed from the foreign state immunity laws of other countries and from the UN Convention on Jurisdictional Immunities of States and Their Properties. In a prior post on Transnational Litigation Blog (TLB), one of us discussed some significant provisions of the FSIL, comparing them to the relevant provisions of the UN Convention. In this post, we examine some foreign relations aspects of the new law, including the role of the Ministry of Foreign Affairs, the principle of reciprocity, and whether the FSIL extends to Hong Kong and Macau.

The Prominent Role of Foreign Ministry

Several provisions of the FSIL reflect the important role of China's Ministry of Foreign Affairs (MFA). The most notable is Article 19.

Article 19 provides in its first paragraph that Chinese courts "shall accept" documents issued by the MFA on certain factual questions. These include whether the state concerned qualifies as a "foreign sovereign state" for purposes of the FSIL, whether and when a state has been served by diplomatic note, and other factual issues relating to the acts of the state concerned. This last provision vests the MFA with authority to decide factual questions regarding the foreign state's conduct.

The second paragraph of Article 19 empowers the MFA to issue opinions to Chinese courts on other issues "that concern foreign affairs and other such major state interests." The distinction between the first and second paragraphs suggests that opinions on other issues are not necessarily binding on Chinese courts. On the other hand, it seems unlikely that Chinese courts will ignore opinions that the MFA decides to express.

Article 19 is somewhat similar to Article 21 of the UK State Immunity Act (SIA). The SIA grants the UK Secretary of State authority to determine conclusively whether a foreign state is covered by the Act and whether service has been made through diplomatic channels. By contrast, the US Foreign Sovereign Immunities Act (FSIA) does not give the US government authority to decide such issues. The US Supreme Court has suggested that the executive branch's views on questions of foreign relations might be entitled to some deference, but the issue remains unresolved in US law.

Articles 4 and 17 of the FSIL also give China's MFA roles to play. Article 4 provides that a foreign state shall not enjoy immunity from jurisdiction if the foreign state has expressly consented to the jurisdiction of Chinese courts. Article 4(4) allows a foreign state to consent, among other means, by submitting a document through diplomatic channels. Article 17 permits service of process through diplomatic channels if the foreign state cannot be served pursuant to an international agreement or other means acceptable to the foreign state.

The UN Convention's provision on consent to jurisdiction (Article 7) does not mention diplomatic channels. Article 2(7) of the UK's SIA, on the other hand, does

allow the head of foreign state's diplomatic mission in the United Kingdom to submit to the jurisdiction of UK courts. The US FSIA makes no express mention of diplomatic channels in its provision on waiving immunity. The UN Convention's provision on service of process (Article 22) does allow service through diplomatic channels, as does Article 12 of the UK's SIA. The US FSIA also permits use of diplomatic channels to serve a foreign state but only if three other means of service listed in § 1608 are not available.

The prominent role of China's MFA under the FSIL is noteworthy, particularly in comparison to the more limited roles played by the governments of the United Kingdom and the United States. The Legislative Affairs Commission of the NPC Standing Committee has stated that the FSIL should "ensure that the policy of foreign affairs of the State is accurately captured in the case." The provisions discussed above—particularly Article 19—seem designed to do this. On the other hand, active involvement by the MFA in cases under the FSIL may raise concerns about lack of predictability and interference with the administration of justice.

The Principle of Reciprocity

The foreign relations aspects of the FSIL are also reflected in its reciprocity provision. Article 21 provides: "Where foreign states accord the PRC and its property narrower immunity than is provided by this Law, the PRC will apply the principle of reciprocity." In Chinese, the term translated here as "reciprocity" is duideng, which connotes equal treatment for unwanted or unfriendly foreign actions. In the context of foreign state immunity, duideng means that, if foreign states grant less immunity to China, China will respond by granting less immunity to those foreign states.

Under the prior Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures, the same principle of reciprocity (duideng) was applied in Article 3 to foreign states that granted less immunity to central bank assets of the People's Republic of China. Article 20 of the FSIL extends this principle to issues of foreign state immunity more generally. This principle of reciprocity (duideng) also appears in Article 5(2) of China's Civil Procedure Law (CPL) and Article 99(2) of China's Administrative Litigation Law to address restrictions on the litigation rights of Chinese parties

imposed by foreign countries.

The principle of reciprocity (duideng) found in the FSIL is distinct from another principle of reciprocity (huhui) used in the context of judicial assistance between China and foreign countries. The CPL generally provides that reciprocity (huhui) may be relied upon to provide judicial assistance in service of process, investigation and collection of evidence, and other litigation activities (Article 293). Above all, reciprocity (huhui) provides the basis for recognizing and enforcing foreign judgments (Article 298). Although Chinese courts used to interpret this principle narrowly by requiring foreign courts to recognize Chinese judgments first, it has recently liberalized its position.

Because "huhui" serves to encourage or promote, whereas "duideng" serves to respond and punish, it is potentially misleading to translate both principles as "reciprocity." It might be better to reserve "reciprocity" for the principle "huhui." which underlies the recognition of foreign judgments for example. "Duiding," as used in the FSIL and other Chinese laws mentioned above, might be translated instead as "equal treatment."

Hong Kong and Macau

Another foreign relations aspect of the FSIL is its territorial scope of application. Hong Kong and Macau are part of the People's Republic of China, but they have separate legal systems. Does the FSIL apply not only in Mainland China but also in Hong Kong and Macau?

The text of the FSIL does not address this question explicitly. However, the FSIL's reference to "Courts of the People's Republic of China" stands in sharp contrast to the references in the CPL and other Chinese laws to "People's Courts of the People's Republic of China" or "People's Courts." By using a different—and potentially broader—term, the NPC Standing Committee has certainly not restricted the FSIL's application to courts in Mainland China.

However, Article 18(2) of Hong Kong's Basic Law states that "National laws shall not be applied in the Hong Kong Special Administrative Region [HKSAR] except for those listed in Annex III to this Law." Under this provision, only when the FSIL is added to Annex III will the FSIL formally apply in Hong Kong courts.

But even if the FSIL is not added to Annex III, Hong Kong courts can be expected to follow it. In *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (2011), the Hong Kong Court of Final Appeal held that "[t]he HKSAR cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC" (¶ 183(a)). In that case, the court held that Hong Kong courts had to follow the doctrine of absolute state immunity, which was then China's official position, even though Hong Kong courts had previously adopted the doctrine of restrictive immunity. Now that China has adopted the restrictive theory, the decision in *FG Hemisphere Associates* requires Hong Kong courts to follow China's new approach. Although the details with respect to Macau are different, courts in Macau can similarly be expected to follow China's new policy on foreign state immunity as reflected in the FSIL.

Conclusion

China has adopted a new approach to foreign state immunity by enacting the FSIL. Applying the FSIL will be primarily a task for China's courts, including courts in Hong Kong and Macau, which will have to follow the new policy. Among other things, Chinese courts must apply the FSIL's reciprocity provision, which requires them to accord "equal treatment" if foreign states grant China less immunity than the law provides. However, the leading role that courts will play under the FSIL must not cause one to ignore the significant role of China's MFA under the new law, particularly in determining when foreign states are covered by the FSIL and in determining factual issues relating to the conduct of foreign states.

Australia's statutist orthodoxy:

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

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

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

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

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

It is unsurprising then that Princess sought to defend the proceedings at a

preliminary stage through litigation over where to litigate.

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

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

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

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

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

Procedural history

Princess applied to stay the proceedings relying on terms of Mr Ho's contract with Princess. A Calgary resident, he booked his ticked on the *Ruby Princess* via a

Canadian travel agent in September 2018. By the time the matter came to the High Court, it was not disputed that when he did so, he became a party to a contract subject to the US Terms and Conditions, which contained three clauses of particular relevance.

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

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

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

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

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

> *'WAIVER OF CLASS ACTION: THIS PASSAGE CONTRACT PROVIDES FOR THE EXCLUSIVE RESOLUTION OF DISPUTES THROUGH INDIVIDUAL LEGAL ACTION ON YOUR OWN BEHALF INSTEAD OF THROUGH ANY CLASS OR REPRESENTATIVE ACTION. EVEN IF THE APPLICABLE LAW PROVIDES OTHERWISE, YOU AGREE THAT ANY ARBITRATION OR LAWSUIT AGAINST CARRIER WHATSOEVER SHALL BE LITIGATED BY YOU INDIVIDUALLY AND NOT AS A MEMBER OF ANY CLASS OR AS PART OF A CLASS OR REPRESENTATIVE ACTION, AND YOU EXPRESSLY AGREE TO WAIVE ANY LAW ENTITLING YOU TO PARTICIPATE IN A CLASS ACTION …'*

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

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

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

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

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

The High Court was comprised of Gageler CJ, Gordon, Edelman, Gleeson and

Jagot JJ. The Court unanimously allowed Ms Karpik's appeal and re-exercised the primary court's discretion by refusing to stay the proceedings. The decision may be distilled into three key propositions.

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

The territorial scope of ACL s 23

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

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

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

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

- The ACL applies to the extent provided by CCA pt XI: ACL s 1.
- CCA s 131(1), within CCA pt XI, provides that the ACL applies to the conduct of corporations and in relation to contraventions of certain chapters of the ACL by corporations.
- CCA s 5 extends the application of relevant parts of the ACL to conduct engaged in outside Australia, where the conduct outside Australia was by a corporation carrying on business within Australia.
- ACL s 23, as part of ACL pt 2-3, prescribes a norm of conduct. Section 23

in particular addresses adhesion contracts—that is, contracts in which one of the parties enters into a contract on a take-it-or-leave it basis. ACL s 23 protects consumer contracts and small business contracts but not others.

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

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

The class action waiver clause was an unfair term

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

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

The Court considered that the clause had the effect of preventing or discouraging passengers from vindicating their legal rights where the cost to do so individually

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

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

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

Strong reasons not to enforce the exclusive foreign jurisdiction clause

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

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

Conclusion

The High Court's decision is significant for its consideration of the territorial scope of ACL s 23. It means that many companies outside of Australia that operate in a way that touches on Australia will have difficulty in contracting out of Australia's consumer protection regime as regards standard contracts with consumers and small businesses. The decision will be a big deal for businesses like Princess, who operate travel services that involve Australia.

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

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

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

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

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