Giustizia consensuale (Consensual Justice): Report on the Journal's Inaugural Conference

This report was kindly prepared by Federica Simonelli, a research fellow funded by the P.O.N. UNI4Justice project at the University of Trento, Italy, and a member of the editorial staff of Giustizia consensuale *(Consensual Justice).*

On 10 June 2022, the University of Trento, Faculty of Law celebrated the first anniversary of the launch of ***Giustizia consensuale***, founded and edited by Professor Silvana Dalla Bontà and Professor Paola Lucarelli.

In recent years, the debate surrounding consensual justice and party autonomy has received increasing attention in the national and international arenas and has raised a broad array of questions. What is the very meaning of consensual justice? Is the idea of consensual justice feasible? What is its role in a globalized world increasingly characterized by cross-border disputes? The rationale behind *Giustizia consensuale* lies in the pressing need to observe this phenomenon from different perspectives.

For those who did not have the opportunity to attend this informative event, this report offers a succinct overview of the topics and ideas exchanged during this well-attended, hybrid conference.

First session

Opening the symposium with an incisive preamble, Professor **Silvana Dalla Bontà** (University of Trento, Italy), editor-in-chief of *Giustizia consensuale* and chair of the first session, provided a context for the reasoning behind this new editorial project and some of the research areas it intends to focus on. Notably, with the aim of meeting the needs of an increasingly complicated and multi-faceted society, *Giustizia consensuale* endeavours to investigate the meaning of consensual justice, its relationship with judicial justice, and the potential for integrating, rather than contrasting, these two forms of justice.

Professor Dalla Bontà's introductory remarks were followed by Professor **Paola**

Lucarelli (University of Florence, Italy), co-editor of the *Giustizia consensuale*, on the topic of *Mediating conflict: a generous push towards change,* strongly reaffirming the importance of promoting and strengthening consensual justice instruments, not only to reduce the judicial backlog but also to empower the parties to self-tailor the solution of their conflict, by fostering responsibility, self-determination, awareness, and trust.

Professor **Francesco Paolo Luiso** (University of Pisa, Italy – Academician of the *Order of Lincei*) then proceeded to effectively illustrate the essential role played by lawyers in changing the traditional paradigm of dispute resolution which sees court adjudication as the main (if not, the sole) way of settling disputes. Conversely, the judicial function is a precious resource, and its use must be limited to instances where the exercise of the judge's adjudicatory powers is strictly necessary, thus directing all other disputes toward amicable, out-of-court dispute resolution mechanisms. Hence, lawyers are in the privileged position of presenting clients with a broad array of avenues to resolve disputes and guiding them to the choice of the most appropriate dispute resolution instrument.

Professor **Antonio Briguglio** (University of Rome Tor Vergata, Italy) then continued with an interesting focus on the relationship between conciliation and arbitration within the overall ADR system. After examining when and how conciliation is attempted during the course of the arbitral proceedings, he shed light on the interesting, and often unknown to the public, 'conciliatory' dynamics which often occur amongst members of arbitral tribunals in issuing the arbitration award. In an attempt to find common ground between different viewpoints, conciliatory and communicative skills of arbitrators play a decisive role, in particular in international commercial arbitrations on transnational litigation.

Procedure, Party agreement, and Contract was the focus of a very thorough presentation by Professor **Neil Andrews** (University of Cambridge, UK) who underlined that consensual justice is a highly stimulating and significant meeting point between substance and procedure, as well as being an important perspective within technical procedural law. He stated that there are three points of interaction between agreement and procedure. Firstly, the parties are free to agree to self-impose preliminary 'negotiation agreements' and/or mediation agreements. Secondly, the parties can take a further step to specify or modify the elements of the relevant formal process, albeit court proceedings or arbitration.

Thirdly, parties can dispose of or narrow the dispute through a settlement.

The first session concluded with an insightful presentation from Professor **Domenico Dalfino** (University of Bari Aldo Moro, Italy) who explored the long-debated issue of which party bears the burden of initiating the mandatory mediation in proceedings opposing a payment order. While expressing his criticism towards mandatory mediation, he maintained that voluntariness is the very essence of mediation and the promise of its success.

Second session

The event continued with a second session chaired by Professor **Paola Lucarelli**. From the perspective of the Brazilian legal system, Professor **Teresa Arruda Alvim** (Pontifical Catholic University of São Paulo, Brazil) began the session by illustrating that in the last few decades, ADR has afforded parties the possibility to self-tailor a solution to their conflict while significantly diminishing the case overload of the judiciary. Nevertheless, the obstacles to the growth of ADR are multiple, ranging from the lack of preparation of mediators to the traditional adversarial approach of attorneys. She concluded by stating that legal systems must invest, on the one hand, in training highly qualified mediators while on the other, providing new educational paths for attorneys to acquire new negotiation and mediation skills.

The session proceeded to address Online Dispute Resolution (ODR), examining the strengths and weaknesses of using new technologies to solve disputes. Professor **Silvia Barona Vilar** (University of Valencia, Spain) highlighted the positive and negative aspects of the increasing use of ODR in our digital and algorithmic society. While ODR devices are considered as ensuring access to justice and favouring social peace and citizens' satisfaction, there are also complex issues around the use of Artificial Intelligence and algorithms such as their accountability, accurate assessment, and transparency.

The relationship between the use of technology and access to justice was explored in depth by Professor **Amy J. Schmitz** (The Ohio State University, USA), who based her presentation on a thorough empirical study of ODR as a means to advance access to justice for poor or vulnerable individuals who would otherwise be unable to have their 'day in court.'

Potential applications of new technologies used in resolving disputes were then

examined by Professor **Colin Rule** (Stanford Law School, USA), who highlighted that ODR, originally created to help e-commerce companies build trust with their users, is now being integrated into the courts to expand access to justice and reduce costs. While admitting there are many questions that still need to be answered, Rule predicted that ODR will play a major role in the justice systems of the future through the expansion of Artificial Intelligence and machine learning.

Showing a more critical approach Professor **Maria Rosaria Ferrarese** (National School of Administration, Italy) shed light on the threat posed by the use of digital technologies in resolving disputes, after having edited the Italian version of a book by Antoine Garapon and Jean Lassègue – *Justice digital. Révolution graphique et rupture anthropologique* (Digital Justice. Graphic Revolution and Anthropologic Disruption). While acknowledging that Artificial Intelligence and algorithms can deliver a fast and cheap justice, she underlines that justice is not only about settling a case in a rapid and inexpensive way but also about reinforcing values of a given society and ensuring a creative application of the law.

Conference on "The HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook" – Rescheduled to 9 and 10 June 2023

Dear Friends and Colleagues,

Due to a conflicting conference on the previously planned date (9 and 10 September 2022) and with a view to ongoing developments on the subject-matter in the EU, we have made the decision to reschedule our Conference to **Friday and Saturday, 9 and 10 June 2023.** This new date should bring us closer to the expected date of accession of the EU and will thus give the topic extra momentum. Stay tuned and register in time (registration remains open)!

On 23 June 2022, the European Parliament by adopting JURI Committee Report A9-0177/2022 gave its consent to the accession of the European Union to the HCCH 2019 Judgments Convention. The Explanatory Statement describes the convention with a view to the "growth in international trade and investment flows" as an "instrument […] of outmost importance for European citizenz ans businesses" and expressed the hope that the EU's signature will set "an example for other countries to join". However, the Rapporteur, Ms. Sabrina Pignedoli, also expresses the view that the European Parliament should maintain a strong role when considering objections under the bilateralisation mechanism provided for in Art. 29 of the Convention. Additionally, some concerns were raised regarding the

protection of employees and consumers under the instrument. For those interested in the (remarkably fast) adoption process, the European Parliament's vote can be rewatched here. Given these important steps towards accession, June 2023 should be a perfect time to delve deeper into the subject-matter, and the Conference is certainly a perfect opportunity for doing so:

The list of speakers of our conference includes internationally leading scholars, practitioners and experts from the most excellent Universities, the Hague Conference on Private International Law (HCCH), the United Nations Commission on International Trade Law (UNCITRAL), and the European Commission (DG Trade, DG Justice). The Conference is co-hosted by the Permanent Bureau of the HCCH.

The Organizers kindly ask participants to contribute with EUR 200.- to the costs of the event and with EUR 50.- to the conference dinner, should they wish to participate. There is a limited capacity for young scholars to contribute with EUR 100.- to the conference (the costs for the dinner remain unchanged).

Please register with sekretariat.weller@jura.uni-bonn.de. Clearly indicate whether you want to benefit from the young scholars' reduction of the conference fees and whether you want to participate in the conference dinner. You will receive an invoice for the respective conference fee and, if applicable, for the conference dinner. Please make sure that we receive your payment at least two weeks in advance. After receiving your payment we will send out a confirmation of your registration. This confirmation will allow you to access the conference hall and the conference dinner.

Please note: Access will only be granted if you are fully vaccinated against Covid-19. Please confirm in your registration that you are, and attach an e-copy of your vaccination document. Please follow further instructions on site, e.g. prepare for producing a current negative test, if required by University or State regulation at that moment. We will keep you updated. Thank you for your cooperation.

Dates and Times:

Friday, 9 June 2023, and Saturday, 10 September 2023, 9 a.m. to 7 p.m.

Venue:

Universitätsclub Bonn, Konviktstraße 9, D – 53113 Bonn

Registration:

sekretariat.weller@jura.uni-bonn.de

Registration fee: EUR 200.-

Programme

Friday, 9 June 2023

8.30 a.m. Registration

9.00 a.m. Welcome notes

Prof Dr Wulf-Henning Roth, Director of the Zentrum für Europäisches Wirtschaftsrecht, Rheinische Friedrich-Wilhelms-Universität Bonn, Germany

Dr Christophe Bernasconi, Secretary General of the HCCH

Part I: Cornerstones

1. Scope of application

Prof Dr Xandra Kramer, Erasmus University Rotterdam, Netherlands

2. Judgments, Recognition, Enforcement

Prof Dr Wolfgang Hau, Ludwig-Maximilians-Universität Munich, Germany

3. Indirect jurisdiction

Prof Dr Pietro Franzina, Catholic University of Milan, Italy

4. Grounds for refusal

Dr Marcos Dotta Salgueiro, Adj. Professor of Private International Law, Law Faculty, UR, Uruguay; Director of International Law Affairs, Ministry of Foreign Affairs, Uruguay

5. Trust management: Establishment of relations between Contracting States

Dr João Ribeiro-Bidaoui, First Secretary, HCCH / Dr Cristina Mariottini, Senior Research Fellow at the Max Planck Institute for International, European and Regulatory Law Luxemburg

1.00 p.m. Lunch Break

Part II: Prospects for the World

1. The HCCH System for choice of court agreements: Relationship of the HCCH Judgments Convention 2019 to the HCCH 2005 Convention on Choice of Court Agreements

Prof Dr Paul Beaumont, University of Stirling, United Kingdom

2. European Union

Dr Andreas Stein, Head of Unit, DG JUST – A1 "Civil Justice", European Commission

3. Canada, USA

Prof Linda J. Silberman, Clarence D. Ashley Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law, USA

Prof Geneviève Saumier, Peter M. Laing Q.C. Professor of Law, McGill Faculty of Law, Canada

4. Southeast European Neighbouring and EU Candidate Countries

Ass. Prof. Dr.sc Ilija Rumenov, Assistant Professor at Ss. Cyril and Methodius University, Skopje, Macedonia

8.00 p.m. Conference Dinner (EUR 50.-)

Saturday, 10 June 2023

9.00 a.m. Part II continued: Prospects for the World

5. Middle East and North Africa (including Gulf Cooperation Council)

Prof Dr Béligh Elbalti, Associate Professor at the Graduate School of Law and

Politics at Osaka University, Japan

6. Sub-Saharan Africa (including Commonwealth of Nations)

Prof Dr Abubakri Yekini, University of Manchester, United Kingdom

Prof Dr Chukwuma Okoli, University of Birmingham, United Kingdom

7. Southern Common Market (MERCOSUR)

Prof Dr Verónica Ruiz Abou-Nigm, Director of Internationalisation, Senior Lecturer in International Private Law, School of Law, University of Edinburgh, United Kingdom

8. Association of Southeast Asian Nations (ASEAN)

Prof Dr Adeline Chong, Associate Professor of Law, Yong Pung How School of Law, Singapore Management University, Singapore

9. China (including Belt and Road Initiative)

Prof Dr Zheng (Sophia) Tang, University of Newcastle, United Kingdom

1.00 p.m. Lunch Break

Part III: Outlook

1. Lessons from the Genesis of the Judgments Project

Dr Ning Zhao, Senior Legal Officer, HCCH

2. International Commercial Arbitration and Judicial Cooperation in civil matters: Towards an Integrated Approach

José Angelo Estrella-Faria, Principal Legal Officer and Head, Legislative Branch, International Trade Law Division, Office of Legal Affairs, United Nations; Former Secretary General of UNIDROIT

3. General Synthesis and Future Perspectives

Hans van Loon, Former Secretary General of the HCCH

First Instance where a Mainland China Civil Mediation Decision has been Recognized and Enforced in New South Wales, Australia

I Introduction

Bank of China Limited v Chen [2022] NSWSC 749 (‘*Bank of China v Chen*’), decided on the 7 June 2022, is the first instance where the New South Wales Supreme Court (‘NSWSC’) has recognised and enforced a Chinese civil mediation decision.

II Background

This case concerned the enforcement of two civil mediation decisions obtained from the People’s Court of District Jimo, Qingdao Shi, Shandong Province China (which arose out of a financial loan dispute) in Australia.[1]

A foreign judgement may be enforced in Australia either at common law or pursuant to the *Foreign Judgements Act 1991*(Cth).[2] As the People’s Republic of China is not designated as a jurisdiction of substantial reciprocity under the *Foreign Judgements Regulation 1992* (Cth) schedule 1, the judgements of Chinese courts may only be enforced at common law.[3]

For a foreign judgement to be enforced at common law, four requirements must be met:[4] (1) the foreign court must have exercised jurisdiction in the international sense; (2) the foreign judgement must be final and conclusive; (3) there must be identity of parties between the judgement debtor(s) and the defendant(s) in any enforcement action; and (4) the judgement must be for a fixed, liquidated sum. The onus rests on the party seeking to enforce the foreign judgement.[5]

Bank of China Ltd ('plaintiff') served the originating process on Ying Chen ('defendant') pursuant to r 11.4 and Schedule 6(m) of the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') which provides that an originating process may be served outside of Australia without leave of the court to recognise or enforce any 'judgement'.[6] Central to this dispute was whether a civil mediation decision constituted a 'judgement' within the meaning of schedule 6(m).

III Parties' Submission

A *Defendant's Submission*

The defendant filed a notice of motion seeking for (1) the originating process to be set aside pursuant to rr 11.6 and 12.11 of the UCPR, (2) service of the originating process on the defendant to be set aside pursuant to r 12.11 of the UCPR and (3) a declaration that the originating process had not been duly served on the defendant pursuant to r 12.11 of the UCPR.[7]

The defendant argued that the civil mediation decisions are not 'judgements' within the meaning of UCPR Schedule 6(m).[8] Moreover, the enforcement of

foreign judgment at common law pre-supposes the existence of a foreign judgement which is absent in this case.[9]

The defendant submitted that the question that must be asked in this case is whether the civil mediation decisions were judgements as a matter of Chinese law which is a question of fact.[10] This was a separate question to whether, as a matter of domestic law, the foreign judgements ought to be recognised at common law.[11]

B *Plaintiff's Submission*

In response, the plaintiff submitted that all four common law requirements were satisfied in this case.[12] Firstly, there was jurisdiction in the international sense as the defendant appeared before the Chinese Court by her authorised legal representative.[13] The authorised legal representative made no objection to the civil mediation decisions.[14] Secondly, the judgement was final and conclusive as it was binding on the parties, unappealable and can be enforced without further order.[15] Thirdly, there was an identity of parties as Ying Chen was the defendant in both the civil mediation decisions and the enforcement proceedings.[16] Fourthly, the judgement was for a fixed, liquidated sum as the civil mediation decisions provided a fixed amount for principal and interest.[17]

In relation to the defendant's notice of motion, the plaintiff argued that the question for the court was whether the civil mediation decisions fell within the meaning of 'judgement' in the UCPR, that is, according to New South Wales law, not Chinese law (as the defendant submitted).[18] On this question, there was no controversy.[19] While the UCPR does not define 'judgement', the elements of a 'judgement' are well settled according to Australian common law and Chinese law expert evidence supports the view that civil mediation decisions have those essential elements required by Australian law.[20]

Under common law, a judgement is an order of Court which gives rise to res judicata and takes effect through the authority of the court.[21] The plaintiff relied on Chinese law expert evidence which indicated that a civil mediation decision possesses those characteristics, namely by establishing res judicata and having mandatory enforceability and coercive authority.[22] The expert evidence noted that a civil mediation decision is a type of consent judgement resulting from mediation which becomes effective once all parties have acknowledged receipt by affixing their signature to the Certificate of Service.[23] The Certificate of Service in respect of the civil mediation decisions in this case had been signed by the legal representatives of the parties on the day that the civil mediation decisions were made.[24] While a civil mediation decision is distinct to a civil judgement,[25] a civil mediation decision nonetheless has the same binding force as a legally effective civil judgement and can be enforced in the same manner.[26]

The expert evidence further noted that Mainland China civil mediation decisions have been recognised and enforced as foreign judgements in the Courts of British Columbia, Hong Kong and New Zealand.[27] The factors which characterise a 'judgement' under those jurisdictions are the same factors which characterise a 'judgement' under Australian law.[28]This supports the view that the same recognition should be afforded under the laws of New South Wales.[29]Accordingly, the plaintiff submitted the a civil mediation decision possesses all the necessary characteristics of a 'judgement' under Australian law such that service could be effected without leave under schedule 6(m).[30]

IV Resolution

Harrison AsJ noted that the judgements of Chinese courts may be enforceable at common law and found that all four requirements was satisfied in this case.[31] There was jurisdiction in the international sense as the defendant's authorised legal representative appeared before the People's Court on her behalf, the parties

had agreed to mediation, the representatives of the parties came to an agreement during the mediation, and this was recorded in a transcript.[32] The parties' representatives further signed the transcript and a civil mediation decision had been issued by the people's courts.[33] Moreover, the civil mediation decision was final and binding as it had been signed by the parties.[34] The third and fourth requirements were also clearly satisfied in this case.[35]

In relation to the central question of whether the civil mediation decisions constituted 'judgements' in the relevant sense, Harrison AsJ found in favour of the plaintiff.[36] Harrison AsJ first noted that this question should not be decided on the arbitrary basis of which of the many possible translations should be preferred.[37] Moreover, the evidence of the enforcement of civil mediation decisions as judgements in the jurisdictions of British Columbia, Hong Kong and New Zealand was helpful, though also not determinative.[38]

Rather, this question must be determined by reference to whether civil mediation decisions constituted judgements under Australian law as opposed to Chinese law, accepting the plaintiff's submission.[39] The civil mediation decisions were enforceable against the defendant immediately according to their terms in China without the need for further order or judgement of the People's Court.[40] The parties could not vary or cancel the civil mediation decisions without the permission of the Jimo District Court.[41] The civil mediation decisions also had the same legal effects as a civil judgement.[42] Therefore, Harrison AsJ concluded that the civil mediation decisions were judgements for the purposes of Australian law as they established res judicata and were mandatorily enforceable and had coercive authority.[43] It then followed that the civil mediation decisions fell within the scope of UCPR schedule 6(m) and did not require leave to be served.[44]

V Orders

In light of the analysis above, Harrison AsJ held that the Chinese civil mediation decisions were enforceable and dismissed the defendant's motion.[45] Costs were further awarded in favour of the plaintiff.[46]

Author: Hao Yang Joshua Mok, LLB Student at the University of Sydney Law School

Supervised by Associate Professor Jeanne Huang, Sydney Law School

References:

[1] *Bank of China Limited v Chen* [2002] NSWSC 749, [1], [16].

[2] Ibid [8]; citing *Bao v Qu; Tian* (No 2) [2020] NSWSC 588, [23]-[29].

[3] Ibid [8].

[4] Ibid.

[5] Ibid.

[6] Ibid [9] – [11].

[7] Ibid [6].

[8] Ibid [57].

[9] Ibid [59], [84].

[10] Ibid [61].

[11] Ibid.

[12] Ibid [25].

[13] Ibid [18].

[14] Ibid.

[15] Ibid [20].

[16] Ibid [22].

[17] Ibid [24].

[18] Ibid [27].

[19] Ibid [28].

[20] Ibid.

[21] Ibid [37].

[22] Ibid [38].

[23] Ibid [39].

[24] Ibid.

[25] Ibid [41].

[26] Ibid [42].

[27] Ibid [49].

[28] Ibid [50].

[29] Ibid [51].

[30] Ibid [52].

[31] Ibid [83], [90].

[32] Ibid [86].

[33] Ibid.

[34] Ibid [87].

[35] Ibid [88]-[89].

[36] Ibid [105].

[37] Ibid [91]-[92].

[38] Ibid [93].

[39] Ibid [96].

[40] Ibid [103].

[41] Ibid.

[42] Ibid.

[43] Ibid [105].

[44] Ibid [106].

[45] Ibid [107]-[108].

[46] Ibid [109]-[112].

Golan v. Saada – a case on the HCCH Child Abduction Convention: the Opinion of the US Supreme Court is now available

Written by Mayela Celis, UNED

Yesterday (15 June 2022) the US Supreme Court rendered its Opinion in the case of Golan v. Saada regarding the HCCH Child Abduction Convention. The decision was written by Justice Sotomayor, click here. For our previous analysis of the case, click here.

This case dealt with the following question: whether upon finding that return to the country of habitual residence places a child at grave risk, a district court is

required to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding. (our emphasis)

In a nutshell, the US Supreme Court answered this question in the negative. The syllabus of the judgment says: "A court is not categorically required to examine all possible ameliorative measures [also known as undertakings] before denying a Hague Convention petition for return of a child to a foreign country once the court has found that return would expose the child to a grave risk of harm." The Court has also wisely concluded that "Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion" (however, this is different in the European Union context where a EU regulation complements the Child Abduction Convention).

While admittedly not everyone will be satisfied with this Opinion, it is a good and well-thought through decision that will make a great impact on how child abduction cases are decided in the USA; and more broadly, on the way we perceive what the ultimate goal of the treaty is and how to strike a right balance between the different interests at stake and the need to act expeditiously.

In particular, the Court stresses that the Convention "does not pursue return exclusively or at all costs". And while the Court does not make a human rights analysis, it could be argued that this Opinion is in perfect harmony with the current approaches taken in human rights law.

In my view, this is a good decision and is in line with our detailed analysis of the case in our previous post. In contrast to other decisions (see recent post from Matthias Lehmann), for Child Abduction – and human rights law in general – this is definitely good news from Capitol Hill.

Below I include a few excerpts of the decision (our emphasis, we omit footnotes):

"In addition, the court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the Convention and ICARA. ***The Second Circuit's rule, by instructing district courts to order return "if at all possible," improperly elevated return above the Convention's other objectives***. Blondin I, 189 F. 3d, at 248. ***The Convention does not pursue return exclusively or at all costs***. Rather, the Convention "is designed to protect the interests of children and their parents," Lozano, 572 U. S., at 19 (ALITO , J., concurring), and children's interests may point against return in

some circumstances. Courts must remain conscious of this purpose, as well as the Convention's other objectives and requirements, which constrain courts' discretion to consider ameliorative measures
in at least three ways.

"First, ***any consideration of ameliorative measures must prioritize the child's physical and psychological safety***. The Convention explicitly recognizes that the child's interest in avoiding physical or psychological harm, in addition to other interests, "may overcome the return remedy." Id., at 16 (majority opinion) (cataloging interests). ***A court may therefore decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave***. Sexual abuse of a child is one example of an intolerable situation. See 51 Fed. Reg. 10510. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated***. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed***. See, e.g., Walsh v. Walsh, 221 F. 3d 204, 221 (CA1 2000) (providing example of parent with history of violating court orders).

"Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute. The Convention and ICARA prohibit courts from resolving any underlying custody dispute in adjudicating a return petition. See Art. 16, Treaty Doc., at 10; 22 U. S. C. §9001(b)(4). Accordingly, ***a court ordering ameliorative measures in making a return determination should limit those measures in time and scope to conditions that would permit safe return***, without purporting to decide subsequent custody matters or weighing in on permanent arrangements.

"Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts "act expeditiously in proceedings for the return of children." Art. 11, Treaty Doc., at 9. Timely resolution of return petitions is important in part because return is a "provisional" remedy to enable final custody determinations to proceed. Monasky, 589 U. S., at ___ (slip op., at 3) (internal quotation marks omitted). The Convention also prioritizes expeditious determinations as being in the best interests of the child because "[e]xpedition will help minimize the extent to which uncertainty adds to the challenges

confronting both parents and child." Chafin v. Chafin, 568 U. S. 165, 180 (2013). ***A requirement to "examine the full range of options that might make possible the safe return of a child," Blondin II, 238 F. 3d, at 163, n. 11, is in tension with this focus on expeditious resolution***. In this case, for example, it took the District Court nine months to comply with the Second Circuit's directive on remand. Remember, the Convention requires courts to resolve return petitions "us[ing] the most expeditious procedures available," Art. 2, Treaty Doc., at 7, and to provide parties that request it with an explanation if proceedings extend longer than six weeks, Art. 11, id., at 9. Courts should structure return proceedings with these instructions in mind. Consideration of ameliorative measures should not cause undue delay in resolution of return petitions.

"***To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate***. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention. A district court's compliance with these requirements is subject to review under an ordinary abuse-of-discretion standard."

U.S. Supreme Court Restricts Discovery Assistance to

International Arbitral Tribunals

Written by Matthias Lehmann, University of Vienna (Austria)

On 13 June 2022, the U.S. Supreme Court ruled that U.S. courts may not help arbitral tribunals sitting abroad in the taking of evidence. This is because in the opinion of the Court, such an arbitral tribunal is not a „foreign or international tribunal" in the sense of 28 U.S.C. § 1782, which allows federal district courts to order the production of evidence for use in proceedings before such tribunals.

The decision concerned an institutional and an ad-hoc arbitration. The first, ZF v. Luxshare, was a commercial arbitration between two companies under the rules of the German Arbitration Institution (DIS). The second, AlixPartners v. Fund for Protection of Investors' Rights in Foreign States, was an investment arbitration involving a disgruntled Russian investor and a failed Lithuanian bank; it was conducted under the UNCITRAL Arbitration Rules.

The opinion, written by Amy Coney Barrett, rejects assistance by U.S. courts in both cases, whether in the pre-arbitration phase or in the main arbitration proceedings. It was unanimously adopted by the Court.

The Supreme Court first relies on a dubious literal interpretation of § 1782. While it does not dispute that arbitral tribunals may be "tribunals", this would change by the addition of the adjectives "foreign or international", as this would require that one or several nations have imbued the tribunal with governmental authority. Alas, the drafters of the New York Convention on recognition and enforcement of "foreign" arbitral awards were wrong, and so apparently were the signatories – among them the U.S. As for the term "international", numerous treatises on "international commercial arbitration" will now supposedly have to be rewritten or newly titled.

The opinion further argues that the "animating purpose" of § 1782 would be "comity" with other nations, and that it would be "difficult to see how enlisting district courts to help private bodies would help that end". Yet other nations also have an interest in efficient arbitration proceedings, as evidenced by the New York Convention. This is even particularly clear for investment arbitration because of the involvement of a state party, but it is also true in commercial arbitration. What is decisive from the point of view of many countries is that

arbitration as a dispute resolution method is equivalent to litigation, and should not be treated less favourably.

The Supreme Court further argues that if § 1782 were to be extended to commercial arbitral "panels", it would cover everything, including even a university's student disciplinary tribunal. Yet the absurdity of this *argumentum ad absurdum* lies not in the inclusion of arbitration in § 1782 but in the extension made by the Court, which was only asked about the former and not about the latter. If need be, it would have been easy to distinguish commercial and investment arbitral tribunals established under national or international rules and covered by international agreements such as the New York Convention from student disciplinary "tribunals" (rather: panels).

Finally, the Court notes that allowing district courts to proffer evidence to a foreign arbitral tribunal would create a mismatch with the Federal Arbitration Act (FAA), which does not foresee such assistance for domestic arbitral tribunals. Yet the solution of this mismatch should have better been left to the legislator, who could either extend the FAA to discovery or exclude foreign and international arbitral tribunals from the scope of § 1782. At any rate, the worse situation of domestic arbitral tribunals does not seem a sufficient justification to also deprive arbitral tribunals abroad, who may have particular difficulties in gathering evidence in the U.S., of assistance by U.S. courts.

All in all, this is disappointing news from Capitol Hill for international arbitration. Whether on arbitration or abortion, the current Supreme Court seems to be willing to upend legal precedent and to question customary legal terminology. At least for arbitration, the consequences will not be life-threatening, because the practice will be able to adapt. But one can already see the next questions coming to the Supreme Court. How about this one: Are ICSID tribunals imbued with governmental authority?

ECJ on the interpretation of the European Succession Regulation in relation to cross-border declarations of waiver, Judgment of 2 June 2022, C-617/20 – T.N. et al. ./. E.G.

On 2 June 2022, the ECJ delivered its judgment in the case of T.N. et al. ./. E.G., C-617/20, on the interpretation of the ESR in relation to cross-border declarations of waiver of succession (on the facts of the case and AG Maciej Szpunar's Opinion in this case see our previous post).

The Court followed the AG's Opinion and concluded (para. 51) that

"*Articles 13 and 28 of Regulation No 650/2012 must be interpreted as meaning that a declaration concerning the waiver of succession made by an heir before a court of the Member State of his or her habitual residence is regarded as valid as to form in the case where the formal requirements applicable before that court have been complied with, without it being necessary, for the purposes of that validity, for that declaration to meet the formal requirements of the law applicable to the succession*".

This conclusion was based on a EU-law specific approach rather than by discussing, let alone resorting to, fundamental concepts of private international law (compare Question 1 by the referring national court, the Higher Regional Court of Bremen, Germany, on a potential application of the concept of substitution; compare the AG's considerations on characterisation of the issue as "substance" or "form", see Opinion, paras. 34 et seq.). Rather, the Court reformulates the question functionally (para. 32):

"*The present reference for a preliminary ruling concerns the conditions which must be satisfied in order for a declaration concerning the waiver of succession, within the meaning of Articles 13 and 28 of Regulation No 650/2012, made before*

the court of the State of the habitual residence of the party waiving succession, to be regarded as valid. In that regard, the referring court asks, in particular, whether and, if so, when and how such a declaration must be notified to the court having jurisdiction to rule on the succession".

Textual as well as systematic arguments (Article 13 as part of Chapter II, Article 28 as part of Chapter III of the ESR), paras. 36 et seq., supported by Recital 32 (simplification of procedures), para. 41, as well as the general effet utile of the ESR in light of Recital 7, para. 42, lead the Court to the result that

"*as the Advocate General stated in point 64 of his Opinion, compliance with the objective of Regulation No 650/2012, which is to enable heirs to make declarations concerning the waiver of succession in the Member State of their habitual residence, implies that those heirs are not required to take further formal actions before the courts of other Member States other than those provided for by the law of the Member State in which such a declaration is made, in order for such declarations to be regarded as valid*".

Whether this result occurs, technically speaking, as a substitution – and thus by a kind of "recognition", or as a matter of characterisation of the issue as "form", is not directly spelled out, but based on the general approval of the AG's approach, the latter is certainly more likely than the former.

Additionally, in furthering the effet utile, the Court adds on the issue of communication of and time limits for a waiver declared according to the conditions of the law of the habitual residence (paras. 49 et seq.) that compliance with "formal requirements" before the court of the habitual residence must suffice as long as the court seised with the succession "has become aware of the existence of that declaration". And the threshold for this awareness seems to be very low, but "in the absence of a uniform system in EU law providing for the communication of declarations" of the kind in question here, must be brought about by the declaring person (para. 48). As a further element of effet utile, this person is not bound by any formal requirements under the *lex successionis*, para. 48: "if those steps [by the declaring person] are not taken within the time limit prescribed by the law applicable to the succession, the validity of such a declaration cannot be called into question" (emphasis added). The only factual time limit therefore is that the court becomes aware before it takes its decision. Appeal, therefore, cannot be grounded directly on the fact that the court was not

made aware in time, even though the declaration had existed before the court's decision. Appeal may be available on other grounds and then the declaration may be introduced as a *novum*, if the *lex fori processualis* allows it.

Speaking of the *lex fori processualis*: As there is now an autonomous time limit, the question became irrelevant whether making the court aware of the declaration of waiver depends on any language requirements. In the concrete case, the persons declaring the waiver before a Dutch court, obviously in Dutch language, informed the German court first by submitting Dutch documents and only later with translations, but at any rate before the court's decision. Principally speaking, however, if the court's language is e.g. German, any kind of communication must be conducted in that language (see section 184 German *Gerichtsverfassungsgesetz*). In addition, according to the Court's decision, only "formal requirements of the law applicable to the succession" are irrelevant. The need for translations, however, is a matter of the *lex fori processualis.* It will be an interesting question of "language law" within the EU whether the effet utile of the ESR (and comparable regulations in other instruments) might overcome principal language requirements according to the *lex fori processualis*. And on a general level it may be allowed to state the obvious: questions of characterisation (and others of general PIL methodology) will never disappear.

Tort Litigation against Transnational Companies in England

This post is an abridged adaptation of my recent article, *Private International Law and Substantive Liability Issues in Tort Litigation against Multinational Companies in the English Courts: Recent UK Supreme Court Decisions and Post-Brexit Implications* in the *Journal of Private International Law*. The article can be accessed at no cost by anyone, anywhere on the journal's website. The wider post-Brexit implications for private international law in England are considered at

length in my recent OUP monograph, *Brexit and the Future of Private International Law in English Courts*.

According to a foundational precept of company law, companies have separate legal personality and limited liability. Lord Templeman referred to the principle in *Salomon v Salomon & co Ltd* [1896] UKHL 1, as the 'unyielding rock' on which company law is constructed. (See Lord Templeman, 'Forty Years On' (1990) 11 *Company Lawyer* 10) The distinct legal personality and limited liability of each entity within a corporate group is also recognized. In *Adams v Cape Industries plc* [1990] Ch 433 the court rejected the single economic unit argument made in the *DHN Ltd v Tower Hamlets LBC* [1976] 1 WLR 852 decision, and also the approach that the court will pierce the corporate veil if it is necessary to achieve justice. In taking the same approach as the one taken in *Salomon v Salomon & co Ltd* [1896] UKHL 1, the court powerfully reasserted the application of limited liability and the separate legal entity doctrine in regard to corporate groups, leaving hundreds of current and future victims uncompensated, whilst assisting those who seek to minimize their losses and liabilities through manipulation of the corporate form, particularly in relation to groups of companies. A parent company is normally not liable for the legal infractions and unpaid debts of its subsidiaries. However, the direct imposition of duty of care on parent companies for torts committed by foreign subsidiaries has emerged as an exception to the bedrock company law principles of separate legal personality and limited liability. In *Chandler v Cape plc* [2012] EWCA Civ 525, [69], Arden LJ '……emphatically reject[ed] any suggestion that this court [was] in any way concerned with what is usually referred to as piercing the corporate veil.'

Arguments drawn from private international law's largely untapped global governance function inform the analysis in the article and the methodological pluralism manifested in the jurisdictional and choice of law solutions proposed. It is through the postulation of territoriality as a governing principle that private international law has been complicit in thwarting the ascendance of transnational corporate social responsibility. (See H Muir-Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347, 386) Private international law has kept corporate liability within the limits of local law through *forum non conveniens* and the *lex loci delicti commissi*. It is only recently that a challenge of territoriality has emerged in connection with corporate social responsibility.

Extraterritoriality is employed in this context as a method of framing a private international law problem rather than as an expression of outer limits. Therefore, there is nothing pejorative about regulating companies at the place of their seat, and there is no reason why the state where a corporate group is based should not (and indeed should not be obliged to) sanction that group's international industrial misconduct on the same terms as similar domestic misconduct, in tort claims for harm suffered by third parties or stakeholders. (Muir-Watt (ibid) 386)

The idea of methodological pluralism, driven by the demands of global governance, can result in jurisdictional and choice of law rules that adapt to the needs of disadvantaged litigants from developing countries, and hold multinational companies to account. The tort-based parental duty of care approach has been utilized by English courts for holding a parent company accountable for the actions of its subsidiary. The limited liability and separate legal entity principles, as applied to corporate groups, are circumvented by the imposition of direct tortious liability on the parent company.

The UK Supreme Court's landmark decisions in *Vedanta v Lungowe* [2019] UKSC 20 and *Okpabi v Shell* [2021] UKSC 3 have granted jurisdiction and allowed such claims to proceed on the merits in English courts. The decisions facilitate victims of corporate human rights and environmental abuse by providing clarity on significant issues. Parent companies may assume a duty of care for the actions of their subsidiaries by issuing group-wide policies. Formal control is not necessarily the determining factor for liability, and any entity that is involved with the management of a particular function risks being held responsible for any damage flowing from the performance of that function. When evaluating whether a claimant can access substantial justice in another forum, English courts may consider the claimants lack of financial and litigation strength. The UK Supreme Court decisions are in alignment with the ethos of the UN Guiding Principles on Business and Human Rights ("Ruggie Principles"), particularly the pillar focusing on greater access by victims to an effective remedy. (The United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011))

Post-Brexit, the broader availability of the doctrine of *forum non conveniens* may help the English courts to ward off jurisdictional challenges against parent companies for damage caused by their subsidiaries at the outset. However, in exceptional cases, the claimant's lack of financial and litigation strength in the natural forum may be considered under the interests of justice limb of *The*

Spiliada test, which motivate an English court not to stay proceedings. (*Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460) It has been argued that if the Australian "clearly inappropriate forum" test for *forum non conveniens* is adopted, (*Voth v Manildra Flour Mills Pty Ltd* (1991) 65 A.L.J.R. 83 (HC); *Regie National des Usines Renault SA v Zhang* [2002] HCA 10 (HC)) it is unlikely that a foreign claimant seeking compensation from a parent company in an English court would see the case dismissed on *forum non conveniens* grounds. As a result, it is more likely that a disadvantaged foreign litigant will succeed in overcoming the jurisdictional hurdle when suing the parent company. From a comparative law standpoint, the adoption of the Australian common law variant of *forum non conveniens* will effectively synthesize *The Spiliada's* wide-ranging evaluative enquiry with the certainty and efficiency inherent in the mandatory rules of direct jurisdiction of the Brussels-Lugano regime.

In relation to choice of law for cross-border torts, the UK has wisely decided to adopt the Rome II Regulation as retained EU law. (See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019) Article 4(1) of the Rome II Regulation will continue to lead to the application of the law of the country where the damage occurred. Post-Brexit, it remains to be seen whether the English courts would be more willing to displace the applicable law under Article 4(1) by applying Article 4(3) of Rome II more flexibly. The territorial limitations of the *lex loci damni* might be overcome by applying the principle of closest connection to select a more favorable law. The result-selectivism inherent in the idea of a favorable law is reminiscent of the regulatory approach of governmental interest analysis. (See SC Symeonides, *Codifying Choice of Law Around the World* (OUP 2014) 287) Article 7 of the Rome II Regulation provides the claimant in an environmental damage claim a choice of applicable law either pursuant to Article 4(1) or the law of the country in which the event giving rise to the damage occurred. Alternatively, any regulatory provisions in English law may be classified as overriding mandatory provisions of the law of the forum under Article 16 of the Rome II Regulation. The Rome II Regulation, under the guise of retained EU law, constitutes a unique category of law that is neither EU law nor English law *per se*. The interpretation of retained EU law will give rise to its own set of challenges. Ultimately, fidelity to EU law will have to be balanced with the ability of UK appellate courts to depart from retained EU law and develop their own jurisprudence.

Any future amendments to EU private international law will not affect the course of international civil litigation before English courts. (Cf A Dickinson, 'Walking Solo – A New Path for the Conflict of Laws in England' Conflictoflaws.net, suggests engagement with the EU's reviews of the Rome I and II Regulations will provide a useful trigger for the UK to re-assess its own choice of law rules with a view to making appropriate changes) However, recent developments in the UK and Europe are a testament to the realization that the avenue for access to justice for aggrieved litigants may lead to parent companies that are now subject to greater accountability and due diligence.

The Applicability of Arbitration Agreements to A Non-Signatory Guarantor—A Perspective from the Chinese Judicial Practice

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

It is axiomatic that an arbitration agreement is generally not binding on a non-signatory unless some exceptional conditions are satisfied or appear, while it could even be more controversial in cases relating to guarantee where a non-signatory third person provides guarantee to the master agreement in which an arbitration clause has been incorporated. Due to the close connection between guarantee contract and master agreement in their contents, parties or even some legal practitioners may take it for granted that the arbitration agreement in master agreement can be automatically extended to the guarantor albeit it is not a signatory, which can be a grave misunderstanding from judicial perspective and results in great loss thereby.

As a prime example, courts in China have long been denying the applicability of arbitration agreements to a non-signatory guarantor with rare exceptions based

on specific circumstances as could be observed in individual cases, nonetheless, the recent legal documents have provided possibilities that may point to the opposite side. This short essay looks into this issue.

1. **The Basic Stance in China: Severability of the Guarantee Contract**

Statutes in China provide limited grounds for extension of arbitration agreement to a non-signatory. As set out in Articles 9 & 10 of the *Interpretation of the Supreme People's Court's (hereinafter, SPC) on Certain Issues Related to the Application of the Arbitration Law*?which was issued on 23 August 2006?, this may occur only under the following circumstances:

"(1) An arbitration clause is binding on the non-signatory who is the successor of a signed-party by means of merge, spilt-up of an entity and decease of a natural person or;

(2) where the rights and obligations are assigned or transferred wholly or partially to a non-signatory, unless parties have otherwise consented".

Current laws are silent on the issue where there is a guarantee relationship. Due to the paucity of direct instructions, some creditors seeking for tribunal's seizure of jurisdiction over a non-signatory guarantor would tend to invoke Article 129 of the *SPC's Interpretation on Certain Issues Related to Application of Warranty Law* (superseded by SPC's *Interpretation on Warranty Chapter of Civil Code* since 2021 with no material changes being made), which stipulates that the guarantee contract shall be subject to the choice of court clause as set out in the main agreement, albeit the creditor and guarantor have otherwise consent on dispute resolution. Nevertheless, courts in China are reluctant to apply Article 129 to an arbitration clause by way of *mutatis mutandis.* In the landmark case of *Huizhou Weitong Real Estate Co., Ltd v. Prefectural People's Government of Huizhou*,[1] the SPC explicitly ruled that the Guarantee Letter entered into between creditor and guarantor had created an independent civil relationship which shall be distinguished from the main agreement and thereby the arbitration clause should not be binding on the guarantor and the court seized with the case could take the case accordingly. In a nutshell, due to the independence of the guarantee contract from the main contract, where there is no clear arbitration agreement in the guarantee contract, the arbitration agreement in the main contract cannot be extended to be applicable to the guarantor.

The jurisprudence of *Weitong* has been subsequently followed and acknowledged as the mainstream opinion for the issue. In SPC's reply to Guangxi Provincial High Court regarding enforcement of a foreign-related arbitral award rendered by CIETAC on 13 September 2006?*Dongxun*?,[2] where a local government had both issued a guarantee letter and signed the main agreement, the SPC opined that as there was no term of guarantee provided in the text of main agreement, the issuance of guarantee letter and signature of main agreement was not sufficient to make the government a party to the arbitration clause. In light of this, SPC agreed with the Guangxi Court's stance that the dispositive section regarding execution of guarantee obligation as set out in the disputed arbitral award had exceeded the tribunal's power and thus shall be rejected to be enforced. In the same vein, in its reply on 20 March 2013 to Guangdong Provincial High Court regarding the annulment of an arbitral award[3], the SPC held that the disputed arbitral award shall be partially vacated for the arbitral tribunal's lack of jurisdiction over the guarantee for which the guarantor was a natural person. Hence, it can be drawn that whether the guarantor is a governmental institution or other entity for public interest is not the determining factor to be considered for this type of cases.

2. **Controversies and Exceptions**

Theoretically, it is correct for the SPC to unfold the autonomous nature of arbitration jurisdiction, which shall be distinguished from that of litigation. Parties' autonomy to designate arbitration as a method of dispute resolution and the existence of an arbitration agreement are key elements for a tribunal to be able to obtain the jurisdiction. By this logic, the mere issuance of guarantee letter or signature of a standing-alone guarantee is not sufficient to prove parties' consent to arbitration as expressed in the main contract. The SPC is not alone in this respect. Actually, one of the much-debated cases by foreign courts is the decision made by the Swiss Supreme Court in 2008 which opined that a guarantor providing guarantee by virtue of a standing-alone letter was not bound by the arbitration clause as provided in the main agreement to which the guarantee letter has been referred, except there was an assumption of contractual rights or obligations, or a clear reference to the said arbitration clause. [4]

All that being said, the SPC's proposition has given rise to some controversies for the sacrifice of efficiency through a dogmatic understanding of arbitration. Moreover, the segregation of the main contract and guarantee contract may

produce risks of parallel proceedings and conflicting legally-effective results. As some commentators have indicated, albeit the severability of guarantee contract in its formality, its content is tight with the main agreement. In the light of the tight connection,[5] the High Court of England ruled in *Stellar* that it was predictably expectable for a rational businessman to agree on a common method of dispute resolution as set out in the main contract, where the term of guarantor's endorsement was involved, based on the close connection between the two contracts.[6]

A like but nuanced approach, however, has been developed through individual cases in China, to the author's best knowledge, one of the prime cases is *Li* v. *Yu* decided by Hangzhou Intermediate Court on 30 March 2018 concerning an annulment of an award handed down via arbitration proceedings.[7] The case concerns a main agreement entered into by the creditor, the debtor and the guarantor (who was also the legal representative of the debtor), which had set out a general guarantee term but did not provide detailed obligations. The guarantor subsequently issued a guarantee letter without any clear reference to arbitration clause as stated in main agreement. After the dispute arose, the creditor lodged arbitration requests against both the debtor and the guarantor, the tribunal ruled in creditor's favor after tribunal proceedings started. The guarantor then applied for annulment of the arbitral award on the basis that there was no valid arbitration agreement between the guarantor and the creditor, contending tribunal's lack of jurisdiction over the guarantor. The court, however, opined that the guarantor's signature in the main agreement, in combination of the general guarantee clause incorporated therein, was sufficient to prove the existence of arbitration agreement between the creditor and the guarantor and the guarantor's consent thereby. Therefore, the annulment application was dismissed by the court.

Admittedly, the opinion as set out in *Li* is sporadic and cannot provide certainty, largely relying on specific circumstances drawn from individual cases, hence it is difficult to produce a new principle hereby. However, the case does have some novelties by providing a new track for extension of arbitration agreement to a guarantor who is not clearly set out as one of the parties in main agreement. In other words, the presumption of severability of guarantee relationship is not absolute and thus rebuttable. To reach that end, creditors shall furnish proof that the guarantor shall be well aware of the details of the main contract (including

arbitration clause) and has shown inclination to be bound thereby.

3. **New Rules That Shed New Light**

On 31 December 2021, the SPC released *Meeting Note of the National Symposium on Foreign-related Commercial and Maritime Trials*, which covers judicial review issues on arbitration agreements. Article 97 of the *Meeting Note* provides systematical approach in reviewing arbitration agreement where an affiliated agreement?generally refers to guarantee contract or other kinds of collateral contract?is concerned, which can be divided into two facets:

First, where the guarantee contract provides otherwise dispute resolution, such consent is binding on the guarantor and thus shall be enforceable. As a corollary, the arbitration agreement in main agreement is not extensible to the guarantor.

Secondly, while the guarantee contract is silent on the issue of dispute resolution, the arbitration agreement as set forth in the main agreement is not automatically binding on the guarantor unless the parties to the guarantee contract is the same as that of main agreement.

In summary, the *Meeting Note* has sustained the basic stance while providing an exception where the main agreement and the guarantee contract are entered into by the same parties. As indicated by one commentator, the *Meeting Note* is not a judicial interpretation which can be adopted by the courts to decide cases directly but it to a large extent reflects consensus of judges among China, [8] and hence will produce impact on judicial practice across the whole country.

Nevertheless, some uncertainties may still arise, for instance, whether a mere signature in the main contract by the guarantor is sufficient to furnish the proof about “the same parties”, or shall be in combination with the scenario where an endorsement term of guarantor is incorporated in the main contract. On the contrary, it is also unclear whether a mere existence of term of guarantee is sufficient to make a non-signatory guarantor a party to the main contract.

Another more arbitration-friendly method can be observed from the draft for Revision of Arbitration Law that has been released for public consultation since 30th July of 2021, Article 24 of which provides that the arbitration clause as set out in the main agreement shall prevail over that in the guarantee contract where there is a discrepancy; where the guarantee contract is silent on dispute

resolution, any dispute connected thereto shall be subject to the arbitration agreement as set out in main agreement. This article is a bold one which will largely overturn the SPC's current stance and makes guarantee relationship an exception. A piece of more exciting news comes from the newly-released law-making schedule of 2022 by the Standing Committee of the National People's Congress,[9] according to which the revision of Arbitration Law is listed as one of the top priorities in 2022 whilst it is still to be seen whether Article 24 in the draft can be retained after scrutiny of the legislature.

4. **Concluding Remarks**

It is not uncommon that a guarantee for certain debts is provided by virtue of a standing-alone document which is separated from the main contract, whether it is a guarantee contract or a unilaterally-issued guarantee letter. It shall be borne in mind that the close connection between the guarantee document and main contract alone is not sufficient to extend the arbitration agreement as set out in main agreement to a non-signatory guarantor per the consistent legal practice in China over the past 20 years. While the new rules have provided more arbitration-friendly approaches, uncertainties and ambiguities will probably still exist.

From a lawyer's perspective, as the mainstream opinion in judicial remains unchanged currently, it is necessary to attach higher importance while reviewing a standing-alone guarantee contract which is separated from a master agreement in its formality. In the light of avoiding prospective parallel proceedings incurred thereby, the author advances two options in this respect:

The first option is to insert an article endorsing guarantee's obligation into the master agreement, and require the guarantor to sign the master agreement, which resembles the scenario in *Stellar* and *Li*. Whereas this approach may be less feasible in the post-negotiation phase of master agreement when all terms and conditions are fixed and endorsed, the option mentioned below can be served as an alternative.

The second option is to incorporate into guarantee document a clause which unequivocally refers to the arbitration agreement as set out in master agreement, in lieu of any revision to the master agreement. This approach is in line with Article 11 *SPC on Certain Issues Related to the Application of the Arbitration Law* which provides that parties can reach an arbitration agreement by reference to

dispute resolution clauses as set out in other contracts or documents. While it is noteworthy that from judicial practice in China, such reference shall be specific and clear, otherwise the courts may be reluctant to acknowledge the existence of such arbitration agreement.

[1] Case No: 2001 Min Er Zhong No. 177.

[2] Case No: 2006 Min Si Ta No. 24.

[3] Case No: 2013 Min Si Ta No. 9.

[4] Case No. 4A_128/2008,decided on August 19, 2008, decided by Tribunal federal(Supreme Court) of Swiss, as cited in *Extension of arbitration clause to non-signatories (case of a guarantor) – Arbitration clause by reference to the main contract (deemed too general and therefore not admitted),* available at https://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua.

[5] See Yifei Lin: Is Arbitration Agreement in Master Agreement Applicable to Guarantee Agreement? Available at http://www.360doc.com/content/16/0124/11/30208892_530188388.shtml.

[6] Stellar Shipping Co Llc v Hudson Shipping Lines [2010] EWHC 2985 (Comm) (18 November 2010).

[7] Case No: 2018 Zhe 01 Min Te No. 23.

[8] Lianjun Li *et al?China issues judicial guidance on foreign related matters,* Reed Smith In-depth?25 April 2022??available at https://www.reedsmith.com/de/perspectives/2022/04/china-issues-judicial-guidance-on-foreign-related-matters.

[9] For more details, please see the news post available at https://m.thepaper.cn/baijiahao_18072465. Moreover, per the news report released in late May of 2022, The National Committee of Chinese People's Political Consultative Conference had discussed the revision of Arbitration Law in its biweekly symposium held on 30 May 2022, where the attendees had stressed the significance of party autonomy in commercial arbitration, available at:

CSDD and PIL: Some Remarks on the Directive Proposal

by Rui Dias

On 23 February 2022, the European Commission published its proposal of a Directive on Corporate Sustainability Due Diligence (CSDD) in respect to human rights and the environment. For those interested, there are many contributions available online, namely in the Oxford Business Law Blog, which dedicates a whole series to it (here). As to the private international law aspects, apart from earlier contributions on the previous European Parliament resolution of March 2021 (info and other links here), some first thoughts have been shared e.g. by Geert von Calster and Marion Ho-Dac.

Building on that, here are some more brief remarks for further thought:

Article 2 defines the personal scope of application. European companies are covered by Article 2(1), as the ones «formed in accordance with the legislation of a Member-State», whereas those of a «third country» are covered by Article 2(2). While other options could have been taken, this criterium of incorporation is not unknown in the context of the freedom of establishment of companies, as we can see in Article 54 TFEU (basis for EU legal action is here Article 50(1) and (2)(g), along with Article 114 TFEU).

There are general, non PIL-specific inconsistencies in the adopted criteria, in light of the *relative*, not *absolute* thresholds of the Directive, which as currently drafted aims at also covering medium-sized enterprises only if more than half of the turnover is generated in one of the high-impact sectors. As recently pointed out by Hübner/Habrich/Weller, an EU company with e.g. 41M EUR turnover, 21M of

which in a high impact sector such as e.g. textiles is covered; whilst a 140M one, having «only» 69M in high-impact sectors, is not covered, even though it is more than three times bigger, including in that specific sector.

Article 2(4) deserves some further attention, by stating:

«As regards the companies referred to in paragraph 1, the Member State competent to regulate matters covered in this Directive shall be the Member State in which the company has its registered office.»

So, the adopted connecting factor as to EU companies is the *registered office*. This is in line with many proposals of choice-of-law uniformization for companies in the EU. But apparently there is no answer to the question of which national law of a Member-State applies to third-country companies covered by Article 2(2): let us not forget that it is a proposed Directive, to be transposed through national laws. And as it stands, the Directive may open room for differing civil liability national regimes: for example, in an often-criticised option, Recital 58 expressly excludes the burden of proof (as to the company's action) from the material scope of the Directive proposal.

Registered office is of course unfit for third country-incorporated companies, but Articles 16 and 17 make reference to other connecting factors. In particular, Article 17 deals with the public enforcement side of the Directive, mandating the designation of authorities to supervise compliance with the due diligence obligations, and it uses the location of a branch as the primarily relevant connection. It then opens other options also fit as subsidiary connections: «If the company does not have a branch in any Member State, or has branches located in different Member States, the competent supervisory authority shall be the supervisory authority of the Member State *in which the company generated most of its net turnover in the Union*» in the previous year. Proximity is further guaranteed as follows: «Companies referred to in Article 2(2) may, on the basis of a change in circumstances leading to it generating most of its turnover in the Union in a different Member State, make a duly reasoned request to change the supervisory authority that is competent to regulate matters covered in this Directive in respect of that company».

Making a parallel to Article 17 could be a legislative option, so that, in respect to third-country companies, *applicable law* and *powers for public enforcement* would coincide. It could also be extended to *jurisdiction*, if an intention arises to act in that front: currently, the general jurisdiction rule of Brussels Ia (Article 4) is a basis for the amenability to suit of companies *domiciled* (i.e., with statutory seat, central administration, or principal place of business – Article 63) in the EU. In order to sue third country-domiciled companies, national rules on jurisdiction have to be invoked, whereby many Member-States include some form of *forum necessitatis* in their national civil procedure laws (for an overview, see here).The Directive proposal includes no rules on jurisdiction: it follows the option also taken by the EP resolution, unlike suggested in the previous JURI Committee draft report, which had proposed new rules, through amendments to Brusselas Ia, on connected claims (in a new Art. 8, Nr. 5) and on *forum necessitatis* (through a new Art. 26a), along with a new rule on applicable law to be included in Rome II (Art. 6a) – a pathway which had also been recommended by GEDIP in October 2021 (here).

As to the applicable law in general, in the absence of a specific choice-of-law rule, Article 22(5) states:

«Member States shall ensure that the liability provided for in provisions of national law transposing this Article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.»

So, literally, it is «the liability provided for» in national transposing laws, and not the provisions of national law themselves, that are to be «of overriding mandatory application». This may be poor drafting, but there is apparently no material consequence arising out of it.

Also, the final part («in cases where the law applicable to claims to that effect is not the law of a Member State») does not appear to make much sense. It is at best redundant, as Geert van Calster points out, suggesting it to be struck out of the proposal. Instead of that text, it could be useful to add «irrespective of the law otherwise applicable under the relevant choice-of-law rules», miming what Rome I and II Regulations state in Articles 9 and 16.

A further question raised by this drafting option of avoiding intervention in Rome II or other choice-of-law regulations, instead transforming the new law into a big set of *lois de police*, is that it apparently does not leave room for the application of foreign, non-EU law more favourable to the victims. If a more classical conflicts approach would have been followed, for example mirrored in Article 7 of Rome II, the *favor laesi* approach could be extended to the whole scope of application of the Directive, so that the national law of the Member-State where the event giving rise to damage occurred could be invoked under general rules (Article 4(1) of Rome II), but a more favourable *lex locus damni* would still remain accessible. Instead, by labelling national transposing laws as overridingly mandatory, that option seems to disappear, in a way that appears paradoxical vis-à-vis other rules of the Directive proposal that safeguard more favourable, existing solutions, such as in Article 1(2) and Article 22(4). If there is a political option of not allowing the application of third-country, more favourable law, that should probably be made clear.

German Judges Travel to Peru in Climate-Change Trial

In a widely reported trip, members of the 5th Civil Chamber of the Higher Regional Court of Hamm, Germany, together with two court-appointed experts, travelled to Peru to collect evidence in one of Germany's first climate-change lawsuits. The highly symbolic case has been brought by Saúl Luciano Lliuyas, a Peruvian farmer, who claims that man-made climate change and the resulting increased flood risk threatens his house in the Andes, which is located right below a glacial lake. Supported by two German NGOs, he seeks compensation from RWE, Europe's single biggest emitter of carbon dioxide, for the equivalent of its contribution to worldwide human carbon dioxide emissions, i.e. 0.47 percent, of the additional protective measures he had to take to flood-prove his house.

The trip had already been scheduled in 2019 but was delayed by the Covid-19

pandemic. Its main purpose appears to have been the proper instruction of the two experts, who are charged with assessing the climate-change-related risk for the claimant and the extent of RWE's potential contribution to it.

In terms of private international law, the case is straightforward. The German courts have international jurisdiction on the basis of Articles 4(1), 63(1) Brussels Ia as RWE has its statutory seat and central administration in Germany. As far as the applicable law is concerned, the claimant can rely on the privilege awarded to the (alleged) victims of environmental torts by Art 7 Rome II, according to which they may opt for the law of the country in which the event giving rise to the damage occurred (as opposed to the law of the country in which the damage occurred, which generally applies pursuant to Art. 4(1) Rome II), i.e. for German law in the case of pollutions caused by RWE's power plants in Germany. Thus, the usual PIL problems of climate-change lawsuits (international jurisdiction based on Art. 7(2) or 8(1) Brussels Ia, immunity of state-owned corporations, predictability of the law of the place of the damage, application of Art. 17 Rome II, …) do not arise in this case.

Regarding the application of substantive German law, the case is much more open. In the first instance, the Regional Court of Essen outright rejected the claim for lack of a sufficient causal connection between RWE's contribution to climate change and the specific risk of the claimant. This is in line with what might still be the majority position in German scholarship, according to which individual contributions to global climate change cannot trigger civil liability in tort or property law. The fact that the second-instance court has now started to collect evidence implies, however, that it considers the claim to succeed on the basis of the claimant's submissions. Seen together with the German Constitutional Court quashing national legislation for being incompatible with Article 20a of the Constitution and international commitments to limit global warming in 2021, the lawsuit in Hamm may be a sign of German courts slowly adopting a more active position in the global fight against climate change, including with regard to civil liability.