Forum Selection Clauses and Cruise Ship Contracts

On August 19, 2021, the U.S. Court of Appeals for the Eleventh Circuit issued its latest decision on foreign forum selection clauses in cruise ship contracts. The case was *Turner v. Costa Crociere S.P.A.* The plaintiff was an American cruise ship passenger, Paul Turner, who brought a class action in federal district court in Florida alleging that the cruise line's "negligence contributed to an outbreak of COVID-19 aboard the Costa Luminosa during his transatlantic voyage beginning on March 5, 2020."

The cruise line moved to dismiss the case on the basis of a forum selection clause in the ticket mandating that all disputes be resolved by a court in Genoa, Italy. The contract also contained a choice-of-law clause selecting Italian law. By way of background, it is important to note that (1) the parent company for the cruise line was headquartered in Italy, (2) its operating subsidiary was headquartered in Florida, (3) the cruise was to begin in Fort Lauderdale, Florida, and (4) the cruise was to terminate in the Canary Islands.

The Eleventh Circuit never reached the merits of the plaintiffs' claims. Instead, it sided with the cruise line, enforced the Italian forum selection clause, and dismissed the case on the basis of *forum non conveniens*. A critique of the Eleventh Circuit's reasoning in *Turner* is set forth below.

Years ago, the U.S. Congress enacted a law imposing limits on the ability of cruise lines to dictate terms to their passengers. 46 U.S.C. § 30509 provides in relevant part:

The owner . . . of a vessel transporting passengers . . . between a port in the United States and a port in a foreign country, may not include in a . . . contract a provision limiting . . . the liability of the owner . . . for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents . . . . A provision described in paragraph (1) is void.

Boiled down to its essence, the statute provides that any provision in a cruise ship contract that caps the damages in a personal injury case is void. If the cruise ship were to write an express provision into its passenger contracts capping the

damages recoverable by plaintiffs such as Paul Turner at $500,000, that provision would be void as contrary to U.S. public policy.

The cruise lines are sharp enough, however, to know not to write express limitations directly into their contracts. Instead, they have sought to achieve the same end via a choice-of-law clause. The contract in *Turner* had a choice-of-law clause selecting Italian law. Italy is a party to an international treaty known as the Athens Convention. The Athens Convention, which is part of Italian law, caps the liability of cruise lines at roughly $568,000 in personal injury cases. If a U.S. court were to give effect to the Italian choice-of-law clause and apply Italian law on these facts, therefore, it would be required to apply the liability cap set forth in the Athens Convention. It seems highly unlikely that any U.S. court would enforce an Italian choice-of-law clause on these facts given the language in Section 30509.

Enter the forum selection clause. If the forum selection clause is enforced, then the case must be brought before an Italian court. An Italian court is likely to enforce an Italian choice-of-law clause and apply the Athens Convention. If the Athens Convention is applied, the plaintiff's damages will be capped at roughly $568,000. To enforce the Italian forum selection clause, therefore, is to take the first step down a path that will ultimately result in the imposition of liability caps in contravention of Section 30509. The question at hand, therefore, is whether the Eleventh Circuit was correct to enforce the forum selection clause knowing that this would be the result.

While the court clearly believed that it reached the right outcome, its analysis leaves much to be desired. In support of its decision, the court offered the following reasoning:

[B]oth we and the Supreme Court have directly rejected the proposition that a routine cruise ship forum selection clause is a limitation on liability that contravenes § 30509(a), even when it points to a forum that is inconvenient for the plaintiff. Shute, 499 U.S. at 596–97 ("[R]espondents cite no authority for their contention that Congress' intent in enacting § [30509(a)] was to avoid having a plaintiff travel to a distant forum in order to litigate. The legislative history of § [30509(a)] suggests instead that this provision was enacted in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by

means of a clause providing that 'the question of liability and the measure of damages shall be determined by arbitration.' There was no prohibition of a forum-selection clause.")

The problem with this argument is that there was no evidence in *Shute*—none—suggesting that the enforcement of the forum selection clause in that case would lead to the imposition of a formal liability cap. Indeed, the very next sentence in the passage from *Shute* quoted above states that "[b]ecause the clause before us . . . *does not purport to limit petitioner's liability for negligence*, it does not violate [Section 30509]." This language suggests that if enforcement of a forum selection clause *would* operate to limit the cruise line's liability for negligence, it would not be enforceable. The Eleventh Circuit's decision makes no mention of this language.

The *Turner* court also cites to a prior Eleventh Circuit decision, *Estate of Myhra v. Royal Caribbean Cruises*, for the proposition that "46 U.S.C. § 30509(a) does not bar a ship owner from including a forum selection clause in a passage contract, even if the chosen forum might apply substantive law that would impose a limitation on liability." I explain the many, many problems with the Eleventh Circuit's decision in *Myhra* here. At a minimum, however, the *Myhra* decision is inconsistent with the Supreme Court's admonition in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc* that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." There is no serious question that the cruise line is here attempting to use an Italian choice-of-law clause and an Italian forum selection clause "in tandem" to deprive the plaintiffs in *Turner* of their statutory right to be free of a damages cap. This attempt would seem to be foreclosed by the language in *Mitsubishi*. The Eleventh Circuit does not, however, cite *Mitsubishi* in its decision.

At the end of the day, the question before the Eleventh Circuit in *Turner* was whether a cruise company may deprive a U.S. passenger of rights guaranteed by a federal statute by writing an Italian choice-of-law clause and an Italian forum selection clause into a contract of adhesion. The Eleventh Circuit concluded the answer is yes. I have my doubts.

EPO and EAPO Regulations: A new reform of the Luxembourgish Code of Civil Procedure

Carlos Santaló Goris, Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers a summary and a compelling analysis of the Luxemburgish domestic legislation regarding the EPO and EAPO Regulations.

On 23 July 2021, a new legislative reform of the Luxembourgish Code of Civil Procedure ("NCPC"), entered into force amending, among other articles, those concerning Regulation No 1896/2006, establishing a European Payment Order ("EPO Regulation") and Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation").

The EPO and the EAPO Regulations embody, respectively, the first and third European uniform civil procedures. While the EPO, as its name indicates, is a payment order, the EAPO is a provisional measure that allows temporary freezing of the funds in the debtor's bank accounts. Although they are often referred to as uniform procedures, both leave numerous elements to the discretion of the Member States' national laws.

With this strong reliance on the Member State's national laws, it is not surprising that most Member States have enacted domestic legislation to embed these Regulations within their national civil procedural systems. Luxembourg is one of them. The EPO Regulation brought two amendments to the NCPC. The first one was introduced in 2009, four months after the EPO Regulation entered into force. In broad terms, the 2009 reform integrated the EPO procedure in the Luxembourgish civil judicial system, identifying the authorities involved in its application. The second legislative amendment stemmed from the 2015 reform of Regulation No 861/2007, establishing a European Small Claims Procedure ("ESCP Regulation") and of the EPO Regulation. Among other changes, this reform

introduced the possibility, once the debtor opposes the EPO, of continuing the procedure "in accordance with the rules of the European Small Claims Procedure" (Article 17(1)(a) EPO Regulation). The change brought to the NCPC pursued the objective to facilitate the swift conversion from an EPO into an ESCP (Articles 49(5) and 49(8) NCPC).

Before the reform of 23 July 2021, the Luxembourgish legislator had already twice modified the NCPC to incorporate the EAPO Regulation. The first EAPO implementing act was approved in 2017 (Article 685(5) NCPC). It mainly served to identify the domestic authorities involved in the EAPO procedure: from the competent courts to issue the EAPO to the competent authority to search for information about the debtor's bank accounts (Article 14 EAPO Regulation). The second reform, introduced in 2018, aimed at facilitating the transition of the EAPO's temporary attachment of accounts into an enforcement measure (Article 718(1) NCPC). In brief, it allowed the transfer of the debtor's funds attached by the EAPO into the creditor's account.

The 2021 legislative reform of the NCPC was not introduced specifically bearing in mind the EPO and the EAPO Regulations: rather, it was meant as a general update of the Luxembourgish civil procedural system. Among the several changes it introduced, it increased the value of the claim that may be brought before the Justice of the Peace (*Justice de paix*). Before the reform, the Justice of the Peace could only be seized for EPOs and EAPOs in claims up to 10.000 euros, while District Courts (*Tribunal d'arrondissement*) were competent for any claims above that amount. As a result of the reform, the Luxembourgish Justice of the Peace will now be competent to issue EPOs and EAPOs for claims up to 15.000 euros in value.

Leave to Issue and Serve

Originating Process Outside Jurisdiction Versus Substituted Service: A Distinction with a Difference

Witten by Orji A Uka (Senior Associate at ALP NG & Co) and Damilola Alabi (Associate at ALP NG & Co)

Introduction

The issuance and service of an originating process are fundamental issues that afford or rob a court of jurisdiction to adjudicate over a matter. This is because it is settled law that the proceedings and judgment of a court which lacks jurisdiction result in a nullity[1]. Yet, despite the necessity of ensuring that the issuance and service of an originating process comply with the various State High Court Civil Procedure Rules or Federal High Court Civil Procedure Rules ("the relevant court rules") or the Sheriffs and Civil Process Act, legal practitioners and sometimes judges commonly conflate the issuance and service of court process on defendants outside jurisdiction with the concept of service of court process by substituted means on defendants within the jurisdiction[2]. This paper set outs the differences between both commonly confused principles with the aim of providing clarity to its readers and contributing to the body of knowledge on this fundamental aspect of the Nigerian adjectival law.

Territorial Jurisdiction of Courts in Nigeria

Historically, Nigerian courts have always exercised jurisdiction over a defined subject matter within a clearly specified territory as provided for under the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the "Constitution"). As an illustrative example, a High Court of a State in Nigeria or that of the Federal Capital Territory, Abuja has jurisdiction over the subject matter of a simple contract. However, the jurisdiction of each High Court is, as a general rule, confined to persons within the territorial boundaries of the State or

the Federal Capital Territory, as the case may be. As highlighted below, there are three established bases under which a High Court in Nigeria can validly exercise jurisdiction in an action *in personam*.[3]

Firstly, a court in Nigeria is donated with jurisdiction in an action *in personam* where the defendant is present or resides or carries on business within the territorial jurisdiction of the court and the defendant has been served with the originating process.[4]In the oft-cited case of *British Bata Shoe Co. Ltd v. Melikan*[5], the Federal Supreme Court held that the High Court of Lagos State, rightly exercised its jurisdiction in an action *in personam* for specific performance of a contract because the defendant resided in Lagos State even though the land in respect of which the subject matter of the dispute arose, was situated at Aba, outside the territorial jurisdiction of the court.

Thus, jurisdiction can be invoked either by residence[6] or simply by presence within jurisdiction.[7] Upon a finding that the defendant is present or resident within the jurisdiction of the court, and the originating process has been duly served on the defendant within jurisdiction, the court automatically assumes jurisdiction over such defendant, subject to the provisions of the Constitution or statutes that confer exclusive jurisdiction on other courts e.g. the Federal High Court or the National Industrial Court in respect of such subject matter.

Secondly, a court can validly exercise jurisdiction over a defendant in an *action in personam* where such defendant submits to the court's jurisdiction or waives his right to raise a jurisdictional challenge. Submission may be express, where the defendant signed a jurisdiction agreement or forum selection clause agreeing to submit all disputes to the courts of a particular legal system for adjudication either or an exclusive or non-exclusive basis. Submission may also be implied where the defendant is served with a court process issued by a court other than where he resides or carries on business and the defendant enters an unconditional appearance and/or defends the case on the merit.[8]

A third basis for the valid exercise of the jurisdiction of a High Court in Nigeria is where the court grants leave for the issuance and service of the originating process on a defendant outside the court's territorial boundaries. As noted above, historically, Nigerian courts could only validly exercise jurisdiction over a defined subject matter within its specified territory. With time, the powers of the court have now extended to the exercise of judicial power over a foreigner who owes no

allegiance to the court's territorial jurisdiction or who is resident or domiciled out of its jurisdiction but is called to appear before the court in the jurisdiction[9]. It is important to note that as an attribute of the concept of sovereignty, the exercise of jurisdiction by a court of one State over persons in another State is *prima facie* an infringement of the sovereignty of the other State. In *Nwabueze v. Okoye*,[10] the Supreme Court highlighted the fundamental rule of Nigerian conflict of laws on exercise of jurisdiction over a foreign defendant by stating as follows:

*"Generally, courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction … It should be noted that except where there is submission to the jurisdiction of the court it has no jurisdiction over a person who has not been served with the writ of summons. The court has no power to order service out of the area of its jurisdiction except where so authorised by statute or other rule having force of statute."***[11]**

Thus, a court may only stretch its jurisdictional arm outside its territory in certain limited circumstances.[12]Where such circumstances apply, the claimant is not entitled as of right to have the originating process issued by the court for service on a defendant who is resident or present outside the jurisdiction and must seek and obtain leave to this effect.**[13]**

The Issuance and Service of Originating Process Outside Jurisdiction

The power of courts to exercise jurisdiction beyond their territorial boundaries has been variously described as "long-arm jurisdiction", "assumed jurisdiction" or even "exorbitant jurisdiction". However, the power is only activated using the instrumentality of the grant of leave for the issuance and service of such originating process outside jurisdiction. While applying for leave, the claimant must convince the court that there exists a special reason for it to exercise its long arm to reach a defendant outside its jurisdiction. The special reasons which must be established by a claimant are contained in the relevant rules of courts.[14] Where none of the conditions outlined in the Rules are met, the courts must refuse the application for leave. This is because – in the language commonly employed in private international law -there would be no real and substantial

connection between the cause of action and the jurisdiction of Nigeria and therefore no special reason to justify the exercise of the court's long arm jurisdiction. Further, even where it is established that the claimant's case falls within one or more of those jurisdictional pathways contained in the Rules, the claimant is nevertheless not entitled as of right to be granted leave and the courts are not automatically bound to grant leave as a matter of course. The claimant must still demonstrate to the court that it is the *forum conveniens* to hear and determine the claim.[15] Unfortunately, in practice, apart from a few instances, which are exceptions rather than the general rule, Nigerian courts hardly give this serious consideration during the *ex-parte* hearing stage for the application for leave.

The failure of a claimant to seek leave to issue and serve an originating process on a defendant outside jurisdiction, is not a rule of mere technicality. As the learned authors of "Private International Law in Nigeria" brilliantly summarised,[16] there are at least three reasons for this conclusion. First, courts are wary of putting a defendant who is outside jurisdiction through the trouble and expense of answering a claim that can be more conveniently tried elsewhere. Two, a court has to satisfy itself before granting leave that the proceedings are not frivolous, vexatious, or oppressive to the defendant who is ordinarily resident outside jurisdiction. Three, Nigerian courts, on grounds of comity, are wary of exercising jurisdiction over a foreign defendant who is ordinarily subject to the judicial powers of a sovereign foreign state. These also explain why the grant of leave is a judicial act – that can only be done by a Judge in chambers or the court; but not by the Deputy Chief Registrar or other court official, even if such leave is subsequently ratified or endorsed by the court. Thus, there is a long line of authorities by appellate courts in Nigeria (including the Supreme Court)to the effect that where leave was not obtained before the Writ of summons was issued and served, such writ is void and must be aside.[17]

Substituted Service

Substituted service on the other hand is resorted to when personal service of an originating process on a defendant within jurisdiction is not possible due to reasons such as evasion of service by the defendant or the inability to locate the defendant. A claimant seeking to serve a defendant within jurisdiction by

substituted means must seek and obtain an order of court to serve the defendant by a specific means as stated in the relevant court rules. For example, Order 9 Rule 5 of the Lagos State High Court Civil Procedure Rules provides that upon an application by a claimant, a judge may grant an order for substituted service as it may seem just. Some of the popular modes of effecting substituted service include by pasting the originating process at the last known address of the defendant, by newspaper publication, or especially more recently, by sending same to the defendant by email. Since the defendant is otherwise within the court's territorial reach, and the court has jurisdiction over him, there is no need to comply with real and substantial connection test set out in Order 10 Rule 1 of the Lagos State High Court Civil Procedure Rules.

Leave to Issue and Serve Versus Substituted Service

As simple as these concepts are, legal practitioners repeatedly confuse an application for leave for the issuance and service of originating process outside Nigeria with an application for substituted service within Nigeria.

In *Kida v. Ogunmola*[18]the appellant commenced an action for specific performance against five defendants. The court bailiff however was not able to serve the respondent, who was resident outside the jurisdiction of Borno State. It was known to the appellant that the 2nd respondent was resident in Ibadan. The appellant then applied for leave to serve the originating process on the 2nd respondent out of jurisdiction. Curiously, the appellant also applied for leave to serve the originating process on the 2nd, 3rd & 4th respondentsby substituted means by pasting same at their last known address in Maiduguri, Borno State and the court granted same. When the respondent failed to file a defence, the High Court entered default judgment against him. When the appellant initiated enforcement proceedings against the respondent, the respondent brought an application to set aside the judgment on grounds that leave of court was not obtained to issue the originating process outside jurisdiction. The High Court refused the application but upon an appeal to the Court of Appeal, the appellate court overturned the trial court's decision. The Appellant ultimately appealed to the Supreme Court which upheld the decision of the Court of Appeal.

The Supreme Court reasoned that the respondent was outside the jurisdiction of the court at the material time and could not be served by substituted means, and that substituted service can only be employed in situations where a defendant is within jurisdiction but cannot be served personally. The Supreme Court further held per Musdapher JSC (as he then was), at page 411 as follows:

"For a defendant to be legally bound to respond to the order for him to appear in Court to answer a claim of the plaintiff, he must be resident within jurisdiction, see National Bank (Nig.) Ltd. v. John Akinkunmi Shoyoye and Anor. (1977) 5 SC 181. Substituted service can only be employed when for any reason, a defendant cannot be served personally with the processes within the jurisdiction of the Court for example when the defendant cannot be traced or when it is known that the defendant is evading service. Also, where at the time of the issuance of the writ, personal service could not in law be effected on a defendant, who is outside the jurisdiction of the Court, substituted service should not be ordered, see Fry vs. Moore (1889) 23 QBD 395. If the defendant is outside the jurisdiction of the Court at the time of the issue of the writ and consequently could not have been personally served in law, not being amenable to that writ, an order for substituted service cannot be made, see Wilding vs. Bean (1981) 2 QB 100."

In the same vein the Court of Appeal stated as follows in *Abacha v. Kurastic Nigeria Ltd*[19]

"Courts exercise jurisdiction over persons who are within its territorial jurisdiction: Nwabueze vs. Obi-Okoye (1988) 10-11 SCNJ 60 at 73; Onyema vs. Oputa (1987) 18 NSCC (Pt. 2) 900; Ndaeyo vs. Ogunnaya (1977) 1 SC 11. Since the respondent was fully aware that before the issuance of the writ the appellant's abode or residence for the past one year was no longer at No.189, Off R.B. Dikko Road, Asokoro, Abuja within jurisdiction, substituted service of the processes should not have been ordered by the learned trial Judge."

The above cases emphasise that a writ issued in the ordinary form cannot be served by substituted means on a defendant who is not present or resident in the jurisdiction of the court, except the leave of court was sought and obtained in accordance with the relevant rules of court. As Okoli and Oppong lucidly put it, where a writ cannot be served on a person directly, it cannot be served indirectly by means of substituted service.[20]

One area of law where parties commonly make the mistake of conflating an application for leave to issue and serve out of jurisdiction with an application for substituted service is in maritime claims. This, in our experience, stems from a historically commonplace mischaracterisation of actions as *actions in rem* instead of *actions in personam*.[21] In *Agip (Nig) Ltd v Agip Petroli International***[22]**the Supreme Court held where an action is not solely an action *in rem* but also an action *in personam*, the plaintiff is bound to comply with the procedural rules, such as obtaining leave of the court.

Further, there is a common practice – particularly in cases with multiple defendants, with one defendant residing within jurisdiction and another outside jurisdiction – where parties apply to the courts to serve the originating process on the party outside jurisdiction through substituted service on the party within jurisdiction. It is pertinent to state that the above practice does not cure the defect and that the only circumstance where it is acceptable is where the party within jurisdiction is the agent of the party outside jurisdiction, and that is not the end of the story. The position of the law is that where a foreign company carries on business through an agent or servant company resident within a court's jurisdiction, the principal company is deemed to also be carrying on business within the same jurisdiction.[23] However, the courts have also held that where the agent company has no hand in the management of the company and receives only the customary agent's commission, the agent's place of business in Nigeria is not the company's place of business. Thus, the company has no established place of business in Nigeria and is not resident in Nigeria,[24] therefore leave of court is still required for the issuance and service of the writ.

Conclusion

The power vested in an appellate court to set aside a judgment of a lower court on the grounds of improper issuance or service of the originating process which is for service out of jurisdiction is symbolic of the imperativeness for claimants and their legal practitioners to ensure that the issuance and service of the originating process are done in conformity with the law and relevant court rules. It is respectfully submitted that the confusion between the service of an originating process outside the jurisdiction of a court and the service of an originating process by substituted means is unnecessary. The principles are clear and distinct

and should not be mixed up.

[1]See. *Boko v. Nungwa (*2019) 1 NWLR (Pt. 1654) 395. In *CRUTECH v. Obeten (*2011) 15 NWLR (Pt. 1271) 588 the Court of Appeal reemphasised the importance of jurisdiction when it stated that "the lack of jurisdiction is detrimental, disastrous, devastating and without leverage for salvaging the situation, regardless of desirability of such a course of action."

[2] See *Nwabueze v. Okoye* (1988) 4 NWLR (Pt. 91) 644; *Bimonure v. Erinosho* (1966) 1 All NLR 250; *Mbadinuju v. Ezuka* (1994) 8 NWLR (Pt. 364) 535; and *Khatoun v. Hans Mehr (Nigeria) and Anor.* (1961) NRNLR 27.

[3] According to the 10th Edition of the Black Law Dictionary, an action is said to be *in personam* when its object is to determine the rights and obligation of the parties in the subject matter of the action, however, the action may arise, and the effect of the judgment may bind the other. A common example is a breach of contract claim.

[4]*Ogunsola v. All Nigeria People's Party* (2003) 9 NWLR (Pt. 826) 462.

[5]*British Bata Shoe Co. Ltd v Melikan* (1956) 1 FSC 100.

[6]*United Bank of Africa v. Odimayo* (2005) 2 NWLR (Pt. 909) 21.

[7]*Ayinule v. Abimbola* (1957) LLR 41.

[8]See *Barzani v Visinoni* (1973) NCLR 383; *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195;*Adegoke Motors Ltd v Adesanya* (1989) 3 NWLR (Pt. 107) 250.

[9]*Caribbean Trading & Fidelity v. Nigerian National Petroleum Corporation* (2002) LPELR- 831 (SC).

[10](1988) 4 NWLR (Pt 91) 664.

[11]See also *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21, 40

[12] Bamodu, G. (1995) 'Jurisdiction and Applicable Law in Transnational Dispute Resolution before the Nigerian Courts' 29 Int'l L 555 available at https://scholar.smu.edu/til/vol29/iss3/6.

[13] *Broad Bank of Nigeria v. Olayiwola* (2005) LPELR-806 (SC).

[14]For instance, Order 10 Rule 1 of the Lagos State High Court Civil Procedure Rules 2019 provides that a judge may allow its originating process to be served on a defendant outside Nigeria where, *inter alia*, the whole subject matter of the dispute is land which located within jurisdiction; the claim is for the administration of the personal estate of any deceased person who was domiciled within jurisdiction at the time of his death; the action is brought in respect of a contract that is made within the jurisdiction, made by an agent residing or carrying on business within jurisdiction, or governed by Lagos State laws; the claim is in respect of a contract breached within jurisdiction regardless of where it was executed; the claim is founded on a tort committed within the jurisdiction; etc.

[15]While it is beyond the purview of this paper to undertake a comprehensive exposition on the concept of *forum conveniens*, it is pertinent for the present purposes to note that another commonly mistaken belief among lawyers is to equate the rule of *forum non conveniens* with the convenience of the parties or their legal practitioners. The word, conveniens is a Latin word for convenient or appropriate. The rule simply means that that there is another forum in which the case may most suitably be tried in the interests of all the parties and the ends of justice.

[16]Okoli, C. S. A. and Oppong, R. (2020) *Private International Law in Nigeria* Hart Publishers p. 75.

[17] An illustrative example is the case of *Owners of the MV Arabella v. Nigeria Agricultural Insurance Corporation (2008) LPELR- 2848 (SC).*Some later authorities have however held that such writ is not void but voidable and is capable of being waived by the defendant if not timeously raised. Whether a writ which is issued without leave is void or voidable is not within the purview of this paper. Either way, such writ is capable of being set aside.

[18]*Mohammed Kida v. A. D. Ogunmola* (2006) All FWLR (Pt. 327) 402.

[19](2014) LPELR-22703(CA).

[20]Okoli, C. S. A. and Oppong, R. (2020) *Private International Law in Nigeria* Hart Publishers p. 59.

[21]For a detailed treatment of the distinction between *actions in rem* and *actions in personam* please see Okoli, C. S. A. and Oppong, R. n. (16) above.

[22](2010) 5 NWLR (Pt. 1187) 348, 416.

[23]*Spiropoulos and Co Ltd v. Nigerian Rubber Co Ltd* (1970) NCLR 94; *Eimskip Ltd v. Exquisite Industries (Nig) Ltd* (2003) 14 WRN 77.

[24]See *In re Gresham Life Assurance Society (Nig) Ltd (*1973) (1) ALR Comm 215, (1973) 1 All NLR (Pt. I) 617, (1973) NCLR 215.

Defending the Rule in Antony Gibbs

By Neerav Srivastava

The Rule in *Antony Gibbs*[1] ('the Rule') provides that if the proper law of a contract is Australian, then a discharge of the debt by a foreign jurisdiction will not be a discharge in Australia unless the creditor submitted to the foreign jurisdiction.[2] The Rule is much maligned, especially in insolvency circles, and has been described as "Victorian".[3] In 'Heritage and Vitality: Whether Antony Gibbs is a Presumption'[4] I seek to defend the Rule.

Presumption

The article begins by arguing that, in the modern context, that the Rule should be recognised as a Presumption as to party intentions.

Briefly, *Gibbs* was decided in the 1890s. At the time, the prevailing view was that the proper law of a contract was either the law of the place of the contract or its

performance.[5] This approach was based on apportioning regulatory authority between sovereign States rather than party intentions. To apply a foreign proper law in a territory was regarded as contrary to territorial sovereignty. Freedom of contract and party intentions were becoming relevant to proper law but only to a limited extent.[6]

As for *Gibbs*, Lord Esher's language is consistent with the 'Regulatory Approach':

It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract …[7]

Notice that the passage makes no reference to party intentions.

By the early 20th century, the position had evolved in that it was generally accepted that party intentions determined the proper law.[8] Even so, it was not until the late 1930s that the Privy Council stated that the position was "well-settled".[9] Party intentions has evolved into being the test for proper law universally.[10]

Under the modern approach, party intentions as to proper law are a question of fact and not territorial. Parties are free to choose a proper law of a jurisdiction with which they have no connection.[11] As a question of fact, party intentions are better understood as a 'Presumption'. Further, the Presumption might be displaced. The same conclusion can be reached via an implied term analysis.

The parties can also agree that there is more than one proper law for a contract. That, too, is consistent with party autonomy. Under *depeçage*, one law can govern a contract's implementation and another its discharge.[12] Likewise, the Second Restatement in the US[13] and the International Hague Principles allow a contract to have multiple proper laws.[14]

Cross-border Insolvency

The second part of the article addresses criticisms of *Gibbs* by cross-border

insolvency practitioners. In insolvency, issues are no longer merely between the two contracting parties. The body of creditors are competing for a share of a company's remaining assets. Under pari passu all creditors are to be treated equally. If a company is in a foreign liquidation, and its discharge of Australian debt is not recognised by an Australian court, *Gibbs* appears inconsistent with pari passu. Specifically, it appears that the creditor can sue in Australia and secure a disproportionate return.

That is an incomplete picture. While the foreign insolvency does not discharge the debt in Australia, when it comes to enforcement comity applies. Comity is agitated by a universal distribution process in a foreign insolvency. Having regard to comity, the Australian court will treat local and international creditors equally.[15] If creditors are recovering 50% in a foreign insolvency, an Australian court will not allow an Australian creditor to recover more than 50% at the enforcement stage. Criticisms of the Presumption do not give due weight to enforcement.

Gibbs has been described as irreconcilable with the United Nations Commission on International Trade Law *Model Law on Cross-Border Insolvency 1997* (the *1997 Model Law*),[16] which is generally[17] regarded as embodying 'modified universalism'. That, it is submitted, reflects a misunderstanding.

Historically, in a cross-border insolvency "territorialism" applied.[18] Each country collected assets in its territory and distributed them to creditors claiming in those insolvency proceedings. In the past 200 years, universalism has been applied.[19] Under 'pure universalism', there is only one process for collecting assets globally and distributing to all creditors. Modified universalism:

> *accepts the central premise of [pure] universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home-country procedures and to protect the interests of local creditors …[20]*

Modified universalism can be understood as a structured form of comity.[21] It asks that all creditors be treated equally but is a tent in that it allows States to choose how to protect the interest of creditors. A State may choose to couple recognition of the foreign insolvency – and the collection of assets in its jurisdiction – with the discharge of creditors' debts. However, the *1997 Model*

Law does not require a State to follow this mechanism.[22] Under the Anglo-Australian mechanism (a) a debt may not be discharged pursuant to *Gibbs* (b), but creditors are treated equally at the enforcement stage. It is a legitimate approach under the tent that is modified universalism.

[1] *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

[2] Albert Venn Dicey, A Digest of the Law of England With Reference To The Conflict of Laws (Stevens, 1896) rule 113.

[3] Varoon Sachdev, "Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism" (2019) 93 *American Bankruptcy Law Journal* 343.

[4] (2021) 29 Insolvency Law Journal 61. Available at Westlaw Australia.

[5] Alex Mills, *Party Autonomy in Private International Law* (CUP, 2018) 53, citing *Peninsular and Oriental Steam Navigation Co v Shand* (1865) 16 ER 103.

[6] Alex Mills, *The Confluence of Public and Private International Law* (CUP, 2009), 53.

[7] *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, 405 (*Gibbs*).

[8] Alex Mills, *Party Autonomy in Private International Law* (CUP, 2018) 56, Lord Collins et al, *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2017), [32-004]–[32-005].

[9] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.

[10] Martin Davis et al, *Nygh's Conflict of Laws in Australia* (Lexis Nexis, 2019), [19.6]; Lord Collins et al, *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2017), [32-004]–[32-005], [32-042]; and Principles on Choice of Law in International Commercial Contracts promulgated by the Hague Conference on Private International Law in 2015.

[11] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, Martin Davis et al, *Nygh's Conflict of Laws in Australia* (Lexis Nexis, 2019), [19.15].

[12] *Club Mediterranee New Zealand v Wendell* [1989] 1 NZLR 216, *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380.

[13] *Restatement (Second) of Contracts* § 188.

[14] Principles on Choice of Law in International Commercial Contracts promulgated by the Hague Conference on Private International Law in 2015.

[15] *Galbraith v Grimshaw* [1910] AC 508, *Chapman v Travelstead* (1998) 86 FCR 460, *Re HIH Casualty & General Insurance Ltd* (2005) 190 FLR 398.

[16] In Australia the *1997 Model Law* was extended to Australia by the *Cross-Border Insolvency Act 2008* (Cth).

[17] Adrian Walters, "Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-border Insolvency Law" (2019) 93 *American Bankruptcy Law Journal* 47, 64.

[18] Although Rares J has pointed out, "centuries earlier, maritime lawyers had developed a sophisticated and generally harmonious system of dealing with cross-border insolvencies": Steven Rares, "Consistency and Conflict – Cross-Border Insolvency" (Paper presented at the 32nd Annual Conference of the Banking & Financial Services Law Association, Brisbane, 4 September 2015).

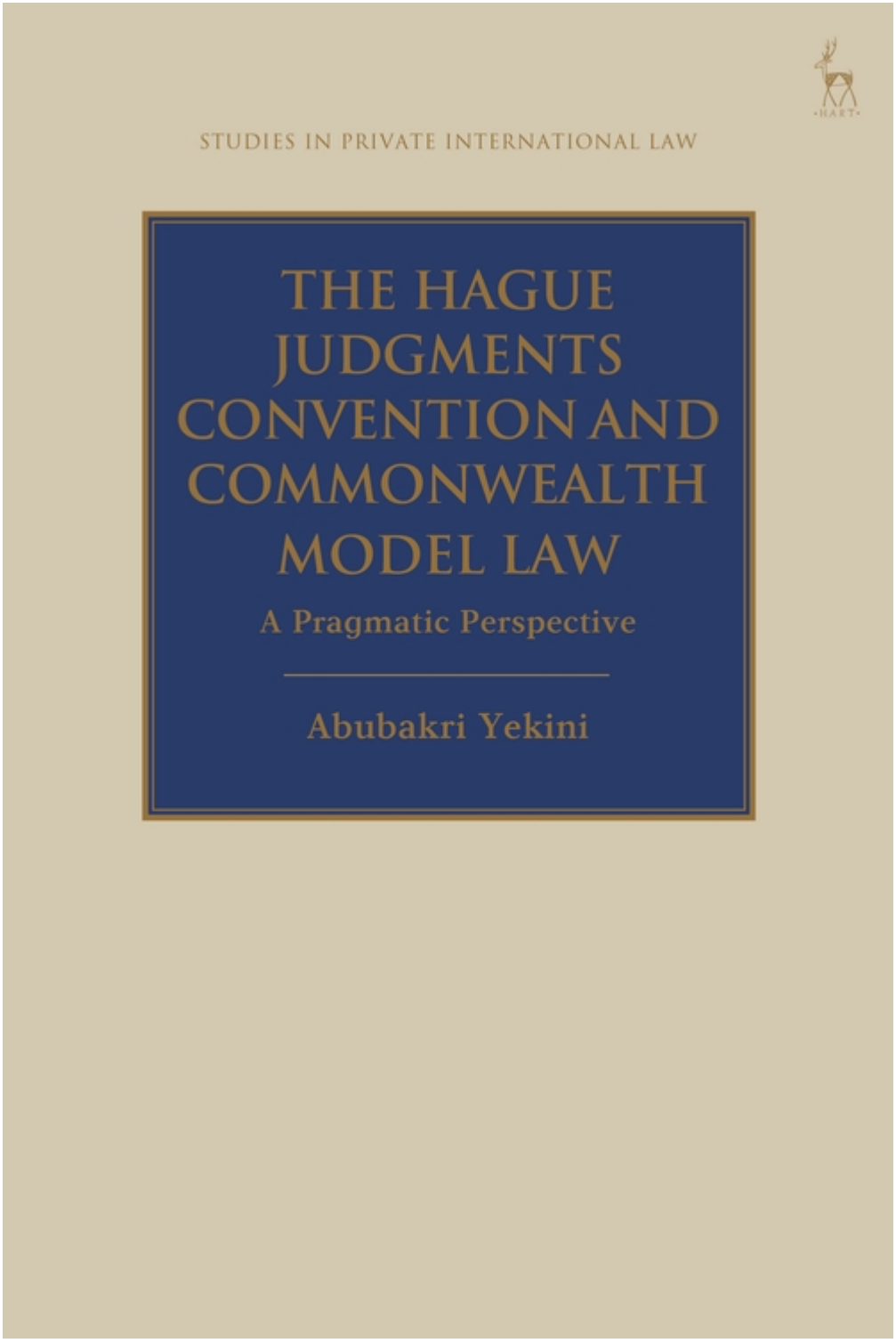
[19] *Re HIH Casualty & General Insurance Ltd* [2008] 1 WLR 852, [30]; [2008] UKHL 21.

[20] Jay Lawrence Westbrook, "Choice of Avoidance Law in Global Insolvencies" (1991) 17 *Brooklyn Journal of International Law* 499, 517.

[21] UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-border Insolvency* (2014) [8].

[22] *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8; [2014] FCAFC 57. See too *Re Bakhshiyeva v Sberbank of Russia* [2019] Bus LR 1130 (CA); [2018] EWCA 2802.

The Hague Judgments Convention and Commonwealth Model Law: A Pragmatic Perspective



A foreign judgment that cannot be enforced is useless no matter how well it is/was written. The fact that a foreign judgment can be readily enforced aids the prompt settlement of disputes and makes international commercial transactions more effective. The importance of the enforcement of foreign judgments cannot be over-emhpasised because international commercial parties are likely to lose confidence in a system that does not protect their interests in the form of recognising and enforcing a foreign judgment.

Today Hart published a new private international law monograph focused on the recognition and enforcement of foreign judgments. Its title is "The Hague Judgments Convention and Commonwealth Model Law: A Pragmatic Perspective." The author of this monograph is Dr Abubakri Yekini of the Lagos State University. The monograph is based on his PhD thesis at the University of Aberdeen titled "A Critical Analysis of the Hague Judgments Convention and Commonwealth Model Law from a Pragmatic Perspective."

The abstract of the book reads as follows:

"This book undertakes a systematic analysis of the 2019 Hague Judgments Convention, the 2005 Hague Choice of Court Convention 2005, and the 2017 Commonwealth Model Law on recognition and Enforcement of Foreign Judgments from a pragmatic perspective.

The book builds on the concept of pragmatism in private international law within the context of recognition and enforcement of judgments. It demonstrates the practical application of legal pragmatism by setting up a toolbox (pragmatic goals and methods) that will assist courts and policymakers in developing an effective and efficient judgments' enforcement scheme at national, bilateral and multilateral levels.

Practitioners, national courts, policymakers, academics, students and litigants will benefit from the book's comparative approach using case law from the United Kingdom and other leading Commonwealth States, the United States, and the Court of Justice of the European Union. The book also provides interesting findings from the empirical research on the refusal of recognition and enforcement in the UK and the Commonwealth statutory registration schemes respectively."

I have had the benefit of reading this piece once and can confidently recommend it to anyone interested in the important topic of recognition and enforcement of foreign judgments. The pragmatic approach utilised in the book makes the work an interesting read. My prediction is that this book will endure for a long time, and will likely be utilised in adjudication.

Tort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law

Tort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law

By Zhen Chen, PhD Researcher, University of Groningen

This blog post is part of the article 'Tort Conflicts Rules in Cross-border Multi-party Litigation: Which Law Has a Closer or the Closest Connection?' published by the Maastricht Journal of European and Comparative Law with open access, available at https://doi.org/10.1177/1023263X211034103. A related previous post is 'Personal Injury and Article 4(3) of Rome II Regulation', available here https://conflictoflaws.net/2021/personal-injury-and-article-43-of-rome-ii-regulation/

This article compares Owen v. Galgey under Article 4 Rome II Regulation and YANG Shuying v. British Carnival Cruise under Article 44 Chinese Conflicts Act in the context of cross-border multi-party litigation on tort liability. As to the interpretation of tort conflicts rules, such as lex loci delicti, the notion of 'damage', lex domicilii communis and the closer/closest connection test, these two cases demonstrate different approaches adopted in European and Chinese private international law. This article does not intend to reach a conclusion which law is better between Rome II Regulation and Chinese Conflicts Act, but rather highlights on a common challenge faced by both Chinese courts and English courts in international tort litigation and how to tackle such challenge in an

efficient way.

I. Tort conflicts rules in China and the EU

It is widely accepted rule that lex loci delicti will be the applicable law for cross-border tort liability in private international law. This is also the case in China and the EU. The application of lex loci delicti, as a general rule, is stipulated in Article 44 Chinese Conflicts Act and Article 4(1) Rome II Regulation. However, Article 4(1) Rome II Regulation explicitly refers to the place of damage, namely 'the law of the country in which the damage occurs' (lex loci damni), and expressly excludes the place of wrong ('the country in which the event giving rise to the damage occurred') and the place of consequential loss ('the country or countries in which the indirect consequences of that event occur'). By contrast, it remains unclear whether lex loci delicti in Article 44 Chinese Conflicts Act merely refers to lex loci damni, as such provision does not expressly state so.

The application of lex loci delicti in China and the EU is subject to several exceptions. Specifically, lex loci delicti is superseded by the law chosen by the parties under Article 44 Chinese Conflicts Act and Article 14 Rome II Regulation, while lex domicilii communis takes precedence over lex loci delicti under Article 44 Chinese Conflicts Act and Article 4(2) Rome II Regulation. Moreover, the escape clause enshrined in Article 4(3) Rome II Regulation gives priority to the law of the country which has a 'manifestly closer connection' with the tort/delict, of which the pre-existing relationship between the parties might be a contract. By contrast, Article 44 Chinese Conflicts Act does not provide an escape clause, but the closest connection principle, which is comparable to the closer connection test in Article 4(3) Rome II, is stipulated in several other provisions.

The questions raised in YANG Shuying v. British Carnival Cruise and Owen v. Galgey were how to determine the applicable law to tort liability in multiparty litigation under Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation and what are the criteria for the closer/closest connection test.

II. Owen v. Galgey under Article 4 Rome II Regulation

In case Owen v. Galgey , a British citizen Gary Owen domiciled in England, fell into an empty swimming pool which was undergoing renovation works at a villa in France owned by the Galgey Couple, domiciled in England, as a holiday home. The British victim sued the British couple, their French public liability insurer, the French contractor carrying out renovation works on the swimming pool and its

French public liability insurer for personal injury compensation. As regards which law is applicable, the British victim contended that French law should be applied by virtue of Article 4(3) Rome II Regulation, since the tort was manifestly more closely connected with France than it was with England. The British defendants held that English law should be applicable law under Article 4(2) Rome II Regulation, because the claimant and the defendants were habitually resident in England. The English High Court held the case was manifestly more closely connected with France, because France was the country where the centre of gravity of the situation was located.

III. YANG Shuying v. British Carnival Cruise under Article 44 Chinese Conflicts Act

In case YANG Shuying v. British Carnival Cruise, a Chinese tourist domiciled in China, sued the British Carnival Cruise Company, incorporated in the UK, for personal injury sustained in a swimming pool accident happened in the cruise when it was located on the high seas. The plaintiff signed an outbound travel contract with Zhejiang China Travel Agency for such cruise tour. The plaintiff held that English law, as the lex loci delicti, should be applicable since the parties did not share common habitual residence in China and the accident occurred on the cruise, which can be regarded as the territory of the UK according to the floating territory theory. The place of wrong and the place of damage were both on the cruise under Article 44 Chinese Conflicts Act. The defendant and the third party argued that Chinese law should be applied since the parties had common habitual residence in China, the floating territory theory was inapplicable and the (indirect) damage of the tort took place in China.

The Shanghai Maritime Court adopted a strict interpretation of the term ‘the parties’ by excluding the third party and denied the application of floating territory theory in this case. The court held that the application of the lex loci delicti leads to neither English law nor Chinese law. Instead, it is advisable to apply the closest connection principle to determine the applicable law. Based on a quantitative and qualitative analysis ofTort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law

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IV. Comments

Both Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation apply to multi-party litigation on tort liability. Article 4(1) Rome II merely refers to lex loci damni and limits the concept 'damage' to direct damage, whilst Article 44 Chinese Conflicts Act can be interpreted broadly to cover the law of the place of wrong and the term 'damage' include both direct damage and indirect damage or consequential loss. As to lex domicilii communis, the law of the country of the common habitual residence of some of the parties, instead of all parties, should not be applicable in accordance with Article 4(2) Rome II and Article 44 Chinese Conflicts Act. The exercise of the closest connection principle or the manifestly closer connection test under 44 Chinese Conflicts Act and Article 4(3) Rome II Regulation requires the the consideration of all relevant factors or all the circumstances in the case. When conducting a balancing test, the factor of the place of direct damage should not be given too much weight to the extent that all other relevant factors are disregarded. A quantitive and qualitative analysis should be conducted to elaborate the relevance or weight of each factor to determine the centre of gravity of a legal relationship.
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Professor Burkhard Hess on "Reforming the Brussels Ibis Regulation: Perspectives and Prospects"

A thought-provoking and much welcome contribution was posted by Prof. Dr. Dres. h.c. Burkhard Hess on SSRN, setting the stage for the discussion on the status quo in the application and the prospects of the Brussels IbisRegulation.

The article, titled "Reforming the Brussels Ibis Regulation: Perspectives and Prospects", may be retrieved here.

The abstract reads as follows:

According to article 79 of Regulation (EU) 1215/2012, the EU Commission shall present a report on the application of the Brussels Ibis Regulation by 11 January 2022. This paper intends to open the discussion about the present state of affairs and the necessary adjustments of the Regulation. Although there is no need to change its basic structure, the relationship of the Brussels Ibis Regulation with other EU instruments (as the General Data Protection Regulation) should be reviewed. There is also a need to address third-State relationships and cross-border collective redress. In addition, the paper addresses several inconsistencies within the present Regulation evidenced by the case law of the CJEU: such as the concept of contract (article 7 no 1), the place of damage (article 7 no 2), the protection of privacy and the concept of consumers (articles 17 – 19). Finally, some implementing procedural rules of the EU Member States should be harmonised, i.e. on the assessment of jurisdiction by national courts, on judicial communication and on procedural time limits. Overall, the upcoming review of the Brussels Ibis Regulation opens up an opportunity to improve further a central and widely accepted instrument of the European law of civil procedure.

Epic's Fight to #freefortnite: Challenging Exclusive Foreign Choice of Court Agreements under Australian Law

By Sarah McKibbin, University of Southern Queensland

Epic Games, the developer of the highly popular and lucrative online video game *Fortnite*, recently won an appeal against tech juggernaut, Apple, in Australia's Federal Court.[1] *Fortnite* is played by over three million Apple iOS users in Australia.[2] In April 2021, Justice Perram awarded Apple a temporary three-month stay of proceedings on the basis of an exclusive foreign choice of court

agreement in favour of the courts of the Northern District of California. Despite awarding this stay, Justice Perram was nevertheless 'distinctly troubled in acceding to' Apple's application.[3] Epic appealed to the Full Court.

On 9 July, Justices Middleton, Jagot and Moshinsky found three errors of principle in Justice Perram's consideration of the 'strong reasons' given by Epic for the proceedings to remain in the Federal Court — despite the exclusive foreign choice of court agreement.[4] Exercising its own discretion, the Full Court then found 'strong reasons' for the proceedings to remain in the Federal Court, particularly because enforcement of the choice of court agreement would 'offend the public policy of the forum.'[5] They discerned this policy from various statutory provisions in Australia's competition law as well as other public policy considerations.[6] The appeal highlights the tension that exists between holding parties to their promises to litigate abroad and countenancing breaches of contract where 'serious issues of public policy' are at play.[7]

1 Exclusive Choice of Foreign Court Agreements in Australia

Australians courts will enforce an exclusive choice of court agreement favouring a foreign court either by granting a stay of local proceedings or by awarding damages for breach of contract. The usual approach is for the Australian court to enforce the agreement and grant a stay of proceedings '*unless* strong reasons are shown why it should not.'[8] As Justice Allsop observed in *Incitec v Alkimos Shipping Corp*, 'the question is one of the exercise of a discretion in all the circumstances, but recognising that the starting point is the fact that the parties have agreed to litigate elsewhere, and should, absent some strong countervailing circumstances, be held to their bargain.'[9] The burden of demonstrating strong reasons rests on the party resisting the stay.[10] Considerations of inconvenience and procedural differences between jurisdictions are unlikely to be sufficient as strong reasons.[11]

Two categories of strong reasons predominate. The first category is where, as stated in *Akai Pty Ltd v The People's Insurance Co Ltd*, enforcement 'offends the public policy of the forum whether evinced by statute or declared by judicial decision'.[12] This includes the situation 'where the party commencing proceedings in the face of an exclusive jurisdiction clause seeks to take advantage

of what is or may be a mandatory law of the forum'.[13] The prohibition in Australian law against misleading and deceptive conduct is an example.[14] The second category justifying non-enforcement is where litigation in the forum concerns issues beyond the scope of the choice of court agreement or concerns third parties to the agreement.[15] Where third parties are concerned, it is thought that 'the court should not start with the prima facie disposition in favour of a stay of proceedings'.[16]

2 Factual Background

The successful appeal represents the latest decision in an ongoing international legal battle between Apple and Epic precipitated by *Fortnite*'s removal from the Apple App Store in August last year. Epic released a software update for Apple iOS devices on 13 August 2020 making the *Fortnite*'s virtual currency (called V-Bucks) available for purchase through its own website, in addition to Apple's App Store, at a 20 per cent discount. Any new game downloads from the App Store 'came equipped with this new feature'.[17] While *Fortnite* is free to download, Epic's revenue is generated by players purchasing in-app content, such as dance moves and outfits, through a digital storefront. After the digital storefront takes a commission (usually 30 per cent), Epic receives the net payment.

App developers only have one avenue if they wish to distribute their apps for use on Apple iOS devices: they must use the Apple App Store and Apple's in-app payment system for in-app purchases from which Apple takes a 30 per cent revenue cut. Epic's co-founder and CEO Tim Sweeney has singled out Apple and Google for monopolising the market and for their 'terribly unfair and exploitative' 30 per cent commission for paid app downloads, in-app purchases and subscriptions.[18] While a 70/30 revenue split has been industry standard for many years, the case for an 88/12 revenue model is building.[19] Sweeney argues that 'the 30% store tax usually exceeds the entire profits of the developer who built the game that's sold'.[20]

3 Apple's App Developer Agreement

Epic's relationship with Apple is regulated by the Apple Developer Program License Agreement ('DPLA') under which Apple is entitled to block the distribution of apps from the iOS App Store 'if the developer has breached the

App Store Review Guidelines'.[21] These Guidelines include the obligation to exclusively use Apple's in-app payment processing system. Clause 14.10 contains Epic's contractual agreement with Apple to litigate in the Northern District of California:

Any litigation or other dispute resolution between You and Apple arising out of or relating to this Agreement, the Apple Software, or Your relationship with Apple will take place in the Northern District of California, and You and Apple hereby consent to the personal jurisdiction of and exclusive venue in the state and federal courts within that District with respect any such litigation or dispute resolution.

By introducing a custom payment facility, the August update breached the App Store Review Guidelines. Apple swiftly removed *Fortnite* from its App Store. There were three consequences of this removal: first, *Fortnite* could not be downloaded to an Apple device; secondly, previously installed iOS versions of *Fortnite* could not be updated; and, thirdly, Apple device users could not play against players who had the latest version of *Fortnite*.[22]

4 The Proceedings

On the same day as Apple removed *Fortnite* from the App Store, Epic commenced antitrust proceedings in the United States District Court for the Northern District of California, alleging Apple's 'monopolisation of certain markets' in breach of the United States' *Sherman Act* and other California legislation. The judgment in the US trial is expected later this year. Epic also sued Apple in United Kingdom, the European Union and Australia on competition grounds. In February, the United Kingdom's Competition Appeal Tribunal refused permission to serve Epic's claim on Apple in California because the United Kingdom was not a suitable forum (forum non conveniens).[23] Together with these legal actions, Epic commenced a marketing campaign urging the game's worldwide fanbase to 'Join the fight against @AppStore and @Google on social media with #FreeFortnite'.[24] Epic also released a video parodying Apple's famous 1984 commercial called 'Nineteen Eighty-Fortnite'.[25]

The Australian proceedings were brought in the Federal Court in November 2020. Epic's complaint against Apple is the same as in the US, the EU and the UK, but

with the addition of a territorial connection, ie developers of apps for use on Australian iOS devices must only distribute their apps through Apple's Australian App Store and only use Apple's in-app payment processing system. As a consequence, Epic alleges that Apple has contravened three provisions of Part IV of the *Competition and Consumer Act 2010* (Cth) concerning restrictive trade practices and the *Australian Consumer Law* for unconscionable conduct. In addition to injunctive relief restraining Apple from continuing to engage in restrictive trade practices and unconscionable conduct, Epic seeks ancillary and declaratory relief.

Apple applied for a permanent stay of the Federal Court proceedings, relying on the choice of court agreement in the DPLA and the doctrine of forum non conveniens. Epic unsuccessfully argued that its claims under Australian law did not 'relate to' cl 14.10 of the DPLA.[26] More critically, Justice Perram did not think Epic had demonstrated strong reasons. He awarded Apple a temporary three-month stay of proceedings 'to enable Epic to bring this case in a court in the Northern District of California in accordance with cl 14.10.'[27] Where relevant to the appeal, Justice Perram's reasoning is discussed below.

5 The Appeal: Three Errors of Principle

The Full Court distilled Epic's 17 grounds of appeal from Justice Perram's decision into two main arguments. Only the second argument — turning on the existence of 'strong grounds'[28] — was required to determine the appeal. Justices Middleton, Jagot and Moshinsky identified three errors of principle in Justice Perram's evaluation of 'strong reasons', enabling them to re-evaluate whether strong reasons existed.

The first error was Justice Perram's failure to cumulatively weigh up the reasons adduced by Epic that militated against the granting of the stay. Justice Perram had grudgingly granted Apple's stay application without evaluating the five concerns he had expressed 'about the nature of proceedings under Part IV which means they should generally be heard in this Court',[29] as he was required to do. The five concerns were:[30]

1. The public interest dimension to injunctive proceedings under the

Competition and Consumer Act;
2. The 'far reaching' effect of the litigation on Australian consumers and Australian app developers as well as the nation's 'interest in maintaining the integrity of its own markets';
3. The Federal Court's exclusive jurisdiction over restrictive trade practices claims;
4. '[D]icta suggesting that [restrictive trade practices] claims are not arbitrable'; and
5. That if the claim in California 'complex questions of [Australian] competition law will be litigated through the lens of expert evidence'.

The second error was Justice Perram's 'failure to recognise juridical disadvantages of proceeding in the US Court'.[31] The judge had accepted that litigating the case in California would be 'more cumbersome' since 'expert evidence about the content of Australian law' would be needed.[32] There was a risk that a California court 'might decline to hear the suit on forum non conveniens grounds.'[33] Despite that, he concluded that '[a]ny inconvenience flows from the choice of forum clause to which Epic has agreed. It does not sit well in its mouth to complain about the consequences of its own bargain'.[34] However, the Full Court viewed the inapplicability of 'special remedial provisions' of the Australian *Competition and Consumer Act* in the California proceedings as the loss of a legitimate juridical advantage.[35]

The third error concerned a third party to the exclusive jurisdiction clause. In *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd*, Justice Bell observed that the default enforcement position was inapplicable in cases where 'not all parties to the proceedings are party to an exclusive jurisdiction clause'.[36] Apple Pty Limited, an Australian subsidiary of Apple, was not a party to the DPLA. Yet it was responsible 'for the distribution of iOS-compatible apps to iOS device users' within the Australian sub-market in a manner consistent with Apple's worldwide conduct.[37] Moreover, Epic's proceedings included claims under the *Competition and Consumer Act* and the *Australian Consumer Law* against the Australian subsidiary 'for conduct undertaken in Australia in connection with arrangements affecting Australian consumers in an Australian sub-market.'[38] In this light, the Full Court rejected Justice Perram's description of the joinder of Apple Pty Limited as 'ornamental and 'parasitic on the claims Epic makes against Apple'.[39]

6 The Appeal: Strong Reasons Re-evaluated

The stay should have been refused. The Full Court found a number of public policy considerations that cumulatively constituted strong reasons not to grant a stay of Epic's proceedings. The judges discerned 'a legislative policy that claims pursuant to [the restrictive trade practices law] should be determined in Australia, preferably in the Federal Court' — although it was not the only court that could hear those claims.[40] Essentially, the adjudication of restrictive trade practices claims in the Federal Court afforded legitimate forensic advantages to Epic — benefits which would be lost if Epic were forced to proceed in California. These benefits included the availability of 'specialist judges with relevant expertise' in the Federal Court, the potential for the Australian Competition and Consumer Commission to intervene, and the opportunity for private litigants (as in this case) to 'develop and clarify the law'.[41] Indeed, the Federal Court has not yet interpreted the misuse of market power provision in the *Competition and Consumer Act* relied upon by Epic, which came into effect in 2017.[42] The litigation will also impact millions of Australians who play *Fortnite* and the state of competition in Australian markets.[43]

[1] *Epic Games, Inc v Apple Inc* [2021] FCAFC 122.

[2] *Epic Games, Inc v Apple Inc (Stay Application)* [2021] FCA 338, [7] (Perram J).

[3] Ibid, [64] (Perram J).

[4] *Epic Games, Inc v Apple Inc* (n 1) [48].

[5] Ibid.

[6] Ibid, [90].

[7] Ibid, [97]. See James O'Hara, 'Strategies for Avoiding a Jurisdiction Clause in International Litigation' (2020) 94(4) *Australian Law Journal* 267. *Compare* Mary Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely

Impact on Australian Practice' (2009) 5(2) *Journal of Private International Law* 181; Richard Garnett, 'Jurisdiction Clauses since *Akai*' (2013) 87 *Australian Law Journal* 134; Brooke Adele Marshall and Mary Keyes, 'Australia's Accession to the *Hague Convention on Choice of Court Agreements*' (2017) 41 *Melbourne University Law Review* 246.

[8] *A Nelson & Co Ltd v Martin & Pleasance Pty Ltd (Stay Application)* [2021] FCA 754, [10] (Perram J) (emphasis added). See also *Huddart Parker Ltd v Ship 'Mill Hill'* (1950) 81 CLR 502, 508–9 (Dixon J); *The Eleftheria* [1970] P 94, 99 (Brandon J); *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 427–9 (Dawson and McHugh JJ), 445 (Toohey, Gaudron and Gummow JJ).

[9] *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496, 505 [43].

[10] There was some argument about onus in *Epic Games (Stay Application)* (n 2) [35]–[40] (Perram J).

[11] *Incitec* (n 9) [49]; Andrew S Bell, 'Jurisdiction and Arbitration Agreements in Transnational Contracts: Part I' (1996) 10 *Journal of Contract Law* 53, 65. See generally O'Hara (n 7).

[12] (1996) 188 CLR 418, 445 (Toohey, Gaudron and Gummow JJ). See also Marshall and Keyes (n 7) 257.

[13] *Australian Health and Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419, 438 [80] (Bell P).

[14] Australian Consumer Law s 18.

[15] *Incitec* (n 9) 506 [47], [49] (Allsop J); Marshall and Keyes (n 7) 258.

[16] *Australian Health* (n 13) 423 [1] (Bathurst CJ and Leeming JA), 442 [90] (Bell J).

[17] *Epic Games (Stay Application)* (n 2) [6] (Perram J).

[18] @TimSweeneyEpic (Twitter, 29 July 2020, 1:29 pm AEDT) <https://twitter.com/TimSweeneyEpic/status/1288315775607078912>.

[19] See, eg, Nick Statt, 'The 70-30 Revenue Split is Causing a Reckoning in the Game Industry', *protocol* (Web Page, 4 May 2021)

<https://www.protocol.com/newsletters/gaming/game-industry-70-30-reckoning?rebelltitem=1#rebelltitem1>.

[20] @TimSweeneyEpic (Twitter, 26 June 2019, 10.13 am AEDT) <https://twitter.com/TimSweeneyEpic/status/1143673655794241537>.

[21] *Epic Games* (n 1) [5].

[22] *Epic Games (Stay Application)* (n 2) [7].

[23] *Epic Games, Inc v Apple Inc* [2021] CAT 4.

[24] '#FreeFortnite', *Epic Games* (Web Page, 13 August 2020) <https://www.epicgames.com/fortnite/en-US/news/freefortnite>.

[25] Fortnite, 'Nineteen Eighty-Fortnite – #FreeFortnite' (YouTube, 13 August 2020) <https://youtu.be/euiSHuaw6Q4>.

[26] *Epic Games (Stay Application)* (n 2) [11]–[12].

[27] Ibid, [66].

[28] *Epic Games* (n 1) [41], [47].

[29] Ibid, [57].

[30] *Epic Games (Stay Application)* (n 2) [59]–[63].

[31] *Epic Games* (n 1) [58].

[32] *Epic Games (Stay Application)* (n 2) [53].

[33] Ibid, [44].

[34] Ibid, [58].

[35] *Epic Games* (n 1) [62].

[36] *Australian Health* (n 13) 442 [90] (Bell P).

[37] *Epic Games* (n 1) [74].

[38] Ibid, [78].

[39] Ibid.

[40] Ibid, [99]. The Full Court clarified that 'other Australian courts may determine Pt IV claims, but within a limited compass and for specific reasons': [116].

[41] Ibid, [104], [107], [122].

[42] Ibid, [107].

[43] Ibid, [97].

HCCH First Secretary Ribeiro-Bidaoui's response re the debate surrounding the 2005 HCCH Choice of Court Convention

Dr. João Ribeiro-Bidaoui (First Secretary at the Hague Conference on Private International Law) has posted a compelling answer on the Kluwer Arbitration Blog to the debate sparked by Prof. Gary Born's criticism in a series of posts published on the same Blog (see Part I, Part II, and Part III). First Secretary Ribeiro-Bidaoui's response is masterfully crafted in drawing the boundaries between equally valuable and essential instruments, and certainly constitutes a most welcome contribution.

For further commentary on these exchanges, see also on the EAPIL Blog, here.

Red-chip enterprises' overseas listing: Securities regulation and conflict of laws

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1.Background

Three days after its low-key listing in the US on 30 June 2021, Didi Chuxing (hereinafter "Didi") was investigated by the Cyberspace Administration of China (hereinafter "CAC") based on the Chinese National Security Law and Measures for Cybersecurity Review.[1] Didi Chuxing as well as 25 Didi-related APPs were then banned for seriously violating laws around collecting and using personal information,[2] leading to the plummet of Didi's share. On 16 July 2021, the CAC, along with other six government authorities, began an on-site cybersecurity inspection of Didi.[3] The CAC swiftly issued the draft rules of Measures for Cybersecurity Review and opened for public consultation.[4] It proposed that any company with data of more than one million users must seek the Office of Cybersecurity Review's approval before listing its shares overseas. It also proposed companies must submit IPO materials to the Office of Cybersecurity Review for review ahead of listing.

It is a touchy subject. Didi Chuxing is a Beijing-based vehicle for hire company. Its core business bases on the accumulation of mass data which include personal and traffic information. The accumulated data not only forms Didi's unique advantage but also is the focus of supervision. The real concern lays in the possible disclosure of relevant operational and financial information at the request of US securities laws and regulations, which may cause data leakage and threaten national security. Therefore, China is much alert to information-based companies trying to list overseas.

The overseas listing of China-related companies has triggered regulatory conflicts long ago. The Didi event only shows the tip of an iceberg. This note will focus on two issues: (1) China's supervision of red-chip companies' overseas listing; (2) the

conflicts between the US's demand for disclosure and China's refusal against the US's extraterritorial jurisdiction.

2. Chinese supervision on red-chip companies' overseas listing

A red-chip company does most of its business in China, while it is incorporated outside mainland China and listed on the foreign stock exchange (such as New York Stock Exchange). Therefore, it is expected to maintain the filing and reporting requirements of the foreign exchange. This makes them an important outlet for foreign investors who wish to participate in the rapid growth of the Chinese economy. When asking Chinese supervision on red-chip companies listed overseas, such as Didi, the foremost question is whether the Chinese regulatory authority's approval is required for them to launch their shares overseas. It is uneasy to conclude.

One reference is the Chinese Securities Law. Article 238 of the original version of the Chinese Securities Law provides that "domestic enterprises issuing securities overseas directly or indirectly or listing their securities overseas shall obtain approval from the securities regulatory authority of the State Council following the relevant provisions of the State Council." This provision was amended in 2019. The current version (Art. 224 of the Chinese Securities Law) only requires the domestic enterprises to comply with the relevant provisions of the State Council. The amendment indicated that China has adopted a more flexible approach to addressing overseas listing. Literally, the securities regulatory authority's approval is no longer a prerequisite for domestic enterprises to issue securities overseas.

When it comes to Didi's listing in the US, a preliminary question is the applicability of such provision. Art. 224 is applied to "domestic enterprise" only. China adopts the doctrine of incorporation to ascertain company's nationality.[5] According to Article 191 of the Chinese Company Law, companies established outside China under the provisions of foreign law are regarded as foreign companies. Didi Global Inc. is incorporated in the state of Cayman Islands, and a foreign company under the Chinese law. In analogy, Alibaba Group Holding Ltd., another representative red-chip enterprise, had not obtained and not been required to apply for approval of the Chinese competent authority before its

overseas listing in 2014. A Report published by the Chinese State Administration of Foreign Exchange specifically pointed out that “domestic enterprises” were limited to legal persons registered in mainland China, which excluded Alibaba Group Holding Ltd., a Cayman Islands-based company with a Chinese background.[6]

In summary, it is fair to say that preliminary control over red-chip enterprise’s overseas listing leaves a loophole, which is partly due to China’s changing policy. That’s the reason why Didi has not been accused of violating the Chinese Securities Law but was banned for illegal accumulation of personal information, a circumvent strategy to avoid the possible information leakage brought by Didi’s public listing. Theoretically, depends on the interpretation of the aforementioned rules, the Chinese regulatory authority may have the jurisdiction to demand preliminary approval. Based on the current situation, China intends to fill the gap and is more likely to strengthen the control especially in the field concerning data security.

3. The conflict between the US’s demand for audit and China’s refusal against the US’s extraterritorial jurisdiction

Another problem is the conflict of supervision. In 2002, the US promulgated the Sarbanes-Oxley Act, under which the Public Company Accounting Oversight Board (hereinafter “PCAOB”) was established to oversee the audit of public companies. Under the Sarbanes-Oxley Act, wherever its place of registration is, a public accounting firm preparing or issuing, or participating in the preparation or issuance of, any audit report concerning any issuer, shall register in the PCAOB and accept the periodic inspection.[7] The PCAOB is empowered to investigate, penalize and sanction the accounting firm and individual that violate the Sarbanes-Oxley Act, the rules of the PCAOB, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants. Opposed to this provision (although not intentionally), Article 177 of the Chinese Securities Law forbids foreign securities regulatory authorities directly taking evidence in China. It further stipulates that no organization or individual may arbitrarily provide documents and materials relating to securities business activities to overseas parties without the consent of the securities regulatory authority of the State Council and the relevant State

Council departments. Therefore, the conflict appears as the US requests an audit while China refused the jurisdiction of PCAOB over Chinese accountant companies.

It is suspected that despite the PCAOB's inofficial characteristic, information (including the sensitive one) gathered by the PCAOB may be made available to government agencies, which may threaten the national security of China.[8] Consequently, China prevents the PCAOB's inspection and some of Chinese public accounting firm's application for registration in the PCAOB has been suspended.[9] In 2013, the PCAOB signed a Memorandum of Understanding with Chinese securities regulators that would enable the PCAOB under certain circumstances to obtain audit work papers of China-based audit firms. However, the Memorandum seems to be insufficient to satisfy the PCAOB's requirement for supervision. The PCAOB complained that "we remain concerned about our lack of access in China and will continue to pursue available options to support the interests of investors and the public interest through the preparation of informative, accurate, and independent audit reports."[10] After the exposure of Luckin Coffee's accounting fraud scandal, the US promulgated the Holding Foreign Companies Accountable Act in 2020. This act requires certain issuers of securities to establish that they are not owned or controlled by a foreign government. Specifically, an issuer must make this certification if the PCAOB is unable to audit specified reports because the issuer has retained a foreign public accounting firm not subject to inspection by the PCAOB. If the PCAOB is unable to inspect the issuer's public accounting firm for three consecutive years, the issuer's securities are banned from trade on a national exchange or through other methods.

China has made "national security" its core interest and is very prudent in opening audit for foreign supervisors. From the perspective of the US, however, it is necessary to strengthen financial supervision over the public listing. As a result, Chinese enterprises have to make a choice between disappointing the PCAOB and undertaking domestic penalties. Under dual pressure of China and the US, sometimes Chinese companies involuntarily resort to delisting. This may not be a result China or the US long to see. In this situation, cooperation is a better way out.

4. Conclusion

China’s upgrading of its cybersecurity review regulation is not aimed at burning down the whole house. Overseas listing serves China’s interest by opening up channels for Chinese companies to raise funds from the international capital market, and thus contribute to the Chinese economy. The current event may be read as a sign that China is making provisions to strengthen supervision on red-chip companies’ overseas listing. It was suggested that the regulatory authority may establish a classified negative list. Enterprises concerning restricted matters must obtain the consent of the competent authority and securities regulatory authority before listing.[11] It is not bad news for foreign investors because the listed companies will undertake more stringent screening, which helps to build up an orderly securities market.

[1] http://www.cac.gov.cn/2021-07/02/c_1626811521011934.htm

[2] http://www.cac.gov.cn/2021-07/04/c_1627016782176163.htm; http://www.cac.gov.cn/2021-07/09/c_1627415870012872.htm.

[3] http://www.cac.gov.cn/2021-07/16/c_1628023601191804.htm.

[4] Notice of Cyberspace Administration of China on Seeking Public Comments on the Cybersecurity Review Measures (Draft Revision for Comment), available at: http://www.cac.gov.cn/2021-07/10/c_1627503724456684.htm

[5] The real seat theory is recommended by commentators, but not accepted by law. Lengjing, Going beyond audit disputes: What is the solution to the crisis of China Concept Stocks?, Strategies, Volume 1, 2021, p. 193.

[6] 2014 Cross-border capital flow monitoring report of the People’s Republic of China, available at: http://www.gov.cn/xinwen/site1/20150216/43231424054959763.pdf

[7] Sarbanes-Oxley Act, §102(a), §104 (a) & (b).

[8] Sarbanes-Oxley Act, §105 (b)(5)(B).

[9] https://pcaobus.org/Registration/Firms/Documents/Applicants.pdf

[10] China-Related Access Challenges, available at: https://pcaobus.org/oversight/international/china-related-access-challenges.

[11] https://opinion.caixin.com/2021-07-09/101737896.html.