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: http://www.icppcc.cn/newsDetail_1092041.

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.

Conflicting Views on the Restatement (Third) of Conflict of Laws

The American Law Institute is currently drafting the *Restatement (Third) of Conflict of Laws*. Lea Brilmayer (an eminent scholar of conflict of laws and a professor at Yale Law School) and Kim Roosevelt (the Reporter for the *Restatement (Third*) and a professor at the University of Pennsylvania Carey Law School) recently engaged in a spirited debate about the current state of that project. Brilmayer and Daniel Listwa argued here that the current draft needs less theory and more blackletter rules. Roosevelt argued in response that the critics identify a problem that does not exist and propose a solution that would make things worse.

This exchange — the latest back-and-forth in a conversation between these interlocutors — is likely to prove illuminating to anyone curious about the status of the *Restatement (Third*) in the United States.

Can Blockchain Arbitration become a proper ‘International Arbitration’? Jurors vs. arbitrators

Written by Pedro Lacasa, Legal Consultant, Universidad Nacional de Asunción

There is no doubt that the use of emerging technologies has impacted the international arbitration arena. This tech revolution was unprecedently accelerated by the 2020 pandemic whilst national States’ borders were closed, and travel activity diminished (if not directly forbidden by some States).

The increase of the application of the Blockchain technology in commercial contracts and the proliferation of smart contracts (even though some think they are in essence merely a piece of software code[1]) have reached the point of being a relevant part of international commerce and suddenly they demand more attention than before (see the overview of these new technologies and its impact in arbitration here http://arbitrationblog.kluwerarbitration.com/2019/01/27/2018-in-review-blockchain-technology-and-arbitration/).

The omnipresence of technology in arbitration and the application of the blockchain technology to dispute resolution mechanisms in the international arena led to the naissance of the ‘blockchain arbitration’.

But just because a method focuses on dispute resolution, is not *ipso facto* a proper ‘*arbitration*’.

While the utilization of a trusted chain of information enhanced by technology is encouraged in arbitration proceedings, particularly in international arbitrations, we must underscore the fact that not any dispute resolution mechanism is a proper ‘*arbitration*’… not even if based on the blockchain.

Blockchain arbitration models do not share some of the essential features of

arbitration. The parties cannot choose the arbitrator in charge freely. They cannot easily choose aspects like the language of the procedure, the nationality of the arbitrators, the qualification of the arbitrators, the applicable law, etc. If the parties choose the arbitrators based on their qualifications or nationality, such choices can directly impact the *availability* of the existing 'blockchain arbitrators'. *A fortiori*, the parties cannot choose the applicable law to the arbitration itself or to the merits of the dispute either.

Nominating the arbitrators

In Kleros, one of the most popular blockchain arbitration applications, the candidates for adjudicators first self-select themselves into specific courts (i.e., specific types of disputes) and then, the final selection of the adjudicators is done randomly (meaning a party cannot directly nominate someone in particular as an arbitrator for the underlying dispute). As it specifies in its whitepaper[2] "*contracts will specify the options available for jurors to vote*", meaning the contract itself is the first factor that restrain party autonomy. In Kleros anyone can be an adjudicator. The probability of being drawn as an adjudicator for a dispute is proportional to the amount of tokens such user stakes within the platform.

Whilst other platforms such as Aragon[3] use the same drafting (of adjudicators) system, networks such as Jur[4], Mattereum and Sagewise[5] use a system that go a step closer to the International Arbitration legal framework (like the 1958 New York Convention, the UNCITRAL Model Law, etc.) in order to make their awards more enforceable worldwide but still lack the flexibility of a wider private autonomy and the role of the conflicts of laws, both present in classical international commercial arbitration processes.

These blockchain-based dispute resolution adjudicators are referred also as 'jurors'[6]. 'Jurors' are Blockchain users elected to vote in favor of one of the parties to the underlying dispute utilizing the Schelling Point method.

But without even analyzing what the Schelling Point methodology has to do with the art of rendering justice in a definitive and final manner, we must ask the question: if the 'jurors' have more features of a jury and not of an arbitrator, why do we call a mechanism that solves disputes through decisions made by jurors and not by arbitrators *arbitration*?

Moreover, these jurors, like users of the Blockchain, have a direct economic interest in serving as jurors in the dispute at hand[7]. However, to think that an arbitrator decided to assume the task of being a part of an arbitral tribunal in an international arbitration constituted to resolve an international dispute, only because that would mean eventually more money to him, is an obscure idea at best. Such arbitrator was elected because of his or her qualities, experience, background, and reputation. This also occurs in domestic arbitrations. Nonetheless, such private autonomy is not possible in some blockchain arbitrations.

It is one thing to refer to such mechanisms as blockchain-based methods. But it is completely different is to maintain that such mechanisms are indeed 'arbitrations' *stricto sensu****[8]***, just like suggested by many authors[9] and professional associations such as the Blockchain Arbitration Society

Although the global society must embrace all the tech innovations regarding dispute resolution, the clear definition of what is an '*arbitration*' and what is not should be a healthy practice.

Conclusion

Overall, the technology evolution within the dispute resolution mechanisms is here to stay. This disruption needs a twofold adaptation: on one hand, the parties on an international contractual commercial relationship must adapt themselves to the new ways of solving disputes. The same goes for Sovereign States, that must update their domestic and international legislation to recognize and somehow regulate such new dispute resolution mechanisms.

On the other hand, these platforms for dispute resolution must adapt to the historical surrounding of the conflict solving industry, calling a dispute resolution mechanism for what it is and avoid euphemisms.

Lastly, the misconception on the dispute resolution mechanisms and international arbitration procedures may provoke a confusion to the detriment of the users of such digital networks.

[1] See Charlie Morgan 'Will the Commercialisation of Blockchain Technologies

Change the Face of Arbitration?' [Kluwer Arbitration Blog, March 5, 2018] available at http://arbitrationblog.kluwerarbitration.com/2018/03/05/topic-to-be-confirmed/.

[2] Kleros white paper [September 2019] available at https://kleros.io/whitepaper.pdf.

[3] See "Juror staking" and " Juror drafting" https://github.com/aragon/whitepaper.

[4] See "Open Justice Platform" in Jur's whitepaper V 3.0.0 [March 2021], available at https://jur.io/wp-content/uploads/2021/03/jur-white-paper-v.3.0.0.pdf.

[5] See Darcy W.E. Allen, Aaron M. Lane & Marta Poblet, 'The Governance of Blockchain Dispute Resolution' [Harvard Negotiation Law Review, vol. 25, issue 1, Fall 2019] 75-102.

[6] Maxime Chevalier, 'From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order' [*Journal of International Dispute Settlement*, vol. 12, issue 4, December 2021] 558 – 584 https://academic.oup.com/jids/article-abstract/12/4/558/6414874?redirectedFrom=PDF.

[7] Kleros white paper [September 2019] available at https://kleros.io/whitepaper.pdf.

[8] See for example Sharath Mulia & Romi Kumari, 'Blockchain Arbitration: The Future of Dispute Resolution' [Fox Mandal, November 2021] available at https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/.

[9] For example, see Ritika Bansal, 'Enforceability of Awards from Blockchain Arbitrations in India [August 2019] available at: http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/.

Conference Report: EAPIL YRN Conference on National Rules on Jurisdiction and the Possible Extension of the Brussels Ia Regulation

The following conference report has been provided by Benjamin Saunier, Research Assistant at the Université Paris 2 Panthéon-Assas and Doctoral Candidate at the Université Paris 1 Panthéon-Sorbonne.

The EAPIL Young Research Network held a conference on the topic J**urisdiction over non-EU defendants – Should the Brussels Ia Regulation be extended?** on Saturday 14 and Sunday morning 15 May. The conference took place in Dubrovnik, Croatia, at the International University Centre operated by the University of Zagreb, which had co-funded the event together with the EU Commission. It gathered specialists from all over the world, including the non-EU Member States.

The conference was part of an ongoing research project directed by Drs Tobias Lutzi (Cologne/Augsburg), Ennio Piovesani (Torino) and Dora Zgrabljic Rotar (Zagreb). As explained by the organisers at the outset of the conference, the project, launched in June 2021, was inspired by Article 79 of the Brussels Ia Regulation, which provides for the EU Commission to come up with a report on the application of the Regulation, addressing in particular the need to extend its rules to defendants not domiciled in a member state. While the report has yet to be released, the organisers rightly felt it was of great interest to compare the practice of Member States for those cases where the defendant is not subject to rules of direct jurisdiction in the Regulation.

A questionnaire on autonomous, national law on international jurisdiction was

sent last year to the 23 participants in the project, who cover 17 Member States of the EU. The questionnaire contained the following questions (here summarised):

> – What are the sources of rules on international jurisdiction in your country?
> – How is the domicile defined for jurisdictional purposes? Is there a general rule of jurisdiction based on a ground other than domicile of the defendant?
> – Is there a *forum necessitatis*? What are the equivalents of the Regulation Article 7(1) for contractual claims, 7(2) for torts, 8(1) for close connection between defendants, and the equivalents of protective heads of jurisdiction such as the one for consumer law disputes?
> – Is your country party to any (bilateral or multilateral) treaty that provides direct rules of jurisdiction in civil and commercial matters?

The national reports were submitted last February and the organisers were able to share some of their (preliminary) conclusions, which will eventually make their way into a book along with the national reports and some of the interventions heard in Dubrovnik. Not all of the findings could be introduced in this report, which only serves as a short teaser for the book.

Tobias Lutzi pointed out that most of the states surveyed, which already make up for the majority of the EU Member States, have adopted specific rules for international jurisdiction. Some of these countries have already extended the rules of the Regulation, or taken substantial inspiration from them. Even courts of the member states that have not adopted specific rules on international jurisdiction did on some occasion take some inspiration from the EU rules when applying the principle of 'double functionality', which sees international jurisdiction as entailed by local jurisdiction. This was addressed in details by the members of the first panel of Saturday, which focused on the topic of the influence of EU law on national rules and was composed of **Tess Bens**, Dr **Stefano Dominelli**, Dr **Dafina Sarbinova** and **Benjamin Saunier**.

Dora Zgrabljic Rotar remarked that in most countries, the same definition of the domicile was applied in international and domestic cases for jurisdictional purposes (which is not to say that the definition itself is the same in all those countries). The majority of the jurisdictions surveyed use the statutory seat as well as the actual seat in order to determine the domicile of a legal person. As for

bases of general jurisdiction apart from the defendant's domicile, most of the countries surveyed seem to have one, be it habitual residence, mere presence, or property of the defendants. Only two of these countries still give relevance to nationality of either party to a litigation in that regard. The existence of a *forum necessitatis* is also a distinctive feature of the countries implementing it. Speakers of the second panel of Saturday (**Vassiliki Marazopoulo**, **Giedirius Ožiunas**, Dr **Ioannis Revolidis**, Dr **Anna Wysocka-Bar**), dealing with the peculiarities of autonomous law of the Member States, all had the opportunity of explaining, among other things, whether or not, and why, their home jurisdiction had a forum necessitatis rule.

The third panel of Saturday, composed of Professors **Ronald Brand**, **Burkard Hess** and **Margerita Salvadori** addressed the issue of "extending the Brussels Ia Regulation", which echoes the project title "should the Regulation be extended?". The panellists put things in a broad perspective, addressing the discrimination (Ronald Brand) and recognition and enforcement of judgements issues (Burkard Hess) that would be associated with an extension (or non-extension) of the Regulation, as well as the possibility of following a method based on reciprocity in an extended Regulation (Margerita Salvadori).

Participants were also provided with a look at the "bigger picture" thanks to the presentations on Sunday. Dr **Johannes Ungerer** for the UK and Dr **Marko Jovanovic** for Serbia both presented third state perspectives. Finally, Dr **Ning Zhao** gave a thorough presentation of the negotiations held in the Hague Conference since the early 1990s on the issues discussed at the conference, their achievements so far (2005 Choice-of-Court Agreements and 2019 Judgements conventions) and orientations.

The interventions and exchange among participants made for two very pleasant days. The gorgeous setting of Dubrovnik also played its part in making the conference a great success. As Ronald Brand put it, the question asked in the project title raises multiple further questions, so that it can be hoped that no matter what the future holds for the Brussels Ia Regulation, projects such as this one will be happening more and more.

The Chinese Court Recognizes an English Commercial Judgment for the First Time

The Chinese Court Recognizes an English Commercial Judgment for the First Time

Written by Zilin Hao, Anjie Law Firm, Beijing, China

Introduction

On 17 March 2022, Shanghai Maritime Court of PRC issued a ruling of recognizing and enforcing a commercial judgment made by the English High Court, with the approval of Supreme People's Court ("SPC"). This is the first time that Chinese court recognizes an English commercial judgment based on the principle of reciprocity, which is undoubtfully a milestone where the English court has not recognized the Chinese judgment before.

I. Case Overview

1. The Original English Judgments

18 March 2015, the high court of Queen's Bench Division (Commercial Court), England & Wales made a judgment on the case of Spar Shipping AS v Grand China Logistics Holding (Group) Company, Ltd (hereinafter "Spar Case") . In the Spar Case, the Claimant ("Spar") was the registered owner of three supramax bulk carriers each let on long term time charter to Grand China Shipping (Hong Kong) Co Ltd (hereinafter "GCS") with guarantees issued by the defendant, GCL, incorporated in Shanghai as the parent of the charterer. The charterer failed to pay hire on time and in September 2011 Spar withdrew the vessels and terminated the charterparties under the cancellation clause, which states: "If the vessel is off-hire for more than 60 days continuously, Charterers have the option to cancel this Charter Party.". Spar then sued the GCL under the guarantees, claiming the balance of hire unpaid under the charters and damages for loss of bargain in respect of the unexpired term of the charters.

In the first instance, Mr Justice Popplewell J. concluded that payment of hire by the Charterers under the three charters was not a condition to cancel charterparties but the liberty to withdraw the vessel from service. The judge also held that payment of hire was that the charterer had renounced the charter parties and that the shipowner was entitled to about USD 24 million in damages for loss of bargain in respect of the unexpired terms of the charter parties. The decision was appealed, the English Court of Appeal upheld the judgment of first instance and ordered the charterers' parent company GCL as guarantor to pay the shipowner the amounts due under the three charterparties including damages plus interest and costs.

2. The Chinese Ruling- (2018) Hu72Xie Wai Ren No.1
In March 2018, the applicant of Norwegian shipowner applied to the Shanghai Maritime Court, the competent court where the respondent is located, for recognition of the judgment of the English court. On March 17, 2022, the Shanghai maritime court finally made a civil ruling to recognize the judgment made by the English court involved in the case.

According to the ruling, the key issues in this judicial cooperation case are as follows: (1)Whether there is a reciprocal relationship between China and the UK on the recognition and enforcement of civil judgments, including whether there are precedents for English courts to recognize and enforce Chinese court judgments and whether there are precedents for refusing to recognize and enforce Chinese court judgments; (2) In the absence of reciprocal precedent, whether the Chinese court can recognize the judgment of the English court based on the principle of reciprocity; (3)Whether the injunction system of the English court constitutes a reason for refusing to recognize the judgment of the English court; (4) Whether the fines for interest and expenses claimed by the applicant fall within the admissible scope of foreign judgment.

After hearing, the Shanghai Maritime Court decided to recognize the judgment of the English court. Firstly, the PRC Ruling considered that the PRC and United Kingdom have not concluded or acceded to treaties on mutual recognition and enforcement of court judgments in civil and commercial matters, so the principle of reciprocity should be taken as the basis for the recognition of an English Judgment. The claimant argued that "the judgment of Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd, [2015] EWHC 999 (Comm) of the English High Court of Justice Queen's Bench Division Commercial Court

(hereinafter “Spliethoff Case”) could be regarded as positive precedent of Chinese judgments recognised and enforced by English Courts. In this Case, the English court confirmed that another Chinese judgment in Rongcheng Xixiakou Shipbuilding Co., Ltd., Wartsila engine (Shanghai) Co., Ltd. v. Wartsila Finland Oy decided by Shandong High Court (hereinafter “Xixiakou Case”) was effective and enforceable, but did not actually enforce it. This opinion was not adopted by the Shanghai Maritime Court.

Despite the above, the Shanghai Maritime Court held that “when stipulating the principle of reciprocity, the Civil Procedure Law of the People’s Republic of China does not limit it to that the relevant foreign court must first recognize the civil and commercial judgment of Chinese court. If there are possibilities that the civil and commercial judgment made by Chinese court can be recognized and enforced by the foreign court, it can be considered that there is reciprocity between the two jurisdictions.” Therefore, even if in the absence of reciprocal precedent, the Chinese court still can recognize the judgment of the English court based on the principle of reciprocity.

Secondly, in terms of the anti-suit injunction in the English judicial system, the Shanghai Maritime Court held that in this specific case, the English courts did not issue anti-suit injunctions to prohibiting the parties from litigating in foreign courts. Both parties have agreed that the English court has the jurisdiction and the English court asserted jurisdiction based on the choice of court agreement. The existence of anti-suit injunction in the foreign legal system is not a reason to make foreign judgments unenforceable in China.

Thirdly, in terms of an error in the application of law in the English judgment, the Shanghai Maritime Court held that this was a substantive matter and was not subject to judicial review in recognition and enforcement of foreign judgments. And even if the error of applying the law is indeed proved, it will constitute the reason for refusing recognition and enforcement only when it violates the basic principles, public order and social public interests under the PRC legislation.

Finally, the Shanghai Maritime Court decided that the interest, expenses and fines in this case were due to the respondent’s failure to perform its payment obligations, which were “monetary debt” and admissible matters for recognition and enforcement of the English judgment.

II. Comments

On 31 December 2021, shortly before this ruling, the SPC issued a memorandum on commercial and maritime matters entitled "Memorandum of the National Courts' Symposium on Trials for Commercial and Maritime Cases" (hereinafter "Memorandum"). Article 44 of the Memorandum provided that "When hearing a case applying for recognition and enforcement of a judgment of a foreign court, the people's court may recognize that there is a reciprocal relationship under any of the following circumstances: (1) according to the law of the country where the court is located, the civil and commercial judgments made by the People's Court can be recognised and enforced by the courts of that country; (2) China has reached a memorandum or consensus of mutually reciprocity with the country where the court is located; (3) the country where the foreign court is located has made reciprocal commitments to China through diplomatic channels or China has made reciprocal commitments to the country where the court is located through diplomatic channels, and there is no evidence that the country where the court is located has refused to recognize and enforce the judgments and rulings made by Chinese courts on the ground that there is no reciprocal relationship. Obviously, the principle of the ruling that Shanghai Maritime Court made to recognize English judgment was consistent with the Memorandum.

Article 288 of the Civil Procedure Law of PRC (hereinafter "CPL") and article 544 of the Judicial Interpretation of CPL issued by the SPC both make reciprocity one of the bases for recognizing and enforcing foreign judgments. When China has committed more to international connection and cooperation, the application of the principle of reciprocity in judicial practice is gradually getting more flexible. The court abandoned the previous rigid 'de facto' reciprocity and adopts the "legal reciprocity" or "de jure reciprocity". As long as the Chinese judgment can be recognized and enforced according to the law of the country where the foreign court is located, the reciprocal relationship exists. According to the Memorandum, the courts of China shall examine and determine whether there is a reciprocal relationship case by case.

Since the UK not a Belt and Road Initiative ("BRI") country, this case shows China adopts a liberal and flexible approach to enforce foreign judgments as a general policy. Chinese courts also adopts a minimum-review approach to review foreign judgments, which is clearly favourable to foreign judgment enforcement. It indicates China continues an open attitude to international commerce and judicial

cooperation in civil and commercial matters.

1. Spar Shipping as v Grand China Logistics Holding (Group) Company Ltd, [2015] EWHC 718 (Comm).
2. Michael Volikas, Court finds payment of charter hire is not a condition: Astra not followed, 20 March 2015, available at https://www.incegd.com/en/news-insights/.
3. Yang Yang and Patrick Lee, PRC Court recognizes an English judgment for the first time – a Gard perspective, 12 April 2022, available at https://www.gard.no/web/updates/content.
4. Grand China Logistics Holding (Group) Co. Ltd v Spar Shipping AS, [2016] EWCA CIV 982.
5. Spar Shipping AS (2018) Hu 72 Xie Wai Ren No 1.
6. Yang Wengui and Luo Yi, The Chinese court recognized the commercial judgment of the British court for the first time (translated), Chinese version published on 24 March 2022, available at HAI TONG & PARTNERS websitehttps://www.haitonglawyer.com/news/598.html. HAI TONG & PARTNERS is the law firm entrusted by the applicant before Shanghai Maritime Court in this case.
7. Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd [2015] EWHC 999 (Comm) (17 April 2015).
8. Case No.: (2013) Lu Min Si Zhong Zi No. 87, accordingly the case number of the first-instance judgment is Qingdao Maritime Court (2011) Qinghai Fa Hai Shang Chu Zi No. 271.
9. WANG Limin and DING Qixue, Report on the trial of Xixiakou Shipyard Case of Qingdao Maritime Court, published on 24 Arial 2014, available at http://qdhsfy.sdcourt.gov.cn/qdhsfy/394069/394047/548075/index.html.
10. Wang Beibei, Key points of "Memorandum of the National Courts' Symposium on Trials for Commercial and Maritime Cases", published on the official social media account of Shanghai Second Intermediate People's Court "SJ-Research", 5 May 2022.

Conflict of Laws of Freedom of Speech on Elon Musk's Twitter

Elon Musk's purchase of Twitter has been a divisive event. Commenting on the response on Twitter and elsewhere, Musk tweeted:

> *The extreme antibody reaction from those who fear free speech says it all*
>
> >
>
> *By "free speech", I simply mean that which matches the law.*
>
> *I am against censorship that goes far beyond the law.*
>
> *If people want less free speech, they will ask government to pass laws to that effect.*
>
> *Therefore, going beyond the law is contrary to the will of the people.*

Ralf Michaels quote-tweeted perceptively: 'But which law?'

Twitter and the conflict of laws

By their very nature, digital platforms like Twitter present a variety of conflict of laws issues.

'Twitter' is not a monolithic entity. The functionality of the social media platform with which readers would be familiar is underpinned by a transnational corporate group. Twitter, Inc is incorporated in Delaware, and has various subsidiaries around the world; Twitter International Company, for example, is incorporated in Ireland and responsible as data controller for users that live outside of the United States. The business is headquartered in San Francisco but has offices, assets, and thousands of staff around the world.

The platform is populated by 400 million users from all over the world. After the US, the top 5 countries with the most Twitter users are comprised of Japan, India, the UK and Brazil. The tweets and retweets of those users may be seen all over

the world. Users have wielded that functionality for all sorts of ends: to report on Russia's war in real-time; to coordinate an Arab Spring; to rally for an American coup d'état; to share pictures of food, memes, and endless screams; and to share conflict of laws scholarship.

Disputes involving material on Twitter thus naturally include foreign elements. Where disputes crystallise into litigation, a court may be asked to consider what system of law should determine a particular issue. When the issue concerns whether speech is permissible, the answer may be far from simple.

Free speech in the conflict of laws

The treatment of freedom of speech in the conflict of laws depends on the system of private international law one is considering, among other things. (The author is one of those heathens that eschews the globalist understanding of our discipline.)

Alex Mills has written that the balance between free speech and other important interests 'is at the heart of any democratic political order'.[1] Issues involving free speech may thus engage issues of public policy, or *ordre public*,[2] as well as constitutional considerations.

From the US perspective, the 'limits of free speech' on Twitter is likely to be addressed within the framework of the First Amendment, even where foreign elements are involved. As regards private international law, the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 28 USC 4101- 4105 ('SPEECH Act') is demonstrative. It operates in aid of the constitutional right to freedom of expression and provides that a US 'domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that' the relevant foreign law would provide the same protections for freedom of speech as would be afforded by the US Constitution.[3]

Other common law jurisdictions have approached transnational defamation issues differently, and not with explicit reference to any capital-c constitutional rights. In Australia, the High Court has held that the *lex loci delicti* choice-of-law rule combined with a multiple publication rule means that defamation is determined by the law of the jurisdiction in which a tweet is 'available in comprehensible form': the place or places it is downloaded.[4] In contrast, where a claim concerns

a breach of confidence on Twitter, an Australian court is likely to apply the equitable principles of the *lex fori* even if the information was shared into a foreign jurisdiction without authorisation.[5] In either case, constitutional considerations are sidelined.

The balance to be struck between free speech on the one hand, and so-called 'personality rights' on the other, is a controversial issue within a legal system, let alone between legal systems. So for example, the choice-of-law rule for non-contractual obligations provided by the Rome II Regulation does not apply to personality rights, as a consensus could not be reached on point.[6] Similarly, defamation and privacy are excluded from the scope of the HCCH Judgments Convention by Art 2(1)(k)–(l).

There is a diversity of approaches to choice of law for cross-border infringements of personality rights between legal systems.[7] But the 'law applicable to free speech on Twitter' is an issue that goes far broader than personality rights. It touches on as many areas of law as there are aspects of human affairs that are affected by the Twitter platform. For example, among other things, the platform may be used to:

- spread misrepresentation about an election, engaging electoral law;
- influence the price of assets, engaging banking and finance law; or
- promote products, engaging consumer law.

Issues falling into different areas of law may be subject to different choice-of-law rules, and different systems of applicable law. What one system characterises as an issue for the proper law of the contract could be treated as an issue for a forum statute in another.

All of this is to say: determining what 'the law says' about certain content on Twitter is a far more complex issue than Elon Musk has suggested.

The law applicable to online dignity

Key to the divisiveness of Musk's acquisition is his position on content moderation. Critics worry that a laissez-faire approach to removing objectionable

content on the platform will lead to a resurgence of hate speech.

Musk's vision for a freer Twitter will be subject to a variety of national laws that seek to protect dignity at the cost of free speech in various ways. For example, in April, the European Parliament agreed on a 'Digital Services Act', while in the UK, at the time of writing, an 'Online Safety Bill' is in the House of Commons. In Australia, an Online Safety Act was passed in 2021, which provided an 'existing Online Content Scheme [with] new powers to regulate illegal and restricted content no matter where it's hosted'. That scheme complements various other national laws, like our Racial Discrimination Act 1975, which outlaws speech that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and was done because of the race, colour or national or ethnic origin of the person or group.

When a person in the United States posts content about an Australian that is permissible under US law, but violates Australian statute, the difficulty of Musk's position on the limits of censorship becomes clear. Diverse legal systems come to diverse positions on the appropriate balance between allowing online freedom and protecting human dignity, which are often struck with mandatory law. When your platform is frequented by millions of users all over the world, there is no single 'will of the people' by which to judge. Perhaps Musk will embrace technological solutions to give effect to national standards on what sort of content must be censored.

A host of other conflicts issues

Musk-era Twitter is likely to pose a smorgasbord of other issues for interrogation by conflict of laws enthusiasts.

For example: legal systems take diverse approaches to the issue of whether a foreign parent company behind a platform like Twitter can be imposed with liability, or even criminal responsibility, for content that is on the platform. While conservatives in America consider the fate of s 230 of the Communications Decency Act—a provision that means that Twitter is not publisher of content they host—other countries take a very different view of the issue. Litigation involving the companies behind Twitter is likely to engage courts' long-arm jurisdiction.

Perhaps the thorniest conflicts problem that may emerge on Musk's Twitter is the scope of national laws that concern disinformation. In an announcement on 25 April, Musk stated:

> *'Free speech is the bedrock of a functioning democracy, and Twitter is the digital town square where matters vital to the future of humanity are debated'.*

Recent years have shown that the future of humanity is not necessarily benefited by free speech on social media. How many lives were lost as a result of vaccine-scepticism exacerbated by the spread of junk science on social media? How many democracies have been undermined by Russian disinformation campaigns on Twitter? The extraterritorial application of forum statutes to deal with these kinds of issues may pose a recurring challenge for Musk's vision.[8] I look forward to tweeting about it.

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[1] Alex Mills, 'The Law Applicable to Cross-border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?' (2015) 7 *Journal of Media Law* 1, 21.

[2] See, eg, International Covenant on Civil and Political Rights, art 19(3).

[3] SPEECH Act s 3; United States Code, title 28, Part VI, § 4102. See generally Lili Levi, 'The Problem of Trans-National Libel' (2012) 60 *American Journal of Comparative Law* 507.

[4] *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

[5] But see Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41 *UNSW Law Journal* 490.

[6] Art 4(1); see Andrew Dickinson, *The Rome II Regulation* (Oxford University Press, 2008).

[7] See generally Symeon C Symeonides, *Cross-Border Infringement of Personality Rights via the Internet* (Brill, 2021) ch VI; Tobias Lutzi, *Private International Law Online: Internet and Civil Liability in the EU* (Oxford University Press, 2020) ch 4.

[8] See generally Matthias Lehmann, 'New Challenges of Extraterritoriality: Superposing Laws' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar, 2019) ch 10.

The CISG Applies to Hong Kong and Mainland China Now: Shall Macau Follow Suit?

(This post is provided by Zeyu Huang & Wenhui Chi. Mr. Huang practises law as a Shenzhen-based associate at Hui Zhong Law Firm. He holds LLB (Renmin U.), LLM & PhD (Macau U.). Ms. Chi is now working as a legal counsel at the Shenzhen Court of International Arbitration (SCIA) and the South China International Arbitration Center (Hong Kong) (SCIAHK). She holds BA (PKU), LLM & JD (PKU School of Transnational Law). The authors may be contacted at huangzeyu@huizhonglaw.com or chiwenhui@scia.com.cn.)

The People's Republic of China (hereinafter "China" or "PRC") deposited its instrument of ratification for the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG") on 11 December 1986. Since its entry into force in 1988, it is beyond doubt that CISG applies to the territory of Mainland China albeit with some reservations and/or declarations (e.g. Article 96). However, businesspeople, courts, practitioners and scholars are split, uncertain and inconsistent over the issue whether the CISG should extend to Hong Kong and Macau after their returns respectively in 1997 and 1999. [1]

This issue stemed from the unclear intentions of China when it submitted the diplomatic notes to the United Nations, which purported to inform the Secretary-General of the status of Hong Kong and Macau in relation to deposited treaties. [2] However, China did not mention CISG in the Diplomatic Notes at all. As a result, whether China had expressed its intention of extending or excluding CISG to Hong Kong and Macau has been subject to inconsistent interpretations and enquires conducted by different non-Hong Kong fora. [3]

To solve this problem, China, after seeking the views of Hong Kong SAR Government, determined to actively remove the uncertainty by depositing a declaration of extension of the territorial application of CISG to Hong Kong on 5 May 2022. [4] On and after 1 December 2022, CISG will apply to both Hong Kong and Mainland China. It should be noted that the declaration that China is not bound by Article 1(1)(b) CISG does not apply to Hong Kong. Nevertheless, it remains to be seen whether the Macau SAR government will follow suit on this matter, requesting the Central Government to extend the application of CISG to Macau.

Extension of International Treatises Ratified by China to Hong Kong and Macau

The issue of whether international treaties ratified by China 'automatically' applies to the territory of the Hong Kong and Macau SARs was once hotly debated in the investor-State arbitration cases of *Tza Yap Shum v. Peru* [5] and *Sanum v. Laos-I* [6]. Contrary to international tribunals and the Court of Appeal of Singapore's confirmative and liberal stances, Chinese government and commentators said no. [7] They all insist that China has made its intentions clear in the Diplomatic Notes that the treaty to which China is or will become a party applies to Hong Kong and Macau only after China has decided so and carried out separately the formalities for such application. [8] Moreover, the extension of territorial application to Hong Kong and Macau must be in line with the "One

Country, Two Systems" policy and the Basic Laws of Hong Kong and Macau. [9] Accordingly, the PRC Central People's Government in Beijing has the final say over whether the international treaty to which China is or will be a party applies to Hong Kong and Macau after consulting with the two SARs' governments.

The same problem stays with the applicability of CISG in the Hong Kong and Macau SARs. On the one hand, no mention of CISG in the Diplomatic Notes submitted by China, at least on the side of Hong Kong, demonstrates China's true intentions in public international law that the CISG shall not apply in the SAR. [10] In this view embraced by some French and US courts, China's Diplomatic Notes not mentioning CISG qualify as Article 93(1) CISG reservation indicating that CISG does not apply to Hong Kong and Macau. [11] On the other hand, some other foreign courts considered the Diplomatic Notes did not constitute an Article 93(1) CISG reservation and therefore the default rule in Article 93(4) applies, saying that CISG 'automatically' applies to all territorial unites of China. [12] This interpretive approach is similar to the confirmative and liberal approach adopted by the tribunals in *Tza Yap Shum v. Peru* and *Sanum v. Laos-I* on the issue whether Chinese investment treaty absent in the Diplomatic Notes extends to territory of the Hong Kong and Macau SARs. However, such approach was often criticized as contrary to China's expressed intentions. [13]

What Does It Mean for Hong Kong?

Legally speaking, the act of China's depositing the declaration of extension of CISG to Hong Kong has three implications.

Firstly, and most obviously, on and after 1 December 2022 it would be correct for any foreign court or international tribunal to hold that CISG applies to Hong Kong. This will wipe out the "confusion and conflict as to whether or not China's diplomatic notes for Hong Kong and Macao, deposited in 1997 and 1999 respectively, are sufficient to exclude the application of the CISG" to Hong Kong

and Macau under Article 93 CISG. [14] Indeed, they are sufficient; but China has now decided to reverse its previous intention.

Secondly, China has impliedly confirmed that the Diplomatic Notes qualify as Article 93(1) CISG reservation, which means CISG would not automatically apply to territorial units of China such as Hong Kong and Macau unless China has determined so. In other words, China's Central People's Government has the final say on whether a Chinese international treaty applies to Hong Kong and Macau or not.

Thirdly, any construction of the Diplomatic Notes by foreign courts or arbitral tribunals which leads to the 'automatic' application of CISG or other international treaties (including Chinese investment agreements) to Hong Kong and Macau would be incorrect and in disregard of China's true intentions expressed in the Diplomatic Notes. This will possibly prevent foreign courts or investment arbitration tribunals from easily reaching the decision that CISG or Chinese international investment agreement 'automatically' applies to Hong Kong and Macau. It also means Hong Kong might need seek the views of Central People's Government on whether or not to extend Chinese international investment agreement to the Hong Kong SAR, especially in cases where the Hong Kong investors intend to rely on these international instruments to safeguard their rights and interests in investments made overseas.

In parallel with the ongoing Reform and Opening-up within and beyond China, China's accession to CISG has fundamentally shaped the legislative and judicial landscape of codifying Chinese contract law. It is believed that the Ordinance [15] implementing the CISG in Hong Kong would for sure reshape the legislative and judicial landscape of Hong Kong law. [16]

Conclusion: Shall Macau Follow Suit?

The answer is of course yes. As another major player in the Belt and Road Initiative (BRI) and Greater Bay Area (GBA) in China, Macau is now confronted with the same "confusion and conflict" issue once faced by Hong Kong before 5 May 2022. As mentioned earlier, such "confusion and conflict" as to whether the Diplomatic Notes are sufficient to exclude the application of CISG and other international treaties not mentioned therein to Hong Kong and Macau has been removed. China impliedly reiterated itself through this act of extending CISG to Hong Kong that the Diplomatic Notes are sufficient to do so.

Hence, whether CISG or Chinese investment treaty extends to Macau is likewise subject to the final decision of China's Central People's Government. Despite divergent opinions and interpretations, Chinese government's stance has been consistent – CISG or Chinese international investment agreement outside the Diplomatic Notes does not 'automatically' applies to Hong Kong and Macau, and such extension needs the Central People's Government's final approval. Therefore, according to Article 138(1) of the Macau Basic Law, Macau should follow up on future consultations with the Central People's Government in Beijing to decide whether the CISG (and Chinese investment treaty) should apply to the Macau SAR, and if so, how they should apply. It is foreseeable that China would probably also deposit another separate instrument of extending the application of CISG to Macau. By then, perhaps we can see the dawn of unifying the sales law as key part of inter-regional private laws within the PRC.

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Endnotes

[1] See the Department of Justice of Hong Kong, Consultation Paper titled "Proposed Application of The United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region" (hereinafter "Consultation Paper"), Consultation Period expired by 30 December 2020, paras. 3.33-3.44. It is available at https://www.gov.hk/en/residents/government/publication/consultation/docs/2020/CISG.pdf.

[2] See United Nations, 'Multilateral Treaties Deposited with the Secretary-General' (hereinafter "Diplomatic Notes"), China: Notes 2 and 3, which informed the Secretary-General of the status of Hong Kong and Macau in relation to treaties deposited with the Secretary-General. The diplomatic notes laid out the deposited treaties that would respectively apply to Hong Kong and Macau.

[3] See Consultation Paper, *supra* note 1, paras. 3.38-3.39.

[4] For Press Release, see https://unis.unvienna.org/unis/en/pressrels/2022/unisl327.html.

[5] See *Tza Yap Shum v. Peru,* ICSID Case No. ARB/07/6, Award, 7 July 2011, where a Hong Kong resident having Chinese nationality relied upon the Peru-China BIT 1994 to bring the ICSID arbitration against Peru.

[6] See *Sanum Investments Ltd. v. Lao People's Democratic Republic*, PCA Case No. 2013-13, Decision on Jurisdiction of 13 December 2013, where a Macau-based company invoked the China-Laos BIT 1993 to initiate the UNCITRAL ad hoc arbitration administered by PCA against Laos.

[7] See e.g., PRC Ministry of Foreign Affairs, 'Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on October 21, 2016', available at https://www.mfa.gov.cn/ce/cegv//eng/fyrth/t1407743.htm; An Chen, 'Queries to the Recent ICSID Decision on Jurisdiction Upon the Case of *Tza Yap Shum v. Republic of Peru*: Should China-Peru BIT 1994 Be Applied to Hong Kong SAR under the "One Country, Two Systems" Policy?' (2009) 10 *Journal of World Investment & Trade* 829, at 832-844.

[8] See Diplomatic Notes, *supra* note 2.

[9] See Article 153 of the Hong Kong Basic Law and Article 138 of the Macau Basic Law.

[10] See Consultation Paper, *supra* note 1, paras. 3.42 ("While it is not disputed that in Hong Kong at least, the CISG should not apply ….").

[11] See *ibid*, at para. 3.38. The Consultation Paper cited the following cases: *Telecommunications Products* Case, Cour de Cassation, Case No. 04-117726, 2 April 2008 (France); *Innotex Precision Ltd v Horei Image Products*, 679 F. Supp. 2d 1356 (2009) (US); *America's Collectibles Network Inc. v Timlly (HK) Ltd*., 746

F. Supp. 2d 914 (2010) (US); *Wuhan Yinfeng Data Network Co. Ltd. v Xu Ming* (19 March 2003), Hubei High People's Court (China).

[12] See *ibid*, at para. 3.39. The Consultation Paper cited the following cases: *CNA Int'l Inc. v Guangdong Kelon Electronical Holdings et al*. Case No. 05 C 5734 (2008) (US); *Electrocraft Arkansas, Inc. v Super Electric Motors Ltd.* (2009) 4:09 CV 00318 SWW (US).

[13] See Consultation Paper, *supra* note 1, para. 3.42. See also Mahdev Mohan & Siraj Shaik Aziz, 'Construing A Treaty Against States Parties' Expressed Intentions: *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*' (2018) 30 *Singapore Academy of Law Journal* 384.

[14] See Consultation Paper, *supra* note 1, para. 3.42.

[15] https://www.elegislation.gov.hk/hk/cap641!en.

[16] For comparison between the CISG and Hong Kong law, see Consultation Paper, *supra* note 1, para. 2.8.