How to Criticize U.S. Extraterritorial Jurisdiction (Part I)

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China has been critical of U.S. extraterritorial jurisdiction. In February, China's Ministry of Foreign Affairs issued a report entitled "The U.S. Willful Practice of Long-arm Jurisdiction and its Perils." In the report, the Ministry complained about U.S. secondary sanctions, the discovery of evidence abroad, the Helms-Burton Act, the Foreign Corrupt Practices Act, the Global Magnitsky Human Rights Accountability Act, and the use of extraterritorial jurisdiction in criminal cases. The report claimed that U.S. extraterritorial jurisdiction has caused "severe harm … to the international political and economic order and the international rule of law."

There are better and worse ways to criticize U.S. extraterritorial jurisdiction. The Ministry of Foreign Affairs report pursues some of the worse ways and neglects some better ones. In this post, I discuss a few of the report's shortcoming. In a second post, I discuss stronger arguments that one could make against U.S. extraterritorial jurisdiction.

Confusing Extraterritorial Jurisdiction with Personal Jurisdiction

One problem with the report is terminology. The report repeatedly uses the phrase "long-arm jurisdiction" to refer to the extraterritorial application of U.S. law. The United States, the report says, has "expand[ed] the scope of its long-arm jurisdiction to exert disproportionate and unwarranted jurisdiction over extraterritorial persons or entities, enforcing U.S. domestic laws on extraterritorial non-US persons or entities, and wantonly penalizing or threatening foreign companies by exploiting their reliance on dollar-denominated businesses, the U.S. market or U.S. technologies."

In the United States, however, "long-arm jurisdiction" refers to the exercise of personal jurisdiction over non-resident defendants based on contacts with the forum state. The report seems to recognize this, referring in its second paragraph to the U.S. Supreme Court's decision in *International Shoe Co. v. Washington* (1945) and the requirement of "minimum contacts." But the report goes on use "long-arm jurisdiction" to refer the extraterritorial application of U.S. law. This is more than an academic quibble. Jurisdiction to prescribe (the authority to make law) and jurisdiction to adjudicate (the authority to apply law) are very different things and are governed by different rules of domestic and international law.

The report's confusion on this score runs deeper than terminology. The Ministry of Foreign Affairs seems to think that the United States uses the concept of "minimum contacts" to expand the extraterritorial application of U.S. law. The United States "exercises long-arm jurisdiction on the basis of the 'minimum contacts' rule, constantly lowering the threshold for application," the report states. "Even the flimsiest connection with the United States, such as having a branch in the United States, using [the] U.S. dollar for clearing or other financial services, or using the U.S. mail system, constitutes 'minimum contacts.'"

In fact, the requirement of "minimum contacts" for personal jurisdiction is quite stringent. Moreover, as I have recently noted, this requirement serves to *limit* the extraterritorial application of U.S. law rather than expand it. When foreign defendants lack minimum contacts with the United States, U.S. courts cannot exercise personal jurisdiction and thus cannot apply U.S. laws extraterritorially even when Congress wants them to. The Helms-Burton Act (one of the laws about which China's Ministry of Foreign Affairs complains) is an example of this. Congress clearly intended its cause of action for trafficking in confiscated property to discourage non-U.S. companies from investing in Cuba. But U.S. courts have been unable to apply the law to foreign companies because they have concluded that those companies lack "minimum contacts" with the United States.

China's complaint is not against U.S. rules of personal jurisdiction or the requirement of "minimum contacts." It is rather with the extraterritorial application of U.S. law. Using the phrase "long-arm jurisdiction" confuses the two issues.

Criticizing Extraterritorial Jurisdiction that China Exercises Too

The report also criticizes the United States for applying its law extraterritorially based on effects: "the United States has further developed the 'effects doctrine,' meaning that jurisdiction may be exercised whenever an act occurring abroad produces 'effects' in the United States, regardless of whether the actor has U.S. citizenship or residency, and regardless of whether the act complies with the law of the place where it occurred." This is true. For example, the U.S. Supreme Court has held that U.S. antitrust law "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."

But China also applies its law extraterritorially based on effects. China's Anti-Monopoly Law provides in Article 2 that it applies not only to monopolistic practices in the mainland territory of the People's Republic of China but also "to monopolistic practices outside the mainland territory of the People's Republic of China that eliminate or restrict competition in China's domestic market." In 2014, China blocked an alliance of three European shipping company because of possible effects on Chinese markets.

China regulates extraterritorially on other bases too. Although the Ministry of Foreign Affairs characterizes the extraterritorial application of U.S. criminal law as "an extreme abuse," China applies its criminal law extraterritorially on all the bases that the United States employs. The Criminal Law of the People's Republic of China asserts jurisdiction based not just on territory (Article 6), but also on effects (Article 6), nationality (Article 7), passive personality (Article 8), the protective principle (Article 8), and universal jurisdiction (Article 9). Each of these bases for jurisdiction to prescribe is consistent with customary international law, and China has the right to extend its criminal law extraterritorially like this. But so does the United States.

In their excellent article *Extraterritoriality of Chinese Law: Myths, Realities and the Future*, Zhengxin Huo and Man Yip provide a detailed discussion of the extraterritorial application of Chinese law. "China's messaging to the international community is," they note, "somewhat confusing: it opposes the US practice of 'long-arm jurisdiction,' yet it has decided to build its own legal system of extraterritoriality." By criticizing the United States for exercising jurisdiction

on the same bases that China itself uses, China opens itself to charges of hypocrisy.

Ignoring Constraints on U.S. Extraterritoriality

The Ministry of Foreign Affairs report also ignores important constraints on the extraterritorial application of U.S. law. It says the United States has "developed a massive, mutually reinforcing and interlocking legal system for long-arm jurisdiction" and has "put in place a whole-of-government system to practice long-arm jurisdiction."

In fact, U.S. courts limit the extraterritorial application of U.S. law in significant ways. First, as noted above, U.S. rules on personal jurisdiction (including "minimum contacts") limit the practical ability of the United States to apply its laws abroad. As I have written before, "Congress cannot effectively extend its laws extraterritorially if courts lack personal jurisdiction to apply those laws."

Second, U.S. courts apply a presumption against extraterritoriality to limit the reach of federal statutes. Most recently, in *Abitron Austria GmbH v. Hectronic International, Inc.* (2023), the Supreme Court held that federal statutes should be presumed to apply only to conduct in the United States unless those statutes clearly indicate that they apply extraterritorially. At issue in *Abitron* was the federal trademark statute, which prohibits use of a U.S. trademark that is likely to cause confusion in the United States. The defendants put U.S. trademarks on products in Europe, some of which were ultimately sold to the United States. The dissent argued that the statute should apply to foreign conduct as long as the focus of Congress's concern—consumer confusion—occurred in the United States. But the majority disagreed, holding that there must also be conduct in the United States. As I have noted previously, this version of the presumption has the potential to frustrate congressional intent when Congress focuses on something other than conduct.

Third, some lower courts in the United States impose additional limits on the extraterritorial application of U.S. law when foreign conduct is compelled by foreign law. In 2005, U.S. buyers sued Chinese sellers of vitamin C for fixing the prices of vitamins sold to the United States. The U.S. court found the Chinese sellers liable for violating U.S. antitrust law and awarded $147 million in damages. Although the anticompetitive conduct occurred in China, it had effects

in the United States because vitamins were sold at higher than market prices in the United States.

The Chinese companies appealed, arguing that they were required by Chinese law to agree on export prices. The case went all the way to the U.S. Supreme Court on the question of how much deference to give the Chinese government's interpretation of its own law. Ultimately, in 2021, the Second Circuit Court of Appeals held that Chinese law did indeed require the anticompetitive conduct and that the case should therefore be dismissed on grounds of international comity because China had a stronger interest in applying its law than the United States did. This is a remarkable decision. Although Congress clearly intended U.S. antitrust law to apply to foreign conduct that causes anticompetitive effects in the United States, and although applying U.S. law based on effects would not violate international law, the U.S. court held that the case should be dismissed in deference to Chinese law.

To be clear, I disagree with these constraints on the extraterritorial application of U.S. laws. I think Congress should have more authority to define rules of personal jurisdiction, particularly when it wants its laws to apply outside the United States. I disagree with *Abitron*'s conduct-based version of the presumption against extraterritoriality. And I filed two separate amicus briefs (with Paul Stephan) urging the Supreme Court to take up the international comity question and make clear that lower courts have no authority to dismiss claims like those in Vitamin C that fall within the scope of U.S. antitrust law. But whether these constraints are wise or not, ignoring them provides a distorted picture of U.S. extraterritorial jurisdiction.

Weak Examples

The Ministry of Foreign Affairs also weakens its case by relying on examples that do not support its arguments. The report singles out the indictment of French executive Frédéric Pierucci for violating the U.S. Foreign Corrupt Practices Act (FCPA), a story he recounts in his 2019 book *The American Trap.* Here is how the report describes what happened:

> *In 2013, in order to beat Alstom in their business competition, the United States applied the Foreign Corrupt Practices Act to arrest and detain Frédéric Pierucci on charges of bribing foreign officials. He was further induced to sign*

> *a plea deal and provide more evidence and information against his company, leaving Alstom no choice but to accept General Electric's acquisition, vanishing ever since from the Fortune 500 list. The U.S. long-arm jurisdiction has become a tool for its public power to suppress competitors and meddle in normal international business activities, announcing the United States' complete departure from its long-standing self-proclaimed champion of liberal market economy.*

I have read Pierucci's book, and his story is harrowing. But the book does not show what the report claims.

First, and perhaps most significantly, application of the FCPA in this case was not extraterritorial. Pierucci was indicted for approving bribes paid to Indonesian officials to secure a contract for Alstrom from his office in Windsor, Connecticut (p. 65). He seems to acknowledge that the bribes violated the FCPA but counters that the statute was "very poorly enforced" at the time (p. 67) and that he "received no personal gain whatsoever" (p. 71). These are not valid defenses under U.S. law.

Second, Pierucci was not arrested to facilitate GE's acquisition of Alstom. The U.S. Department of Justice (DOJ) began investigating Alstom's payment of bribes in late 2009 (p. 54), and Pierucci was arrested in April 2013 (p. 1). Alstom's takeover discussions with GE began during the summer of 2013 (p. 162), and the deal was made public in April 2014 (p. 155). Pierucci plausibly claims that GE took advantage of Alstom's weakened position, noting that "Alstom is the fifth company to be swallowed up by GE after being accused of corruption by the DOJ" (p. 164). But I saw no claim in the book that DOJ's investigation of Alstom was intended to bring about its acquisition by a U.S. competitor.

Finally, it is hard to credit the report's assertion that prosecuting bribery constitutes "meddl[ing] in normal international business activities." China has joined the U.N. Convention Against Corruption. In 2014, China fined British company GlaxoSmithKline 3 billion yuan (U.S.$489 million) for bribing Chinese doctors. Earlier this year, China launched an unprecedented campaign against corruption in its health care industry. And, of course, fighting corruption remains a top priority of President Xi Jinping.

Conclusion

Perhaps it seems unfair to criticize a report from a foreign ministry for making mistakes about law. Perhaps the report should be seen merely as a political document. But the report itself discusses legal matters in detail and charges the United States with "violat[ing] international law." Whether the report is a political document or not, the shortcomings that I have discussed here weaken its credibility and undermine its arguments.

There are better ways to criticize U.S. extraterritorial jurisdiction. In Part II of this post, I will offer some examples.

[This post also appears at Transnational Litigation Blog (TLB)]

International child abduction: navigating between private international law and children's rights law

In the summer of 2023 **Tine Van Hof** defended her PhD on this topic at the University of Antwerp. The thesis will be published by Hart Publishing in the Studies in Private International Law series (expected in 2025). She has provided this short summary of her research.

When a child is abducted by one of their parents, the courts dealing with a return application must consider several legal instruments. First, they must take into

account private international law instruments, specifically, the Hague Child Abduction Convention (1980) and the Brussels IIb Regulation (2019/1111). Second, they have to take into account children's rights law instruments, including mainly the UN Convention on the Rights of the Child.

Because these instruments have different approaches regarding the concept of the best interests of the child, they can lead to conflicting outcomes. Strict adherence to private international law instruments by the return court could mean sending a child back to the country where they lived before the abduction. Indeed, the Hague Child Abduction Convention and Brussels IIb presume that it is generally best for children to return to the State of habitual residence and therefore require ¾ in principle ¾ a speedy return. The children's rights law instruments, on the other hand, require that the best interests of the individual child be taken into account as a primary consideration. If the court follows these instruments strictly, it could for example rule in a particular case that it is better for a child with medical problems to stay in country of refuge because of better health care.

The question thus arises how to address these conflicts between private international law and children's rights law in international child abduction cases. To answer this question, public international law can give some inspiration, as it offers a number of techniques for addressing conflicts between fields of law. In particular, the techniques of formal dialogue and systemic treaty interpretation can provide relief.

Formal dialogue, in which the actors of one field of law visibly engage with the instruments or case law of the other field of law, can be used by the Hague Conference, the EU and the Court of Justice of the European Union (CJEU) as private international law actors, and the Committee on the Rights of the Child and the European Court of Human Rights (ECtHR) as children's rights law actors. By paying attention to the substantive, institutional and methodological characteristics of the other field of law, these actors can promote reconciliation between the two fields and prevent the emergence of actual conflict. However, a prerequisite for this is that the actors are aware of the relevance of the other field of law and are willing to engage in such a dialogue. This awareness and willingness can be generated through informal dialogue. The CJEU and the ECtHR, for example, conduct such informal dialogue in the form of their biennial

bilateral meeting.

In addition, supranational, international and domestic courts can apply the technique of systemic treaty interpretation by interpreting a particular instrument (e.g., the Hague Child Abduction Convention) in light of other relevant rules applicable in the relationship between the parties (e.g., the UN Convention on the Rights of the Child). This allows actual conflicts between the two fields of law to be avoided. This technique was used, for example, by the ECtHR in *X v. Latvia*. To apply this technique, it is also important that courts are aware of the applicability of the other field of law and are willing to take into account its relevant rules. Again, courts have established initiatives that promote this awareness and willingness, such as the International Hague Network of Judges.

The expectation is that by applying these techniques, the potential conflict between private international law and children's rights law in the context of international child abduction will no longer manifest itself as an actual conflict. Further, applying these techniques will make it possible for national courts to adequately apply all instruments and make a balanced decision on the return of children. In addition to these two techniques, other techniques, such as coordination *ex ante*, are considered appropriate to better align private international law and children's rights law when dealing with other issues, such as for example international surrogacy.

Choice of law in commercial contracts and regulatory competition: new steps to be made by the EU?

The recently published study titled 'European Commercial Contract Law', authored by Andrea Bertolini, addresses the theme of regulatory competition. It offers new policy recommendations to improve EU legal systems' chances of

being chosen as the law governing commercial contracts.

The Study's main question

The European Parliament's Committee on Legal Affairs has published a new study authored by Andrea Bertolini, titled 'European Commercial Contract Law' (the 'Study'). The Study formulates the main question as follows: 'why the law chosen in commercial contracts is largely non-European and non-member state law'. The expression 'non-European and non-member state' law is specified as denoting the legal systems of England and Wales, the United States, and Singapore, and more generally, common law legal systems. The Study states:

It is easily observed how most often international contracts are governed by non-European law. The reasons why this occurs are up to debate and could be quite varied both in nature and relevance. Indeed, a recent study by Singapore Academy of Law (SAL) found that 43 per cent of commercial practitioners and in-house counsel preferred English law as the governing law of the contracts.

Although the SAL's findings are immediately relativised, the Study is underpinned by the assumption (derived from the SAL's findings) that commercial parties frequently opt for common law. The trend of choosing non-European and non-member state law, the Study submits, is the main reason for enquiring into measures that can be taken to improve the chances of EU Member States' legal systems being chosen as the law governing commercial contracts:

While the validity of such a study may be questioned, the prevalence of common law in international business transactions, emerging also from other reports and studies (see for a detailed discussion §§2.2 ff.), is one of the very reasons that led to need of performing the current analysis, and should be taken into account, so as to identify those elements that may be improved in the European and MS's regulatory framework for commercial contracts entered into by sophisticated parties.

The endeavour to identify the points of improvement in the EU and Member States' regulatory frameworks for international contracts merits appreciation and is relevant to businesses and policymakers. Meanwhile, this endeavour implies a complex task. This task can be approached from different perspectives.

The parties' perspective

The question of what drives private parties to choose one legal system over another as the law governing their contract is an empirical question. It implies the need to conduct an empirical study, including surveys, interviews, or to use another quantitative or qualitative social science method. This method has been used in several empirical studies, which have provided various insights into the parties' attitudes to the choice of law in commercial contracts. To name a few important studies, these include the research by Stefan **Vogenauer** on regulatory competition through the choice of contract law in Europe, the research by Gilles **Cuniberti** on international market for contracts and the most attractive contract laws, and an empirical study of parties' preferences in international sales contracts conducted by Luiz Gustavo **Meira Moser**. Vogenauer's research focused on Europe (which included the United Kingdom at that time), while the studies by Cuniberti and Meira Moser had a broader ambit.

Despite the possibly empirical nature of the Study's main question, the Study neither uses empirical methods nor focuses on the parties' perspectives. Instead, it takes the policymakers' perspective.

The policymakers' perspective

The Study aims to 'identify possible policies to be implemented to overcome' the trend that 'the law chosen in commercial contracts is largely non-European and non-member state'. The findings are formulated as recommendations for policymakers who attempt to make their own legal systems attractive to parties involved in international transactions. The recommendations address both substantive contract law and civil procedure (see inter alia point 2.1 on page 42). Within civil procedure, the Study leaves outside the scope conflict-of-law questions of the extent to which the courts upheld choice-of-law agreements or how various legal systems applicable to contract interpretation deal with the application of foreign law. By contrast, specific attention is paid to the efficiency of the national judiciaries.

Along with the discussion of substantive law, civil procedure and national judiciaries' efficiency, the Study looks for the reasons for (what it assumes to be) the low success rate of EU Member States' contract law in the pitfalls of the projects to harmonise contract law that have been undertaken over the last

decades. The Study states from the outset:

*Indeed, **absent an autonomous European contract law**, business parties often elect other, non-European jurisdictions (often common law ones), to govern their contractual agreements.*

It goes on to identify 'the fate' of various attempts to harmonise contract law, such as soft law instruments (including the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Commercial Contracts (UPICC), the Acquis Principles, the Draft Common Frame of Reference (DCFR), and the Common European Sales Law project. These are addressed in the first part of the Study, after which the contract laws of various legal systems are compared and coupled with a comparison of the functioning of the court systems. The method on which the Study bases its conclusions and recommendations is outlined as follows:

To do so, it first provides an overview of the relevant academic and policy efforts underwent to formulate a European contract law (Chapter 1). Then it moves on to touch upon a broad spectrum of matters emerging both from international reports on the adjudication and the functioning of the courts systems, as well as from academic literature on matters that span from contract qualification, interpretation, integration, and some fundamental aspects of remedies (Chapter 2). It then provides a series of policy options (Chapter 3), European institutions could consider when attempting to alter this trend and ensure EU regulation a global role in commercial contracts too.

Regulatory competition, soft law, or de facto harmonisation?

Placing harmonisation of contract law at the core of the discussion of regulatory competition is a fresh look at the (soft law) instruments harmonising contract law. However, it is a somewhat unexpected take on these instruments, because participation in regulatory competition, whereby a EU instrument would compete with third states' laws, does not appear to be the goal of any contract law harmonisation project. For instance, the UNIDROIT principles have harmonised commercial contract law worldwide. The instrument contains a number of rules rooted in the legal system of the United States (Uniform Commercial Code and States' case law) and has been endorsed by the UNCITRAL. The PECL and DCFR limit their scope to the EU, but at the time of these instruments' drafting, the

United Kingdom was an EU Member State. Furthermore, PECL and DCFR are not confined to commercial contract law; they address contract law more broadly.

In contrast to these harmonisation projects, the Study appears to promote (without explicitly stating this) the de facto harmonisation by contract clauses and the need to foster party autonomy in the interpretation of contracts. If this is correct, this would be a very welcome recommendation, albeit not entirely novel. The Study states:

*Overall, the analysis is then used to lay out some **policy recommendations** that may only be broad in scope and point at one direction more than providing detailed solutions.*

*All efforts should aim at pursuing the **efficiency of the judiciary** on the one hand, and the **creation of a set of minimalist and – possibly – self-sufficient norms dedicated to the regulation of business contracts that prioritize legal certainty, foreseeability of the outcome, preservation of the parties will**.*

This and other recommendations are summarised on page 9 and provided on pages 76 ff, and are certainly worth reading.

Financial Hardship and Forum Selection Clauses

The U.S. Supreme Court has long held that a forum selection clause should not be enforced when "trial in the contractual forum will be so gravely difficult and inconvenient" that the plaintiff "will for all practical purposes be deprived of his day in court." The financial status of the plaintiff is obviously a factor that should be considered as part of this inquiry. Large corporations can usually afford to litigate cases in distant courts. Individual plaintiffs frequently lack the resources to do so. Nevertheless, the lower federal courts in the United States have repeatedly held that financial hardship on the part of the plaintiff is not enough to

make an otherwise valid forum selection clause unenforceable.

In a new article, *Financial Hardship and Forum Selection Clauses,* I argue that this practice is both doctrinally incorrect and deeply unfair. U.S. courts can and should consider the plaintiff's financial circumstances when deciding whether to enforce foreign forum selection clauses. To illustrate the perversity of current practice, one need look no further than *Sharani v. Salviati & Santori, Inc*.

Jay Sharani, his wife Catherine, and their two young children were moving from the United Arab Emirates to San Franciso, California. They paid $3600 to IAL Logistics Emirates, LLC (IAL), a shipping company, to transport seventy pieces of household goods to the Bay Area. Although the goods were successfully delivered to a warehouse in Oakland, IAL never communicated this fact to the Sharanis. The Sharanis repeatedly sought to contact IAL over the course of two months. They received no response. When the company finally responded, the Sharanis discovered that many of their goods were in the process of being sold at auction. When the remaining goods were finally delivered, most of them were damaged and unusable.

The Sharanis filed a lawsuit, *pro se*, against IAL's delivery agent in federal district court in California alleging breach of contract and negligence under the Carriage of Goods by Sea Act. The defendant moved to dismiss the case based on a forum selection clause in the shipping agreement. That clause required all lawsuits to be brought in London, England. The Sharanis argued that the clause should not be enforced because it would deprive them of their day in court. Specifically, they alleged that (1) they could not afford to hire counsel in the United Kingdom, and (2) they could not afford to take extended time away from their jobs and family responsibilities to represent themselves abroad. The court rejected these arguments. It held that the Sharanis had failed to show that litigating in England would be so expensive as to deprive them of their day in court. It also held that that the Sharanis had not explained "why one parent could not stay with the children while the other parent pursues the claim, or why their income is insufficient to pay for childcare." The case was dismissed. So far as I can determine, it was never refiled in England.

In my article, I demonstrate that the outcome in *Sharani* is no outlier. In case after case, decided decade after decade, U.S. courts have enforced foreign forum selection clauses knowing full well that the practical effect of enforcement would

almost certainly deprive plaintiffs of their day in court because they lack the financial resources to bring their cases abroad. The end result is a long trail of abandoned lawsuits where plaintiffs holding legal claims were denied access to a forum in which to assert those claims.

[This post is cross posted at Transnational Litigation Blog.]

Revised Canadian Statute on Judgment Enforcement

Two years ago, the Uniform Law Conference of Canada (ULCC) released a revised version of the Court Jurisdiction and Proceedings Transfer Act (CJPTA), model legislation putting the taking of jurisdiction and staying of proceedings on a statutory footing. The statute is available here.

The ULCC has now released a revised version of another model statute, the Enforcement of Canadian Judgments Act (ECJA). The original version of this statute was prepared in 1998 and had been amended four times. It has now been consolidated and substantially revised. It is available here and background information is available here and here.

Disclosure: I was the lead researcher and a member of the Working Group for the revised ECJA.

The ECJA is based on the general rule that a party seeking to enforce a Canadian judgment in a province or territory that has enacted the ECJA should face no additional substantive or procedural barriers beyond those that govern the enforcement of judgments of the local courts.

The core features of the ECJA are unchanged. The statute allows for the registration of a Canadian judgment (a defined term: s 1). This is an alternative from the common law process of suing on the judgment. Registration is a simple administrative process (s 4) and makes the judgment enforceable as if it were a

judgment of the province or territory in which it is registered (s 5). The aim is to make the enforcement of Canadian judgments easier.

Another core feature is also unchanged. The defendant cannot, at the registration stage, object to the jurisdiction of the court that rendered the judgment (s 7(4)(a)). Any challenge to the jurisdiction of that court must be made in the province or territory in which the plaintiff has chosen to sue.

What has changed? First, the commentaries to the statutory provisions have been extensively revised. In part this reflects the many developments that have occurred over the past thirty years. Second, a new provision (s 1(3)(f)) makes it clear that the scheme does not apply to a judgment that itself recognizes or enforces a judgment of another province, territory or foreign jurisdiction. This precludes registering so-called "ricochet" judgments. There had been some debate in the jurisprudence about whether the scheme applies to such judgments. Third, a clearer process has been established (s 7(1)) for setting aside a registration (for example, if the judgment does not in fact meet the requirements for registration). Fourth, there are some smaller changes to provisions dealing with the calculation of post-judgment interest (s 8) and costs of the registration process (s 9).

In addition, an optional defence to registration has been added (s 7(2)(a)(ii)). The defence protects individual defendants who are resident in the place of registration against certain judgments in consumer and employment litigation. Such a defence is not, in general, available under the current statutory schemes or at common law: these treat consumer and employment litigation similar to all other civil litigation rather than as a special case. The defence is optional in that it is left to an enacting province or territory to decide whether to implement it.

It will now fall to the provinces and territories that have enacted the ECJA to determine how to respond to these changes. A version of the statute is in force in several provinces and territories including British Columbia, Manitoba, Nova Scotia and Saskatchewan. It will also be interesting to see if the revised and updated version generates any interest in the provinces and territories that did not enact the earlier version (which include Alberta, Ontario and Quebec).

The expectation is that the ULCC will now turn its attention to revising its third model statute in this area, the Enforcement of Foreign Judgments Act (available

here).

New Proposed Rules on International Jurisdiction and Foreign Judgments in Morocco

Last Thursday, November 9, Draft No. 02.23 proposing the adoption of a new Code of Civil Procedure (*al-musattara al-madaniyya*) was submitted to the Moroccan House of Representatives. One of the main innovations of this draft is the introduction, for the first time in Moroccan history, of a catalogue of rules on international jurisdiction. It also amends the existing rules on the enforcement of foreign judgments.

Despite the importance of this legislative initiative for the development of private international law in Morocco, the proposed provisions are unfortunately disappointing in many respects.

First, with regard to the rules of international jurisdiction, it is surprising that the drafters of the 2023 proposed Code have relied heavily on the rules of the Egyptian Code of Civil Procedure, which date back to the fifties of the last century. These rules are in many respects completely parochial and outdated. Other codifications from the MENA region (e.g., the Tunisian codification of PIL) or elsewhere (e.g., recent codifications of PIL in Europe and Asia) could have served as better models. Furthermore, the proposed rules seem to have overlooked developments at the regional or international level, in particular those in the European Union and the Hague Conference on Private International Law over the last two decades. The fact that the new proposed rules do not even take into account the solutions of the 1991 Ras Lanouf Convention, a double convention concluded between the Maghreb countries (but not yet ratified by Morocco), is difficult to explain.

Examples of questionable aspects of the new proposed rules include, among others:

- Adopting the nationality of the defendant as the basis for jurisdiction in all matters, including civil and commercial matters, even if the dispute has no other connection with Morocco.
- Failure to distinguish between concurrent and exclusive jurisdiction. This is problematic because the new proposed provision on the requirements for the enforcement of foreign judgments allows Moroccan courts to refuse enforcement if the judgments were rendered in matters within the exclusive jurisdiction of Moroccan courts, without providing a list of such matters.
- The adoption of questionable and outdated grounds of jurisdiction, such as the location of property without limitation and the place of the conclusion of the contract.
- Failure to introduce new rules that take into account the protection of weaker parties, especially employees and consumers.
- Failure to include a clear and coherent rule on choice of court agreements.
- Failure to include a rule on lis pendens.

Second, with regard to the enforcement of foreign judgments, the main surprise is the introduction of the reciprocity rule, which was not part of the law on foreign judgments in Morocco. Moreover, Moroccan courts have never invoked the principle of reciprocity when dealing with the enforcement of foreign judgments, either as a possible requirement or as ground for refusing to give effect to foreign judgments. It is not clear why the drafters felt the need to introduce reciprocity when there does not seem to be any particular problem with the enforcement of Moroccan judgments abroad.

The following is a loose translation of the relevant provisions. The text in brackets has been added by the author.

Part II – The Jurisdiction of the Courts

Chapter IV – International Judicial Jurisdiction

Article 72 [(General) Jurisdiction over Moroccans]
The courts of the Kingdom shall have jurisdiction to hear actions brought against Moroccans even if they are not domiciled or resident in Morocco, except when the action concerns immovables located abroad.

Article 73 [(General) Jurisdiction over Foreigners Domiciled or Resident in Morocco]
The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are domiciled or resident in Morocco, except where the dispute concerns immovables located abroad.

Article 74 [(Special) Jurisdiction over Foreigners not domiciled or resident in Morocco]
[1] The courts of the Kingdom shall have jurisdiction to hear actions brought against foreigners who are not domiciled or resident in Morocco [in the following cases]:

1. **[Property and Obligations]** [if the action] concerns property located in Morocco, or an obligation formed, performed, or should have been performed in Morocco;

2. **[Tortious Liability]** [if the action] concerns tortious liability when the act giving rise to liability or the damage takes place in Morocco;

3. **[Intellectual Property]** [if the action] concerns the protection of intellectual property rights in Morocco;

4. **[Judicial Restructuring]** [if the action] concerns procedures for businesses in difficulty instituted in Morocco;

5. **[Joint Defendants]** [if the action] is brought against joint defendants, and one of them is domiciled in Morocco;

6. **[Maintenance]** [if the action] concerns a maintenance obligation and the maintenance creditor is resident in Morocco;

7. **[Filiation and Guardianship]** [if the action] concerns the filiation of a minor resident in Morocco or a matter of guardianship over a person or property;

8. **[Personal status]** [if the action] concerns other matters of personal status:

a) if the plaintiff is Moroccan;
b) if the plaintiff is a foreigner who is resident in Morocco and the defendant does not have a known domicile abroad,

9. **[Dissolution of marriage]** [if the action] concerns the dissolution of the marital bond:
a) if the marriage contract was concluded in Morocco;
b) if the action is brought by a husband or a wife of Moroccan citizenship;
c) if one of the spouses abandons the other spouse and fixes his/her domicile abroad or has been deported from Morocco

[2] **[Counterclaims and related claims]** The courts of the Kingdom that have jurisdiction over an original action shall also have jurisdiction to hear counterclaims and any related claims.

[3] **[Conservative and Provisional measures]** The courts of the Kingdom shall also have jurisdiction to take conservative and provisional measures to be executed in the Kingdom even if they do not have jurisdiction over the original action.

Article 75
[1. **Consent and Submission]** The courts of the Kingdom shall also have jurisdiction to hear actions even where they do not otherwise fall within their jurisdiction, where the defendant expressly or implicitly accepts their jurisdiction, unless the action concerns an immovable located abroad.

[2. **Declining jurisdiction]** If the defendant in question does not appear, the court shall [in its motion] rule that it has no jurisdiction.

Part IX – Methods of Execution
Chapter III – General Provisions relating to Compulsory Execution of Judicial Judgments

Article 451 [Necessity of an Exequatur Declaration]
Foreign judgments rendered by foreign courts shall not be enforced unless they are declared enforceable following the conditions laid down in the present Act.

Article 452 [Procedure]
[1] The request for exequatur shall be submitted to the First President of the

court of the second instance with subject-matter jurisdiction.
[2] Jurisdiction shall lie with the court of the place of execution, and the executor shall have the authority to pursue the execution wherever the property of the person against whom the execution was issued is found.
[3] The first president or the person replacing him/her shall summon the defendant when necessary.

Article 453 [Requirements]
The foreign judgment shall not be declared enforceable except after verifying that the following requirements are satisfied:
[a] The foreign court did not render a judgment that falls within the exclusive jurisdiction of Moroccan courts;
[b] There exists a substantial connection between the dispute and the court of the state where the judgment was rendered;
[c] There was no fraud in choosing the rendering court;
[d] The parties to the dispute were duly summoned and properly represented;
[e] The judgment became final and conclusive following the law of the rendering court;
[f] The judgment does not contradict with a judgment already rendered by Moroccan courts;
[g] The judgment does not violate Moroccan public policy.

Article 454 [Documents and Appeal]
[1] Except otherwise stipulated in the international conventions ratified by Morocco and published in the Official Gazette, the request [for declarations of enforceability] shall be submitted by way of application accompanied by the following:
[a] an official copy of the judicial judgment
[b] a certificate of non-opposition, appeal, or cassation
[c] a full translation into Arabic of the documents referred to above and certified as authentic by a sworn translator.
[2] The judgment of granting exequatur can be subject to appeal before the Supreme Court.
[3] The Supreme Court shall decide on the appeal within one month.
[4] Judgments granting exequatur in cases relating to the dissolution of marriage shall not be subject to any appeal except by the public prosecutor.

Article 455 [Titles and Authentic Instruments]

Titles and authentic instruments established abroad before competent public officers and public servants can be enforced in Morocco after being declared enforceable, and that after showing that the title or the authentic instrument has the quality of an enforceable title and that it is enforceable following the law of the State where it was drawn up and does not violate the Moroccan public policy.

Article 456 [International Conventions and Reciprocity]
The rules laid down in the previous articles shall be applied, without prejudice to the provisions of the international conventions and treaties ratified by the Kingdom of Morocco and published in the Official Gazette. The rule of reciprocity shall also be considered.

The Jurisdiction Puzzle: Dyson, Supply Chain Liability and Forum Non Conveniens

Written by Dr Ekaterina Aristova, Leverhulme Early Career Fellow, Bonavero Institute of Human Rights, University of Oxford

On 19 October 2023, the English High Court declined to exercise jurisdiction in *Limbu v Dyson Technology Ltd*, a case concerning allegations of forced labour and dangerous conditions at Malaysian factories which manufactured Dyson-branded products. The lawsuit commenced by the migrant workers from Nepal and Bangladesh is an example of business and human rights litigation against British multinationals for the damage caused in their overseas operations. Individuals and local communities from foreign jurisdictions secured favourable outcomes and won jurisdictional battles in the English courts over the last years in several notable cases, including *Lungowe v Vedanta*, *Okpabi v Shell* and *Begum v Maran*.

The *Dyson* case is particularly interesting for at least two reasons. First, it

advances a novel argument about negligence and unjust enrichment of the lead purchasing company in a supply chain relationship by analogy to the parent company liability for the acts of a subsidiary in a corporate group. Second, it is one of the few business and human rights cases filed after Brexit and the first to be dismissed on *forum non conveniens* grounds. Since the UK's EU referendum in 2016, the return of *forum non conveniens* in the jurisdictional inquiry has been seen as a real concern for victims of business-related human rights and environmental abuses seeking justice in the English courts. With the first case falling on jurisdictional grounds in the first instance, the corporate defendants started to collect a 'Brexit dividend', as cleverly put by Uglješa Grušic in his case comment.

Facts

The proceedings were commenced in May 2022. The claimants were subjected to forced labour and highly exploitative and abusive conditions while working at a factory in Malaysia run by a local company. The defendants are three companies in the Dyson corporate group, two domiciled in England and one in Malaysia. The factory where alleged abuses took place manufactured products and components for Dyson products. Claimants argued that Dyson defendants were liable for (i) negligence; (ii) joint liability with the primary tortfeasors (the Malaysian suppliers running the factory and local police) for the commission of the torts of false imprisonment, intimidation, assault and battery; and (iii) unjust enrichment. They further alleged that the Dyson group exercised a high degree of control over the manufacturing operations and working conditions at the factory facilities and promulgated mandatory ethical and employment policies and standards in Dyson's supply chain, including in Malaysian factories.

The English courts are already familiar with the attempts to establish direct liability of the English-based parent companies for the subsidiaries' harms relying on negligence and the breach of duty of care owed to the claimants. In *Vedanta* and *Okpabi*, the UK Supreme Court made it clear that the parent company's involvement and management of the subsidiary's operations in different ways can give rise to a duty of care.

Broadening the scope of the parent company liability in a corporate group beyond strict control opened paths to supply chain liability. While lead purchasing companies, like Dyson, are not bound by shareholding with their suppliers, they

often exercise a certain level of managerial control over independent contractors. Such involvement with particular aspects of a supplier's activities leads to the argument that a lead company could also be liable in negligence for a breach of the duty of care. The unjust enrichment claim that Dyson group has been enriched at the claimant's expense is a relatively novel legal basis, although it has already been raised in similar cases. To the best of my knowledge, in addition to the *Dyson* case, at least four legal actions focusing on supply chain liability are progressing in England: Malawian tobacco farmer claims against British American Tobacco and Imperial, Malawian tea farmer claims against PGI Group Ltd, Ghanaian children accusations against cocoa producer Olam and forced labour allegations by Burmese migrants against Tesco and Intertek.

Judgment

The court had to resolve the jurisdictional question of whether the case would proceed to trial in England or Malaysia. The English common law rules are founded on service of the claim form on the defendant and are based on the defendant's presence in the jurisdiction. In general terms, jurisdiction over English-domiciled parent companies is effected within the jurisdiction as of right. Following Brexit, proceedings against an English parent company may be stayed on *forum non conveniens* grounds. Foreign subsidiaries are served outside the jurisdiction with the court's permission, usually on the basis of the 'necessary or proper party' gateway. In the *Dyson* case, the English defendants asked the court to stay the proceedings based on *forum non conveniens*, and the Malaysian defendant challenged the service of the claim form, arguing that Malaysia is a proper place to bring the claim.

The court agreed with the corporate defendants, having applied the two-stage test set out by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*. The first stage requires consideration of the connecting factors between the case and available jurisdictions to determine a natural forum to try the dispute. The court concluded that Malaysia was 'clearly and distinctly more appropriate' [122]. Some factors taken into account were regarded as neutral between the different fora (convenience for all of the parties and the witnesses [84], lack of a common language for each of the witnesses [96], location of the documents [105]). At least one factor was regarded as a significant one favouring England as the proper place to hear the claim (risk of a multiplicity of proceedings and or irreconcilable judgments [109]). However, several factors weighed heavily in favour of Malaysia

(applicable law [97], place where the harm occurred [102]). As a result, Malaysia was considered to be the 'centre of gravity' in the case [122].

Under the second limb of the *Spiliada* principle, the English courts consider whether they should exercise jurisdiction in cases where the claimant would be denied substantial justice in the foreign forum. The claimants advanced several arguments to demonstrate that there is a real risk of them not obtaining substantial justice in Malaysia [125–168], including difficulties in obtaining justice for migrant workers, lack of experienced lawyers to handle the case, the risk of a split trial, the cost of the trial and financial risks for the claimants and their representatives, limited role of local NGOs to support the claimants. The court did not find cogent evidence that the claimants would not obtain substantial justice in Malaysia [169]. A stay of proceedings against English defendants was granted, and the service upon the Malaysian company was set aside [172]. Reaching this conclusion involved consideration of extensive evidence, including contradictory statements from Malaysian lawyers and civil society organisations. The Dyson defendants have given a number of undertakings to submit to the jurisdiction of the Malaysian courts and cover certain claimants' costs necessary to conduct the trial in Malaysia, which persuaded the court [16].

Comment

The *Dyson* case marks a shift from the recent trend of allowing human rights and environmental cases involving British multinationals to proceed to trial in the UK courts. Three principal takeaways are worth highlighting. First, the claimants in the business and human rights cases can no longer be certain about the outcome of the jurisdictional inquiry in the English courts. The EU blocked the UK's accession to the Lugano Convention despite calls from NGOs and legal experts. The risk of dismissal on *forum non conveniens* grounds is no longer just a theoretical concern.

Second, the *Dyson* case demonstrates the difficulties of finding the natural forum under the doctrine of *forum non conveniens* in civil liability claims involving multinationals. These complex disputes have a significant nexus with both England, where the parent or lead company is alleged to have breached the duty of care, and the foreign jurisdiction where claimants sustained their injuries. The underlying nature of the liability issue in the case is how the parent or lead company shaped from England human rights or environmental performance of its

overseas subsidiaries and suppliers. In this context, I agree with Geert van Calster, who criticises the court's finding about Malaysia being the 'centre of gravity' in the case. I have argued previously that the *forum non conveniens* analysis should properly acknowledge how the claimants frame the argument about liability allocation between the parent company and other entities in the group or supply chain.

Finally, the *Dyson* case is not the first one to be intensely litigated on the *forum (non) conveniens* grounds. In *Lubbe v Cape*, *Connelly v RTZ* and *Vedanta*, the English courts accepted jurisdiction, acknowledging that the absence of a means of funding or experienced lawyers to handle the case in a host state will lead to a real risk of the non-availability of substantial justice. The court in *Dyson* reached a different conclusion, but its analysis of the availability of substantial justice for claimants in Malaysia is not particularly persuasive, especially considering the claimants' 'fear of persecution, detention in inhumane conditions and deportation should they return to Malaysia' [71].

One aspect of the judgment is notably concerning. Claimants referred to the conduct of the Dyson defendants as being 'aggressive' and 'heavy-handed' [71], [73]. In concluding remarks, the court accepted there were deficiencies in Dyson's responses to the claimants' requests for the documents [173]. Yet despite this acceptance, the court has on multiple occasions relied on the defendants' undertakings to cooperate with the claimants to ensure the trial can proceed in Malaysia [136], [147], [151], [152], [166], [169]. Undoubtedly, the ruling will be appealed, and it remains to be seen if the English courts will be willing to try cases involving British multinationals in the post-Brexit landscape.

The 2019 Hague Judgments Convention Applied by Analogy in

the Dutch Supreme Court

Written by Birgit van Houtert, Assistant Professor of Private International Law at Maastricht University

On 1 September 2023, the 2019 Hague Judgments Convention (HJC) entered into force. Currently, this Convention only applies in the relationship between EU-Member States and Ukraine. Uruguay has also ratified the HJC on 1 September 2023 (see status table). The value of the HJC has been criticised by Haimo Schack inter alia, for its limited scope of application. However, the HJC can be valuable even beyond its scope as this blog will illustrate by the ruling of the Dutch Supreme Court on 29 September 2023, ECLI:NL:HR:2023:1265.

Facts

In 2019, a couple with Moroccan and Dutch nationality living in the Netherlands separated. They have two children over whom they have joint custody. On 5 June 2020, the wife filed for divorce and ancillary relief, inter alia division of the matrimonial property, with the Dutch court. On 29 December 2020, the husband requested this court to also determine the contribution for child maintenance to be paid by the wife. However, the wife raised the objection of *lis pendens* with reference to Article 12 Dutch Civil Code of Procedure (DCCP), arguing that the Dutch court does not have jurisdiction regarding child maintenance, since she filed a similar application with the Moroccan court on 9 December 2020, and the judgment to be rendered by the latter court could be recognised in the Netherlands.

Lis pendens

On 26 March 2021, the Dutch district court pronounced the divorce and ruled that the wife must pay child maintenance. This court rejected the objection of *lis pendens* because the Moroccan and Dutch proceedings did not concern the same subject matter as in Morocco a husband cannot request child support to be paid by the wife. Furthermore, there has been no Convention to enforce the Moroccan judgment in the Netherlands, as required by Article 12 DCCP. However, the Court of Appeal held that the district court should have declined jurisdiction regarding child maintenance, because both proceedings concerned the same subject matter,

i.e. the determination of child maintenance. Subsequently, the Court of Appeal declined jurisdiction over this matter by pointing out that the Moroccan judgment, which in the meantime had been rendered, could – in the absence of a Convention – be recognised in accordance with the Dutch requirements for recognition of non-EU judgments, the *Gazprombank*-requirements (see Hoge Raad 26 September 2014, ECLI:NL:HR:2014:2838, 3.6.4).

The case brought before the Supreme Court initially concerned the interpretation of *lis pendens* under Article 12 DCCP. In accordance with this provision, the Supreme Court states that the civil action should be brought to a foreign court first, and subsequently the Dutch court to consider the same cause of action between the same parties. If it is expected that the foreign proceedings will result in a judgement that can be recognised, and if necessary enforced, in the Netherlands either on the basis of a Convention or *Gazprombank*-requirements (see Hoge Raad 29 September 2023, ECLI:NL:HR:2023:1266, 3.2.3), the Dutch court may stay its proceedings but is not obliged to do so. The court may, for example, decide not to stay the case because it is expected to take too long for the foreign court to render the final judgment (3.3.5). However, the court must declare itself incompetent if the foreign judgment has become final and this judgment could be recognised and, if necessary enforced, in the Netherlands. To define the concept of finality of the foreign judgement, the Supreme Court drew inspiration from the HJC and the Explanatory Report by Garcimartín and Saumier (paras. 127–132) by applying the definition in Article 4(4) HJC by analogy; i.e the judgment is not the subject to review in the State of origin and the time limit for seeking ordinary review has been expired. According to the Supreme Court, this prevents that the dispute cannot be settled anywhere in court (3.3.6).

In the case at hand, the Dutch district court did thus not have to decline jurisdiction as the Moroccan judgment had not been final yet. The Supreme Court has also specified the conditions under which the court at first instance's decision on the application of Article 12 DCCP can be challenged on appeal (3.4.2-3.4.6), which is outside the scope of this blog.

Finality of the foreign judgment in the context of recognition

Moreover, the Supreme Court clarifies that in proceedings involving *lis pendens*, an action may be brought for recognition of the foreign decision, including a claim to rule in accordance with the condemnation in the foreign decision (on the basis

of Article 431(2) DCCP) (3.5.1). After reiterating the known *Gazprombank*-requirements for recognition, the Supreme Court addresses for the first time the issue whether the foreign judgment should be final (which has frequently been debated by scholars). According to the Supreme Court, the court may, postpone or refuse the recognition on the basis of the *Gazprombank*-requirements if the foreign judgement is not final, i.e. the judgment is the subject of review in the State of origin or the time limit for seeking ordinary review has not expired (3.6.2). The Supreme Court therefore copies Article 4(4) HJC, and refers to the Explanatory Report by Garcimartín and Saumier (paras. 127–132). Similar to the latter provision, a refusal on this ground does not prevent a renewed application for recognition of the judgment. Furthermore, the court may, on application or of its own motion, impose the condition that the party seeking recognition of a non-final foreign judgment provides security for damages for which she could be ordered to pay in case the judgement is eventually annulled or amended. The Supreme Court therefore follows the suggestion in the Explanatory Report by Garcimartín and Saumier (para. 133).

Comment

The application by analogy of the autonomous definition of finality in Article 4(4) HJC yields legal certainty in the Netherlands regarding both the *lis pendens*-conditions under Article 12 DCCP, and the recognition of non-EU judgments in civil matters to which no Convention applies. Because of the generally uncodified nature of Dutch law for recognition of latter judgements, legal certainty has been advocated. In this regard, the Dutch Government Committee on Private International Law submitted its advice in February 2023 to revise Article 431 DCCP which inter alia includes the application by analogy of the jurisdictional filters in Article 5(1) HJC (see advice, p. 6). Thus, despite its limited scope of application, the HJC has value because of its possible application by analogy by courts and legislators (see also B. van Houtert, 'Het 2019 Haags Vonnissenverdrag: een *gamechanger* in Nederland? Een rechtsvergelijkende analyse tussen het verdrag en het Nederlandse commune IPR', forthcoming *Nederlands Internationaal Privaatrecht* 4, 2023). Furthermore, the Dutch Supreme Court's application by analogy of Article 4(4) HJC contributes to the Hague Conference on Private International Law's aim to unify Private International Law.

Which Law Governs Subject Matter Arbitrability in International Commercial Disputes?

*Written by Kamakshi Puri**[1]***

Arbitrability is a manifestation of public policy of a state. Each state under its national laws is empowered to restrict or limit the matters that can be referred to and resolved by arbitration. There is no international consensus on the matters that are arbitrable. Arbitrability is therefore one of the issues where contractual and jurisdictional natures of international commercial arbitration meet head on.

When contracting parties choose arbitration as their dispute resolution mechanism, they freely choose several different laws that would apply in case of disputes arising under the contract. This includes (i) the law that is applicable to the merits of the dispute, (ii) the institutional rules that govern the conduct of the arbitration, (iii) law that governs the arbitration agreement, including its interpretation, generally referred to as the 'proper law of the arbitration agreement'. Similarly, contracting parties are free to choose the court that would exercise supervisory jurisdiction over such arbitration, such forum being the 'seat' of arbitration.

Since there is no global consensus on the matters that are arbitrable, and laws of multiple states simultaneously apply to an arbitration, in recent years, interesting questions surrounding arbitrability have presented themselves before courts adjudicating cross-border disputes. One such issue came up before the Singapore High Court in the *Westbridge Ventures II v Anupam Mittal*, succinctly articulated by the General Court as follows:

"which system of law governs the issue of determining subject matter arbitrability at the pre-award stage? Is it the law of the seat or the proper law of the arbitration agreement?"

In this piece, I will analyze the varied views taken by the General Court at Singapore ("**SGHC**"), Singapore Court of Appeal ("**SGCA**") and the Bombay High Court ("**BHC**") on the issue of the law(s) that would govern the arbitrability of the disputes in international commercial disputes.

The Westbridge Ventures-Anupam Mittal dispute began in 2021 when Mittal approached the National Company Law Tribunal in Mumbai ("**NCLT Mumbai**") alleging acts of minority oppression and mismanagement of the company, People Interactive (India) Private Limited, by the majority shareholder, Westbridge Ventures. In response to the NCLT proceedings, Westbridge Ventures approached the Singapore High Court for grant of permanent anti-suit injunction against Mittal, relying on the arbitration agreement forming part of the Shareholders' Agreement between the suit parties. Since 2021, the parties have successfully proceeded against one another before various courts in Singapore and India for grant of extraordinary remedies available to international commercial litigants *viz* anti-suit injunctions, anti-enforcement injunctions and anti-arbitration injunctions.

Singapore General Court Decision on Pre-award Arbitrability

Oppression and mismanagement claims are arbitrable under Singapore law but expressly beyond the scope of arbitration under Indian law. To determine whether proceedings before the NCLT were in teeth of the arbitration agreement, the court had to determine if the disputes raised in the NCLT proceedings were arbitrable under the *applicable* law. Thus, the question arose as to the law which the court ought to apply to determine arbitrability.

At the outset, the SGHC noted that the issue of arbitrability was relevant at both initial and terminal stages. While at the initial stage, non-arbitrable subject matter rendered arbitration agreements *inoperative* or *incapable of being*

performed, at the terminal stage, non-arbitrability rendered the award liable to be set aside or refused enforcement. Since at the post-award stage, arbitrability would be determined by the enforcing court applying their own public policy, the lacuna in the law was limited to the issue of subject matter arbitrability at the pre-award stage.

Upon detailed consideration, the SGHC concluded that it was the *law of the seat* that would determine the issue of subject matter arbitrability at the pre-award. The court reasoned its decision broadly on the following grounds:

- Contracts are a manifestation of the party autonomy principle. States being asked to give effect to a contract ought to respect party autonomy but for very limited grounds, such as public policy considerations. Power of the seat court to limit the arbitral tribunal's jurisdiction, and consequently affect party autonomy, ought to be limited to necessary constraints posed by such seat State's public policy;
- Since seat courts their own law at the post-award stage (in setting-aside and enforcement proceedings), it would be a legal anomaly for the same court to rely on different systems of law to determine subject-matter arbitrability at pre and post-award stages. This could also result in a situation where a subject matter, being arbitrable under the law of the arbitration agreement despite being non-arbitrable under the law of the seat, is first referred to arbitration however later the resulting award is set aside;
- Courts should, as a general position, apply their own law unless specifically directed by law to another legal system. Public interest and state policy favoured the promotion of International Commercial Arbitration. It was neither necessary nor desirable for a court to give effect to a foreign non-arbitrability rule to limit an otherwise valid arbitration agreement. Arbitrability was therefore a matter to be governed by national courts by applying domestic law.

Interestingly, despite noting that arbitrability was an issue of jurisdiction and that non-arbitrability made an agreement *incapable of being performed*, the SGHC distinguished the scenarios where a party's challenge was based on arbitrability and where parties challenged the formation, existence, and validity of an agreement. The court held that for the former, the law of seat would apply, however, for the latter, the proper law of arbitration agreement could apply.

Accordingly, the SGHC held that oppression and mismanagement disputes were arbitrable under the law of the seat, *i.e.*, in Singapore law, the arbitral tribunal had exclusive jurisdiction to try the disputes raised by the parties. An anti-suit injunction was granted against the NCLT proceedings relying on the arbitration agreement between the parties.

Appeal before the Singapore Court of Appeal

Mittal appealed the SGHC judgment before the Singapore Court of Appeal. The first question of law before the SGCA was whether the SGHC was correct in their holding that to determine subject matter arbitrability, *lex fori* (*i.e.*, the law of the court hearing the matter) would apply over the proper law of the arbitration agreement. Considering the significance of the issue, Professor Darius Chan was appointed as *amicus curie* to assist the court.

Professor Chan retained the view that *lex fori* ought to be the law applicable to the question of arbitrability. This was for reasons of *predictability* and *certainty*, which weighed on the minds of the drafters of the UNCITRAL Model Law. Although the Model Law was silent on the question of pre-award arbitrability since it was clear on the law to be applied post-award, a harmonious reading of the law was preferable. The courts ought to generally apply *lex fori* at both, pre and post-award stages.

The SGCA disagreed. It held that the *essence* of the principle of arbitrability was public policy. In discussing issues of *predictability*, *certainty*, and congruence between law to be applied at pre and post-arbitral stages, the parties had lost sight of the core issue of public policy in considering the question of arbitrability. Public policy of which state? – it unequivocally held that it was public policy derived from the law governing the arbitration agreement. Where a dispute could not proceed to arbitration under the foreign law that governed the arbitration agreement for being contrary to the foreign public policy, the seat court ought to give effect to such non-arbitrability.

The SGCA relied on the same concepts as the General Court albeit to come to the opposite conclusion:

- Arbitration agreements are the manifestation of party consensus. When parties expressly adopt a system of law to govern their arbitration agreement, public policy enshrined under such law ought to be given effect. Further, if arbitrability is a question of jurisdiction, then it necessarily follows that the law of the agreement from which jurisdiction of the tribunal is derived be considered first.
- As regards the potential anomaly with the seat court applying different laws pre and post-award, SGCA held that non-arbitrability under the law of the seat would be an *additional* obstacle to the enforcement of the arbitration agreement. This could, however, not go to say that the law of the seat would be the *only* law to govern arbitrability. Accordingly, the SGCA upheld a *composite approach*:

"55. Accordingly, it is our view that the arbitrability of a dispute is, in the first instance, determined by the law that governs the arbitration agreement. … where a dispute may be arbitrable under the law of the arbitration agreement but Singapore law as the law of the seat considers that dispute to be non-arbitrable, the arbitration would not be able to proceed. In both cases, it would be contrary to public policy to permit such an arbitration to take place. Prof Chan refers to this as the "composite" approach."

- On the state policy to encourage International Commercial Arbitration, the court noted that principles of comity, requiring the court to respect public policy under foreign undoubtedly outweighed the policy to encourage arbitration. This was despite Prof. Chan's concerns that expanding the grounds for refusal of reference of arbitration was *"unnecessarily restrictive and not in line with the general tendency to favor arbitration*".

On facts, however, the court noted that the law of the arbitration agreement was in fact Singapore law itself, and Indian law was but the law of the substantive contract. Accordingly, arbitrability had to be determined under Singapore law and the appeal was dismissed.

Anti-Enforcement Injunction by the Bombay High Court

Mittal approached the Bombay High Court seeking an anti-enforcement injunction against the SGHC decision, and for a declaration that NCLT Mumbai was the only forum competent to hear oppression and mismanagement claims raised by him.

The BHC did not directly consider the issue of the law governing arbitrability, however, the indirect effect of the anti-enforcement injunction was the court determining the same. The BHC's decision reasoned as follows – the NCLT had the exclusive jurisdiction to try oppression and mismanagement disputes in India, such disputes were thus non-arbitrable under Indian law. The enforcement of any ensuing arbitral award would be subject to the Indian Arbitration Act. An award on oppression and mismanagement disputes would be contrary to the public policy of India. Enforcement of an arbitral award in India on such issues would be an impossibility – "*What good was an award that could never be enforced?*". The court noted that allowing arbitration in a case where the resulting award would be a nullity would leave the plaintiff remediless, and deny him access to justice. An anti-enforcement injunction was granted.

The BHC's decision can be read in two ways. The decision has either added subject matter arbitrability under a third law for determining jurisdiction of the tribunal, *i.e.*, the law of the court where the award would inevitably have to be enforced or the decision is an isolated, fact-specific order, not so much a comment on the law governing subject matter arbitrability but based on specific wording of the arbitration clause which required the arbitral award to be enforceable in India, although clearly the intent for the clause was to ensure that neither parties resist enforcement of the award in India and not to import India law at the pre-award stage.

Concluding Thoughts

The SGHC is guided by principles of party autonomy and Singapore policy to encourage International Commercial Arbitration, on the other hand, the Court of Appeal was driven by comity considerations and the role of courts applying foreign law to be bound by foreign public policy. Finally, the Indian court was

occupied with ensuring “access to justice” to the litigant before it, which according to the court overrode both party autonomy and comity considerations. Whether we consider the BHC decision in its broader or limited form, the grounds for refusing reference to arbitration stand invariably widened. Courts prioritizing different concerns as the most significant could potentially open doors for forum shopping.

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Choice of law rules and statutory interpretation in the Ruby Princess Case in Australia

Written by Seung Chan Rhee and Alan Zheng

Suppose a company sells tickets for cruises to/from Australia. The passengers hail from Australia, and other countries. The contracts contain an exclusive foreign jurisdiction clause nominating a non-Australian jurisdiction. The company is incorporated in Bermuda. Cruises are only temporarily in Australian territorial waters.

A cruise goes wrong. Passengers, Australian and non-Australian, want relief under the *Australian Consumer Law* (*ACL*). They commence representative proceedings alleging breaches of consumer law, and negligence in the Federal Court of Australia. The Australian court must first resolve the conflict of laws

problems posed – problems as sustained as they have been complex in the history of private international law.

These are the facts at the heart of the Ruby Princess cruise, and her 2,600 passengers. The story was reported widely. A COVID-19 outbreak prematurely terminated the cruise. Many passengers contracted COVID-19; some died. Unsurprisingly, the cruise then spawned an inquiry and a class action against Carnival plc (Carnival) as charterer and operator of the Ruby Princess, and Princess Cruise Lines Ltd, the Bermuda-registered subsidiary and vessel owner.

Statute has left little of the common law untouched. This short note analyses the interaction between a mandatory law and an exclusive jurisdiction clause in the context of the case. The note observes the tension between the selection of the statutist approach or conventional choice of law rules as an analytical starting point, in difficult consumer protection cases.

Background

The Ruby Princess' passengers contracted on different sets of terms and conditions (US, UK and AU). The US and UK terms and conditions contained exclusive foreign jurisdiction clauses favouring the US and English courts respectively (PJ, [26], [29]). US customers also waived their rights to litigate in representative proceedings against Carnival (the 'class action waiver') (PJ, [27]). In aid of these clauses, Carnival sought a stay of the proceedings vis-à-vis the UK and US passenger subgroups.

Whether a stay is granted under Australian law turns on whether the Australian court is 'a clearly inappropriate forum' (See *Oceanic Sun Line Special Shipping Co Inc v Fay* at 247–8) (***Oceanic Sun Line***). In *Regie Nationale des Usines Renault SA v Zhang* (***Renault v Zhang***), the High Court (at [78]) described the test as requiring the applicant to show the Australian proceeding:

would be productive of injustice, because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious …

In *Voth v Manildra Flour Mills Pty Ltd* (***Voth***), a majority observed (at 566):

the extent to which the law of the forum is applicable in resolving the rights and liabilities of the parties is a material consideration … the selected forum should

not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable in the determination of the rights and liabilities of the parties.

Through these cases the High Court elected not to follow the English approach (see *Spiliada Maritime Corporation v Cansulex Ltd*) which requires that another forum is clearly or distinctly *more* appropriate. The Australian test, after *Voth* poses a negative test and a more difficult bar.

First Instance

Stewart J found the Federal Court was not a clearly inappropriate forum and declined to stay the proceedings. A critical plank of this conclusion was the finding that the exclusive foreign jurisdiction and class action waiver clauses were not incorporated into the contracts (PJ, [74]). Even if the clauses were incorporated, Stewart J reasoned in obiter that the class action waiver was void as an unfair contract term under s 23 of the *ACL* (PJ, [145]) and the Federal Court was not a clearly inappropriate forum.

As noted in *Voth* and *Oceanic Sun Line*, simply because the contract selected the US or UK as the particular lex causae did not end the analysis (PJ, [207]) — the US and UK subgroups were not guaranteed to take the benefit of the *ACL* in the US and English courts, notwithstanding Carnival's undertaking that it would not oppose the passengers' application to rely on the *ACL* in overseas forums (PJ, [297], [363]). Ultimately, there remained a real juridical advantage for the passengers to pursue representative proceedings *together* in Australia.

Carnival appealed.

Full Court

The majority (Derrington J, Allsop CJ agreeing) allowed Carnival's appeal, staying the US subgroup's proceedings. Unlike the primary judge, the majority reasoned the clauses were incorporated into the US subgroup contracts. Further, a stay should be refused because the US and English courts had similar legislative analogues to the *ACL* (FCAFC, [383]-[387]). Although he US passengers would lose the benefit of the class action, that was a mere procedural advantage and the question of forum is informed by questions of substantive rights (FCAFC, [388]).

Rares J dissented, upholding the primary judge's refusal of a stay (FCAFC, [96]).

The passengers appealed to the High Court.

The Interaction between a Mandatory Law and an Exclusive Jurisdiction Clause

Statutes generally fall into one of three categories (see Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435). The categories move in degrees of deference towards choice of law rules. First, a statute may impose a choice of law rule directing the application of the lex fori where a connecting factor is established. Second, a statute may contain, on its proper construction, a 'self-limiting' provision triggered if the applicable law is the lex fori. Third, a statute may override a specified lex causae as a mandatory law of the forum. An oft-repeated refrain is that all local Australian statutes are mandatory in nature ([2023] HCATrans 99).

In the High Court, Carnival contended that if contracting parties select a lex causae other than the forum law, the forum statute will not apply unless Parliament has expressly overridden the lex causae.

The passengers (supported by the Commonwealth Attorney-General and ACCC, as interveners) took a different starting point — the threshold question is whether the forum law, *as a matter of interpretation*, applies to the contract irrespective of the parties' usage of an exclusive jurisdiction clause. In this case, several factors supported the *ACL's* application including s 5(1)(g) of the CCA, and the need to preserve the *ACL's* consumer protection purpose by preventing evasion through the insertion of choice of law clauses.

The parties adopted unsurprising positions. The passengers' case was conventionally fortified by the statutist approach, prioritising interpretation in determining the forum statute's scope of application. Carnival relied on the orthodox approach, prioritising choice of law rules in controlling when and to what extent forum statutes will apply, and more aligned with comity norms and party autonomy the selection of the governing law of private agreements. The orthodox approach was exemplified in Carnival's submission that '[i]t was not the legislature's purpose to appoint Australian courts as the global arbiter … of class actions concerning consumer contracts across the world' (See Respondent's Outline of Oral Argument, p. 3).

Against that view, it was said that party autonomy should be de-emphasised where contracts are not fully negotiated, involve unequal bargaining power and standard terms (contracts of 'adhesion' as here provide a good example): see [2023] HCATrans 99 and the exchange between Gordon J and J Gleeson SC.

As scholars have noted, differences between the two approaches can be almost imperceptible. Characterisation is a 'species of interpretation' (Michael Douglas, 'Does Choice of Law Matter?' (2021) 28 *Australian International Law Journal* 1). However, the approach taken can lead to different outcomes in hard cases.

The key obstacle to the statutist approach is uncertainty. If interpretation of a statute's extraterritorial scope controls the choice of law, then how do contracting parties ensure their selection of law prevails and that they are complying?

Interpretation (*both* in the choice of law sense and statutory interpretation) invites reasonable arguments that cut in both directions requiring judicial adjudication. Take, for example, Carnival's response to the passengers' argument that the *ACL's* consumer protection policy weighs against the use of choice of law clauses to evade liability. Carnival contended any evasion can be controlled by a two-step approach: firstly, applying the *ACL's* unfair contract provisions to the choice of law clause itself and, if it the clause is void, *only then* secondly applying the provisions to the contract as a whole. However, this only shifts the application of statutory interpretation to an anterior stage, namely how and when a given choice of law clause, on its face, might be considered unfair. To the extent any determination of unfairness could be made, this turns on the consequences of the clause *per se* than any particular manner of wording. Such an outcome equally produces unpredictability as to the anticipated effect and application of the forum law.

There is another example on point. Section 5(1)(g) extends the *ACL* to the 'engaging in conduct outside Australia' by bodies corporate carrying on business in Australia. Carnival's *expressio unius*-style argument that s 5(1)(g) does not support the passengers' case because the unfair contracts prohibition is not predicated on 'engaging in' any conduct, whereas *ACL* prohibitions apply to 'conduct'. Accordingly, taking up a point made by the Full Court majority (FCAFC, [301]), Carnival contended a limitation should be read into s 5(1)(g) else it capriciously apply to companies like Carnival whose business were entirely engaged outside of Australia's territorial limits.

Nevertheless, as the appellants pointed out (relying on drafting history), 'when the unfair contract terms legislation was first introduced … s 5(1) was specifically amended to apply to those provisions' (See Appellant's Written Submissions, p. 6). It is therefore apparent how the statutist approach invites a certain level of textual skirmishing.

Choices are available to judges under both the statutist approach and in the application of choice of law rules (see Michael Douglas, 'Choice of Law in the Age of Statutes' in Michael Douglas, Vivienne Bath, Mary Keyes and Andrew Dickinson, *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) ch 9). However, it does not follow that there are comparable levels of certainty in the two approaches. Characterisation of a case as contract or tort (to take a very general example) invites a narrower range of choices than the entire arsenal of statutory interpretation techniques deployable analysing words in a statutory provision. That is so because characterisation is controlled by matters external to submissions, namely pleadings and the facts as objectively found (e.g. where was the defective product manufactured, or where was the injury sustained). Interpretation, particularly through the modern focus on text, context and purpose, is not disciplined by facts or pleadings. Instead, it is shaped by submissions and argumentation actuated by the connotative ambiguity found in statute.

That has led the High Court to observe that choice of law rules uphold certainty. In *Renault v Zhang*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ stated ([66]-[67]):

The selection of the lex loci delicti as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the lex causae engenders doubt as to liability and impedes settlement.

Against the aim of certainty (and deference to choice of law clauses) are the countervailing considerations arising from legislative policy and the higher-order status of statute over choice of law rules sourced from the common law (see Douglas, 'Choice of law in the Age of Statutes'). The interveners put it as an 'unattractive prospect' if the 'beneficial' aspects of the *ACL* regime could be defeated by expedient foreign jurisdiction clauses.

Insofar as the legislature evinces an intent to confer the benefit of legislation beyond Australia's territorial bounds, courts bound by an interpretive obligation to give effect to that legislative intention will not be able to defer to choice of law rules. In the case of the *CCA* and the *ACL*, s 15AA of the *Acts Interpretation Act 1901* (Cth) enjoins courts to prefer the interpretation 'that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act)'. Douglas and Loadsman (see 'The Impact of the Hague Principles on Choice of Law in International Commercial Contracts' (2018) 19(1) *Melbourne Journal of International Law* 1) observe that:

It is consistent with this purposive approach to statutory interpretation that Australian courts take a broad approach to the geographical scope of Australian statutes. In an environment where Australian lives and businesses increasingly cross borders on a regular basis, it would defeat the purposes of many pieces of Australian legislation if courts were to take a territorially-limited approach to statutes' scope of operation.

No doubt there is some truth to Carnival's submission that Parliament did not intend to render Australian courts the global arbiters of consumer contracts. However, subject to a pronouncement to the contrary from the High Court, the judgments to date in *Karpik v Carnival plc* suggest a statutist analysis, however uncertain, difficult or comity-ablating, will be a necessary precondition to determining the weight given to the wording of a choice of law clause. This is ultimately a consequence of the premium placed on a purposive construction to mandatory laws arising out of the home forum. For better or worse (and a strong case has been made for worse – see Maria Hook, 'The "Statutist Trap" and Subject-Matter Jurisdiction' (2017) 13(2) *Journal of Private International Law* 435), '[i]f the purposive approach to statutory interpretation gives rise to forum shopping in favour of Australian courts, so be it' (see Douglas and Loadsman, 20).

Notwithstanding this, another difficulty with Carnival's submissions in favour of the choice of law approach is that it functionally revives the common law *presumption* of non-extraterritorial application of laws and elevates the rebuttability threshold of that presumption to something made 'manifest' by parliament (which has been keenly disputed in the High Court: see Respondent's Submissions, [10]).

It is important to recall that the presumption was always couched in the language

of construction. In *Wanganui-Rangitiei Electric Power Board v Australian Mutual Provident Society,* Dixon J stated (at 601):

The rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter.

Rebuttability does not arise at all if the context or subject matter of the forum statute, as a matter of interpretation, supplies a relevant territorial connection. If it so supplies, that territorial connection operates as a restriction.

Dixon J also went on to state (at 601):

But, in the absence of any countervailing consideration, the principle is that general words should not be understood as extending to cases which, according to the rules of private international law administered in our courts, are governed by foreign law.

Most recently in *BHP Group Ltd v Impiombato*, Kiefel CJ and Gageler J (at [23]) considered the common law presumption resembled a 'presumption *in favour of* international comity' rather than one *against* extraterritorial operation – although it is worth noting that three other judges recognised (at [71]) the common law presumption was ultimately a statutory construction rule which did not always require reference to comity. Nevertheless, an important factor for Kiefel CJ and Gageler J in finding the class action provisions of Part IVA of the *Federal Court of Australia Act 1976* (Cth) were not restricted to Australian residents by the presumption was the fact no principle of international law or comity would be infringed by a non-consenting and non-resident group member being bound by a judgment of the Federal Court in relation to a matter over which that court had jurisdiction.

Conversely, as Derrington J noted on appeal (FCAFC, [300]), the extension of s 23 to the transactions of companies operating in overseas markets as a result of their ancillary dealings in Australia would have been an 'anomalous result'. Such a result would not have promoted comity between Australia and other national bodies politic, where the *ACL* would have had the result of potentially subjecting foreign companies to obligations additional to those imposed by the laws of their home country. As Carnival put it in the High Court:

if a company happens to carry on business in Australia, all of its contracts with

consumers (as defined) all over the world are then subject to Part 2-3 of the ACL. It would mean, for example, that contractual terms between a foreign corporation and consumers in Romania under standard form contracts can be deemed void under s 23 (Respondent's Submissions, [36]).

Without an expressed intention to the contrary, it was unlikely that Parliament had intended to 'legislate beyond the bounds of international comity' – into an area that would ordinarily be expected to be governed by foreign law.

To some extent, the judgments to date, despite their differing conclusions, suggest in common that an entirely non-statutist outcome (insofar as the CCA and *ACL* is concerned) is something of a will-o'-the-wisp. If it is accepted that matters of high forum public policy can supervene the contractual arrangements of the parties, expressed in no uncertain terms, then a court must always evaluate legislation in a statutist manner to determine how contractual arrangements interact with that policy. This is so even if, as in Derrington J's view in *Carnival plc v Karpik,* the conclusion would be that the policy would not be advanced by applying the mandatory law.

The High Court's decision will not only clarify the ambit of the CCA regime; it will materially bear upon the desirability of Australian courts as a forum for future transnational consumer law class actions. Coxtensively, companies with Australian operations liable to be on the respondent end of such class actions will be watching the developments closely before drafting further exclusive foreign jurisdiction clauses.

Judgment is reserved in the High Court.

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