China Adopts Restrictive Theory of Foreign State Immunity

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On September 1, 2023, the Standing Committee of the National People's Congress promulgated the Foreign State Immunity Law of the People's Republic of China (FSIL) (English translation here). When the law enters into force on January 1, 2024, China will join those countries—a clear majority—that have adopted the restrictive theory of foreign state immunity. For the law of state immunity, this move is particularly significant because China had been the most important adherent to the rival, absolute theory of foreign state immunity.

In two prior posts (here and here), I discussed a draft of the FSIL (English translation here). In this post I analyze the final version of the law, noting some of its key provision and identifying changes from the draft, some of which address issues that I had identified. I also explain why analysts who see China's new law as a form of "Wolf Warrior Diplomacy" are mistaken. Contrary to some suggestions, the FSIL will not allow China to sue the United States over U.S. export controls on computer chips or potential restrictions on Tiktok. Rather, the FSIL is properly viewed as a step towards joining the international community on an important question of international law.

The Restrictive Theory of Foreign State Immunity

Under the restrictive theory of foreign state immunity, foreign states are immune from suits based on their governmental acts (acta jure imperii) but not from suits based on their non-governmental acts (acta jure gestionis). During the twentieth century many countries moved from an absolute theory of foreign state immunity, under which countries could never be sued in another country's courts, to the restrictive theory. Russia and China long adhered to the absolute theory. But Russia joined the restrictive immunity camp in 2016, when its law on the jurisdictional immunity of foreign states went into effect.

In 2005, China signed the U.N. Convention on Jurisdictional Immunities of States and Their Property, which follows the restrictive theory. But China has not ratified the U.N. Convention, and the Convention has not gained enough signatories to enter into force. As I noted in a prior post, China stated in 2009 that, despite signing the U.N. Convention, its position on foreign state immunity had not changed and that it still followed the absolute theory.

China's new FSIL therefore marks a significant shift in China's position on an important question of international law. As I explained in my earlier posts and discuss further below, the FSIL follows the U.N. Convention in many respects. By adopting this law, however, China has extended these rules not only to other countries that may join the Convention but to all countries, even those like the United States that are unlikely ever to sign this treaty.

Significant Provisions of the State Immunity Law

China's FSIL begins, as most such laws do, with a general presumption that foreign states and their property are immune from jurisdiction. Article 3 says: "Foreign states and their property enjoy immunity from the jurisdiction of PRC courts, except as otherwise provided by this Law." Article 2 defines "foreign states" to include "foreign sovereign states," "state organs or constituent parts of foreign sovereign states," and "organizations or individuals who are authorized by foreign sovereign states to exercise sovereign authority and who engage in activities on the basis of such authorization." These provisions generally track Articles 1 and 2(1)(b) of the U.N. Convention.

Waiver Exception

Articles 4-6 of the FSIL law provide that a foreign state is not immune from jurisdiction when it has consented to the jurisdiction of Chinese courts. Article 4 sets forth means by which a foreign state may expressly consent to jurisdiction. Article 5 provides that a foreign state is deemed to consent if it files suit as a plaintiff, participates as a defendant and files "an answer or a counterclaim on the merits of the case," or participates as a third party in Chinese courts. Article 5 further provides that a foreign state participating as a plaintiff or third party waives immunity from counterclaims arising from the same legal relationship or

facts. Article 6, on the other hand, says that a foreign state shall not be deemed to have consented to jurisdiction by appearing in Chinese court to assert immunity, by having its representatives testify, or by choosing Chinese law to govern a particular matter. These provisions track Articles 7-9 of the U.N. Convention.

Commercial Activities Exception

The FSIL also contains a commercial activities exception. Article 7 provides that a foreign state shall not be immune from proceedings arising from commercial activities when those activities "took place in PRC territory, or have had a direct effect in PRC territory even though they took place outside PRC territory." Article 7 defines "commercial activity" as "transactions of goods or services, investments, borrowing and lending, and other acts of a commercial nature that do not constitute an exercise of sovereign authority." To determine whether an act is commercial, "a PRC court shall undertake an overall consideration of the act's nature and purpose." Like the U.N. Convention, the FSIL deals separately with employment contracts (Article 8) and intellectual property cases (Article 11).

Article 7's reference to both "nature and purpose" is significant. U.N. Convention Article 2(2) allows consideration of both. But considering "purpose" is likely to result in a narrower exception—and thus in broader immunity for foreign states—than considering "nature" alone. Under the U.S. Foreign Sovereign Immunities Act (FSIA), the commercial character of an act is determined only by reference to its nature and not by reference to its purpose. Applying this definition, the U.S. Supreme Court has held that issuing foreign government bonds is a commercial activity, even if done for a sovereign purpose. It is unclear if Chinese courts applying the FSIL will reach the same conclusion.

Territorial Tort Exception

Article 9 of the FSIL creates an exception to immunity for claims "arising from personal injury or death or damage to movable or immovable property caused by the relevant act of the foreign state in PRC territory." This generally tracks Article 12 of the U.N. Convention.

Property Exception

Article 10 of the FSIL creates an exception to immunity for claims involving

immoveable property in China, interests in moveable or immoveable property arising from gifts, bequests, or inheritance, and interests in trust property and bankruptcy estates. This provision closely follows Article 13 of the U.N. Convention.

Arbitration Exception

Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from jurisdiction with respect to certain matters requiring review by a court. These include "the validity of the arbitration agreement," "the confirmation or enforcement of the arbitral award," and "the setting aside of the arbitral award." This provision corresponds to Article 17 of the U.N. Convention.

Reciprocity Clause

China's FSIL also contains a reciprocity clause. Article 21 provides: "Where foreign states accord the PRC and its property narrower immunity that is provided by this Law, the PRC will apply the principle of reciprocity." This means, for example, that Chinese courts could hear claims against the United States for expropriations in violation of international law or for international terrorism, because the U.S. FSIA has exceptions for suchclaims, even though China's FSIL does not.

The U.N. Convention does not have a reciprocity provision. Nor do most other states that have codified the law of state immunity. But Russia's 2016 law on the jurisdictional immunities of foreign states does contain such a clause in Article 4(1), and Argentina's state immunity law contains a reciprocity clause specifically for the immunity of central bank assets, reportedly adopted at China's request.

The FSIL's reciprocity clause is consistent with the emphasis on reciprocity that one finds in other provisions of Chinese law. For example, Article 289 of China's Civil Procedure Law (numbered Article 282 in this translation, prior to the law's 2022 amendment of other provisions), provides for the recognition and enforcement of foreign judgments "pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity."

The example of foreign judgments also shows that reciprocity may be interpreted

narrowly or broadly. China used to insist on "de facto" reciprocity for foreign judgments—proof that the foreign country had previously recognized Chinese judgments. Last year, however, China shifted to a more liberal "de jure" approach, under which reciprocity is satisfied if the foreign country *would* recognize Chinese judgments even if it has not already done so. Time will tell how Chinese courts interpret reciprocity under the FSIL.

Service

Article 17 of the FSIL provides that Chinese courts may serve process on a foreign state as provided in treaties between China and the foreign state or by "other means accepted by the foreign state and not prohibited by PRC law." (The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state's Central Authority.) If neither of these means is possible, then service may be made by sending a diplomatic note. A foreign state may not object to improper service after it has made a pleading on the merits. This provision also follows the U.N. Convention closely, specifically Article 22.

Default Judgments

If the foreign state does not appear, Article 18 of China's draft law requires a Chinese court to "sua sponte ascertain whether the foreign state enjoys immunity from its jurisdiction." The court may not enter a default judgment until at least six months after the foreign state has been served. The judgment must then be served on the foreign state, which will have six months to appeal. Article 23 of the U.N. Convention is similar but with four-month time periods.

Immunity of Property from Execution

Under customary international law, the immunity of a foreign state's property from compulsory measures like execution of a judgment is separate from—and generally broader than—a foreign state's immunity from suit. Articles 13-15 of the FSIL address the immunity of a foreign state's property from compulsory measures.

Article 13 states the general rule that "[t]he property of a foreign state enjoys immunity from the judicial compulsory measures of PRC courts" and further

provides that a foreign state's waiver of immunity from suit is not a waiver of immunity from compulsory measures. Article 14 creates three exceptions to immunity: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically earmarked property for the enforcement of such measures; and (3) "to implement the effective judgments and rulings of PRC courts" when the property is used for commercial activities, relates to the proceedings, and is located in China. Article 15 goes on to identify types of property that shall *not* be regarded as used for commercial activities for the purpose of Article 14(3), including the bank accounts of diplomatic missions, property of a military character, central bank assets, and property of scientific, cultural, or historical value.

As discussed further below, the addition of "rulings" (??) to Article 14(3) is significant because Chinese court decisions that recognize foreign judgments are considered "rulings." This change means that the exception may be used to enforce *foreign* court judgments against the property of a foreign state located in China by obtaining a Chinese court ruling recognizing the foreign judgment. This change brings the FSIL into greater alignment with Articles 19-21 of the U.N. Convention, which similarly permit execution of domestic and foreign judgments against the property of foreign states.

Foreign Officials

As noted above, Article 2 of the FSIL defines "foreign state" to include "individuals who are authorized by foreign sovereign states to exercise sovereign authority and who engage in activities on the basis of such authorization." The impact of the FSIL on foreign official immunity is limited by Article 20, which says that the FSIL shall not affect diplomatic immunity, consular immunity, special-missions immunity, or head of state immunity. But Article 20 makes no mention of conduct-based immunity—that is, the immunity that foreign officials enjoy under customary international law for acts taken in their official capacities.

Thus, foreign officials not mentioned in Article 20 will be subject to suit in Chinese courts, even for acts taken in their official capacities, if one of the exceptions discussed above applies. If, for example, a foreign official makes misrepresentations in connection with a foreign state's issuance of bonds, the FSIL's commercial activities exception would seem to allow claims for fraud not just against the foreign state but also against the foreign official.

The FSIL's treatment of foreign officials generally tracks the U.N. Convention, both in defining "foreign state" to include foreign officials (Art. 2(1)(b)(iv)) and in exempting diplomats, consuls, and heads of state (Art. 3). But, as I noted in an earlier post, there is no reason China had to follow the U.N. Convention's odd treatment of conduct-based immunity. Doing so in the absence of a treaty, moreover, appears to violate international law by affording some foreign officials less immunity than customary international law requires.

Some Changes from the Draft Law

The NPC Standing Committee made small but potentially significant changes to the draft law in promulgating the FSIL. The NPC Observer has a helpful chart comparing the Chinese text of the final version to the draft law.

One change that others have noted is the explicit mention of "borrowing and lending" (??) in the commercial activities exception in Article 7. The enormous amounts that China has loaned to foreign states under the Belt and Road Initiative may explain this addition. But the practical effect of the change seems limited for two reasons. First, "borrowing and lending" would have naturally fallen into the catch-all phrase "other acts of a commercial nature" in any event. Second, as noted above, Article 7 instructs Chinese courts to "undertake an overall consideration of the act's nature and purpose." Considering an act's purpose may lead Chinese courts to conclude that some "borrowing and lending" involving foreign states is not commercial if it is done for governmental purposes.

The NPC Standing Committee also helpfully changed Article 9's territorial tort exception to clarify when that exception applies. In an earlier post, I wrote that the draft law did "not make clear whether it is the tortious act, the injury, or both that must occur within the territory of China." The final text of the FSIL now clearly states that the relevant conduct of the foreign state, though not the injury, must occur within China (???????????? ??????????????). This position is generally consistent with Article 12 of the U.N. Convention but, most importantly, it is simply clearer than the text of the draft law.

Another small but important change is the addition of "rulings" (??) to Article 14(3)'s exception for compulsory measures to enforce judgments. The corresponding provision in the draft law referred to Chinese "judgments" (??) but not to "rulings." As I pointed out before, this omission was significant because

Chinese decisions recognizing foreign court decisions are designated “rulings” rather than “judgments.” Under the draft law, the exception would have allowed execution against the property of a foreign state for Chinese court judgments but not for Chinese rulings recognizing foreign judgments. By adding “rulings” to the final text of the FSIL, the NPC Standing Committee has brought this exception more in line with Article 19(c) of the U.N. Convention and made it available to help enforce foreign judgments against foreign-state-owned property in China if the other requirements of the exception are met.

In another change from the draft law, the NPC Standing Committee has added “PRC Courts” (??????????) to the beginning of Article 17 on service of process. The general practice in China is that courts, rather than litigants, serve process. This is one reason why the practice of some U.S. courts to authorize alternative service on Chinese defendants by email is problematic. For present purposes, the change simply clarifies something that Chinese practitioners would take for granted but non-Chinese practitioners might not.

Article 20 provides that the FSIL does not affect the immunities of certain foreign officials. In its second paragraph, dealing with head-of-state immunity, the NPC Standing Committee has added “international custom” (????? ?) as well as “PRC laws” and “international agreements.” This makes sense. Although diplomatic immunity, consular immunity, and other immunities mentioned in the first paragraph of Article 20 are governed by treaties, head-of-state immunity is governed not by treaty but by customary international law.

Finally, in Article 21’s reciprocity provision, the NPC standing committee has eliminated the word “may” (??). The effect of this change is to make the application of reciprocity mandatory when foreign states accord China and its property narrower immunity than is provided by the FSIL.

The Impact on China-U.S. Relations

Recent media coverage has suggested that China views the FSIL as a legal tool in its struggle with the United States. A senior official in China’s Ministry of Foreign Affairs was quoted as saying that the law “provides a solid legal basis for China to take countermeasures” against discriminatory action by foreign courts and may have a “preventive, warning and deterrent” effect. One analyst has even suggested that the FSIL is “an important part of China’s Wolf Warrior diplomacy,

and another step forward in its diplomatic bullying of other countries." Such comments miss the mark. As Professor Donald Clarke aptly observes: "All China is doing is adopting a policy toward sovereign immunity that is the one already adopted by most other states."

Professor Sophia Tang points out that, although suits against China in U.S. courts over Covid-19 pushed the issue of state immunity up on Chinese lawmakers' agenda, the question had been under discussion for years. The Covid-19 lawsuits may explain why China included Article 21's provision on reciprocity, but it bears emphasis that these suits against China were *dismissed* by U.S. courts on grounds of state immunity. If Congress were foolish enough to amend the FSIA to permit such suits, the FSIL's reciprocity provision would allow China to respond in kind, but this scenario seems unlikely.

China's FSIL will not permit suits against the United States for other actions that China has protested, such as U.S. export controls on selling semiconductors to China or potential restrictions on TikTok. These are governmental actions, and the restrictive theory adopted by the FSIL maintains state immunity for governmental actions.

On the other hand, the FSIL clearly will permit suits in Chinese courts against foreign governments that breach commercial contracts. As Professor Congyan Cai points out, the FSIL may play a role in enforcing contracts with foreign governments under China's Belt and Road Initiative. More generally, Clarke notes, China's past adherence to the absolute theory meant that Chinese parties could not sue foreign states in Chinese courts even though foreign parties could sue China in foreign courts. "China finally decided," he continues, "that there was no point in maintaining the doctrine of absolute sovereignty, since other states weren't respecting it in their courts and the only people it was hurting were Chinese plaintiffs."

Ultimately, the FSIL is a step in what Professor Cai has called China's "progressive compliance" with international law, which helps legitimate China as a rising power. The FSIL brings Chinese law into alignment with the law on state immunity in most other countries, ending its status as an outlier in this area.

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

“Quasi” Anti-Suit Injunctions and Public Policy under Brussels Regime

THE CJEU: “QUASI” ANTI-SUIT INJUNCTION JUDGMENTS ARE AGAINST PUBLIC POLICY UNDER BRUSSELS REGIME

This post is written by Mykolas Kirkutis, a lecturer and PhD student of law at Mykolas Romeris University and visiting researcher at Rotterdam Erasmus School of Law, Erasmus University Rotterdam (EU Civil Justice group).

The Court of Justice of European Union (CJEU) on 7 of September 2023 in its newest case *Charles Taylor Adjusting Limited, FD v Starlight Shipping Company, Overseas Marine Enterprises Inc.* (case No. C?590/21) 2023 rendered a new preliminary ruling related to a non-recognition of “Quasi” anti-suit injunctions’ judgment under public policy ground of Brussels regime. This case is important because of two aspects. Firstly, CJEU clarified the main elements of “Quasi” anti-suit injunctions’ judgments. Secondly, Court stated what impact such judgments have for mutual trust in EU and if it can be safeguarded by public policy ground.

Facts of the case and preliminary question

The case concerns the maritime accident and dispute deriving from it. In connection with the sinking of a ship owners of the ship (Starlight and OME) demanded the insurers of that ship to pay an insurance claim based on their insurance contracts. After the insurers refused to pay a compensation, Starlight filed a claim against of the insurers to the UK courts and commenced another proceedings against another insurer in arbitration. While the legal action and arbitration were pending, Starlight, OME and the insurers concluded the settlement agreements in the UK court. According to the settlement agreement, it shall end parties’ dispute and insurers had to pay the insurance benefit. The settlement agreements have been approved by the UK court.

Following the conclusion of the settlement agreements, the owners of the vessel (Starlight and OME with the other owners) brought several legal actions before the court in Greece for compensation of material and non-material damage. Legal actions were based insurers and their representatives liability on the publication of false and defamatory statements about the owners at a time when the initial proceedings for the payment of the insurance claim. These actions were based on the fact that the insurers' agents and representatives had informed the National Bank of Greece (the mortgage creditor of one of the shipowners) and had spread false rumours in the insurance market that the ship had sunk due to serious defects of which the shipowners were aware.

While those new legal actions before the Greece court were pending, the insurers of the vessel and their representatives brought another legal actions against Starlight and OME before the UK courts seeking a declaration that those new actions, instituted in Greece, had been brought in breach of the settlement agreements, and requesting that their applications for 'declarative relief and compensation' be granted. The High Court of Justice (England & Wales) on 26 September 2014 (while legal actions before the Greece court were pending) rendered judgment and orders by which the insurers and their representative's obtained compensation in respect of the proceedings instituted in Greece and payment of their costs incurred in England.

After that the issue of non-recognition of these UK court judgment and orders has come before the Greece courts. The Supreme Court of Greece deciding on the question of non-recognition of UK courts judgment and order refered to the CJEU for a preliminary ruling. The main question, which was referred to the CJEU was whether recognition and enforcement of a judgment of a court of another Member State may be refused on grounds of public policy on the ground that it obstructs the continuation of proceedings pending before a court of another Member State by awarding one of the parties interim damages in respect of the costs incurred by that party in bringing those proceedings.

Elements of "Quasi" anti-suit injunctions' judgment

First, in its preliminary judgment the CJEU clarified the elements of the "Quasi" anti-suit injunctions' judgment. Court noted, that in the context of an 'anti-suit injunction', a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court

undermines the latter court's jurisdiction to determine the dispute. When a court order prohibits a plaintiff from bringing an action before a court in another country, the order constitutes a restriction on the jurisdiction of the court in the other country, which is not compatible with the Brussels regime.

However, it is clear from this CJEU judgment that it is not essential that a prohibition to bring an action before a court of another State would be expressed directly in the such judgment to qualify it "Quasi" anti-suit injunctions' judgment. In this case, the judgment and orders of the UK court did not prohibited to bring an action before the courts of another State (Greece) *expressis verbis*. Although, that judgment and those orders contained grounds relating to the breach settlement agreements, the penalties for which they will be liable if they fail to comply with that judgment and those orders and the jurisdiction of the Greece courts in the light of those settlement agreements. Moreover, that judgment and those orders also contained grounds relating to the financial penalties for which Starlight and OME, together with the natural persons representing them, will be liable, in particular a decision on the provisional award of damages, the amount of which is not final and is predicated on the continuation of the proceedings before the Greece courts.

It is clear from paragraph 27 of the preliminary judgment of CJEU that, in order for a particular judgments of a another Member State to qualify them as a "quasi" anti-suit injunctions' judgments it is enough that they may be regarded as having, at the very least, the effect of deterring party from bringing proceedings before the another Member State courts or continuing before those courts an action the purpose of which is the same as those actions brought before the courts of the United Kingdom. A court judgment with such consequences is contrary to the objectives of the Brussels regime. This leads to the conclusion that such judgment cannot be enforced in another Member states, because it contradicts to mutual trust on which Brussels regime is based.

"Quasi" anti-suit injunctions', Mutual Trust and Public Policy

Secondly, the CJEU considered whether such judgment can be not recognised on the ground of public policy. This means that court had to answer whether mutual trust and the right to access a court fall within the scope of the public policy clause. Court noted that such "quasi" anti-suit injunctions' run counter to the trust which the Member States accord to one another's legal systems and judicial

institutions and on which the system of jurisdiction under Brussels I Regulation (as well as under Brussels Ibis Regulation) is based.

As well as, the CJEU ruled that the recognition and enforcement of the judgment and orders of the High Court of Justice (England & Wales) may breach public policy in the legal order of the Member State in which recognition and enforcement are sought, inasmuch as that judgment and those orders are such as to infringe the fundamental principle, in the European judicial area based on mutual trust, that every court is to rule on its own jurisdiction. Furthermore, that type of '"quasi" anti-suit injunction' is also such as to undermine access to justice for persons on whom such injunctions are imposed.

The CJEU decided that Article 34(1) of Regulation No 44/2001, read in conjunction with Article 45(1) thereof, must be interpreted as meaning that a court or tribunal of a Member State may refuse to recognise and enforce a judgment of a court or tribunal of another Member State on the ground that it is contrary to public policy, where that judgment impedes the continuation of proceedings pending before another court or tribunal of the former Member State, in that it grants one of the parties provisional damages in respect of the costs borne by that party on account of its bringing those proceedings on the grounds that, first, the subject matter of those proceedings is covered by a settlement agreement, lawfully concluded and ratified by the court or tribunal of the Member State which gave that judgment and, second, the court of the former Member State, before which the proceedings at issue were brought, does not have jurisdiction on account of a clause conferring exclusive jurisdiction.

Conclusion

The above mentioned CJEU preliminary ruling leads to two findings. First, public policy ground includes both the principle of a EU judicial area which is based on mutual trust and the right to access a court, which is an important and fundamental principle of EU law. And second, that "Quasi" anti-suit injunctions' are against the purpose of Brussels regime, therefore such judgments can be non-recognized in another Member States on the basis of public policy clause.

International high-tech surrogacy and legal developments in the Netherlands

This blogpost is an edited version of this blogpost written in Dutch by Stichting IJI (The Hague Institute for private international law and foreign law). We thought it was interesting to also bring it to the attention of the international readership of this blog.

Introduction

In the Netherlands, international high-tech surrogacy is a hot topic, resulting in interesting legal developments. Recently, a Dutch District Court dealt with a case on the recognition of US court decisions on legal parenthood over children born from a high-tech surrogacy trajectory in the US, providing many private international law insights on how to assess such request for recognition. Furthermore, on July 4 a bill was proposed that encloses several private international law provisions. This blogpost briefly highlights both developments.

High-tech surrogacy in the Netherlands

In the Netherlands, high-tech surrogacy – this involves the use of in vitro fertilization (ivf), often with the use of an ovum of a woman other than the surrogate mother – has been allowed (decriminalized) since 1997, but under strict conditions. Important conditions include having a medical reason and medical, psychological and legal information and counseling. It should be noted that commercial surrogacy is illegal.

It is not well tracked how often surrogacy occurs in the Netherlands. The Dutch government estimates that there are several dozen occurrences annually, but indicates that the number is increasing.

High-tech surrogacy abroad

Because, i.a., there are not always (enough) surrogate mothers to be found in the Netherlands, it occurs that some intending parents search for a surrogate mother

abroad. Surrogacy is treated differently abroad, to which roughly three variations apply:

1. Surrogacy is prohibited (e.g. Germany and France);
2. Surrogacy is allowed, through a legal framework with either various safeguards (counseling, legal assistance, judicial review etc.) or rules that provide for the legal parenthood of the intended parents. Thereby, as far as legal parenthood at birth is concerned, roughly two alternatives can be distinguished. For example, the surrogate mother is regarded as the legal mother and her husband or partner as the legal father. But there are also countries where the intended parents are considered to be the legal parents from the birth of the child;
3. There is no specific regulation in place for surrogacy and existing legal regulations are applied by analogy or not (e.g. Belgium and the Netherlands).

In case intended parents enter into a surrogacy trajectory abroad, all kinds of private international law issues arise in the Netherlands regarding, among others, the legal parenthood of the intended parents.

District Court decision of January 13, 2023

Early in 2023, said private international law issues arose before the District Court of The Hague (ECLI:NL:RBDHA:2023:363). The court had to rule on several requests by two married men (hereinafter: husband X and husband Y) regarding legal parenthood over children born from a surrogacy trajectory in the US.

The surrogate mother became pregnant with twins following ivf treatment in the US. Two embryos were transferred to her, using sperm from husband X and an ovum from an ovum donor, and sperm from husband Y and an ovum from an ovum donor. The couple applies in the Netherlands for, among other things, recognition of several court decisions on legal parenthood issued in the US, including a decision on denial of paternity, denial of maternity and establishment of paternity, and a decision on custody.

The District Court ruled that the court decisions from the US could be recognized in the Netherlands, with an extensive assessment of the public policy exception and the question of whether there was a diligent surrogacy trajectory.

Dutch bill of July 4, 2023 to regulate (international) surrogacy

On July 4, 2023, a bill was proposed in the Netherlands. This bill introduces rules for granting parenthood after surrogacy within the Netherlands and further holds rules for recognising parenthood after surrogacy from abroad. The bill indicates there will be a standard for ‘responsible surrogacy’ that intended parents should consider when choosing a surrogacy route both domestically and abroad. If certain conditions are met and the court has given its consent prior to conception, the intended parents will be considered the legal parents from birth. The bill also provides a specific recognition scheme for decisions made abroad, in which family law relations following surrogacy have been established or modified between the child and the intended parents. Important here is that the surrogacy process has been diligent. The standard will be that comparable requirements have been met that are also set for a ‘national’ surrogacy trajectory.

Same-sex relationships concluded abroad in Namibia – Between (Limited) Judicial Recognition and Legislative Rejection

There is no doubt that the issue of same-sex marriage is highly controversial. This is true for both liberal and conservative societies, especially when the same-sex union to be formed involves parties from different countries. Liberal societies may be tempted to open up access to same-sex marriage to all, especially when their citizens are involved and regardless of whether the same-sex marriage is permitted under the personal law of the other foreign party. For conservative societies, the challenge is even greater, as local authorities may have to decide whether or not to recognise same-sex marriages contracted abroad (in particular when their nationals are involved). The issue becomes even more complicated in

countries where domestic law is hostile to, or even criminalises, same-sex relationships.

It is in this broader context that the decision of the Supreme Court of Namibia in *Digashu v. GRN, Seiler-Lilles v. GRN* (SA 7/2022 and SA 6/2022) [2023] NASC (16 May 2023) decided that same-sex marriages concluded abroad should be recognised in Namibia and that the failure to do so infringes the right of the spouses to dignity and equality. Interestingly, the Supreme Court ruled as it did despite the fact that Namibian law does not recognise, and also criminalises same-sex relationships (see *infra*). Hence, the Supreme Court's decision provides valuable insights into the issue of recognition of same-sex unions contracted abroad in Africa and therefore deserves attention.

I. General Context

In his seminal book (*Private International Law in Commonwealth Africa* (Cambridge University Press, 2013) p. 182), Richard F. Oppong describes the issue of same-sex unions in Commonwealth Africa as follows: '*It still remains highly contentious in most of the countries under study whether the associations between persons of the same sex should be recognized as marriage. In Zambia, a marriage between persons of the same sex is void. It only in South Africa where civil unions solemnised either as marriage or a civil partnership are recognized*' (footnotes omitted). As to whether other African countries would follow the South African example, Richard F. Oppong opined that '*[t]here is little prospect of this happening […]. Indeed, there have been legislative attempts […] in countries such as Nigeria, Uganda, Malawi and Zimbabwe – to criminalise same-sex marriage.*' (*op. cit.* p. 183). For a detailed study on the issue, see Richard F. Oppong and Solomon Amoateng, 'Foreign Same-Sex Marriages Before Commonwealth African Courts', *Yearbook of Private International Law*, Vol. 18 (2016/2017), pp. 39-60. On the prohibition of same-sex marriages and same-sex unions and other same-sex relationships in Nigeria under domestic law and its implication on the recognition of same-sex unions concluded abroad, see Chukwuma S. A. Okoli and Richard F. Oppong, *Private International Law in Nigeria* (Hart Publishing, 2020) pp. 271-274.

II. The Law in Namibia

A comprehensive study of LGBT laws in Namibia shows that same-sex couples cannot marry under either of the two types of marriage permitted in Namibia, namely civil or customary marriages (see Legal Assistance Center, *Namibian Laws on LGBT Issues* (2015) p. 129). In one of its landmark decisions decided in 2001 known as 'the *Frank* case' (*Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 (SC)*), the Supreme Court held that the term 'marriage' in the Constitution should be interpreted to mean only a '*formal relationship between a man and a woman*' and not a same-sex relationship. Accordingly, same-sex relationships, in the Court's view, are not protected by the Constitution, in particular by Article 14 of the Constitution, which deals with family and marriage. With regard to same-sex marriages contracted abroad, the above-mentioned study explains that according to the general principles of law applicable in Namibia, a marriage validly contracted abroad is recognised in Namibia, subject to exceptions based on fraud or public policy (p. 135). However, the same study (critically) expressed doubt as to whether Namibian courts would be willing to recognise a foreign same-sex marriage (*ibid*). The same study also referred to a draft bill discussed by the Ministry of Home Affairs and Immigration which '*contained a provision specifically forbidding the recognition of foreign same-sex marriages*' (p. 136).

III. The Case

The case came before the Supreme Court of Namibia as a consolidated appeal of two cases involving foreign nationals married to Namibians in same-sex marriages contracted abroad.

In the first case, the marriage was contracted in South Africa in 2015 between a South African citizen and a Namibian citizen (both men) under South African law (Civil Union Act 17 of 2006). The couple in this case had been in a long-term relationship in South Africa since 2010. In 2017, the couple moved to Namibia.

In the second case, the marriage was contracted in Germany in 2017 under German law between a German citizen and a Namibian citizen (both women). The couple had been in a long-term relationship since 1988 and had entered into a formal life partnership in Germany under German law in 2004. The couple later

moved to Namibia.

In both cases, the foreign partners (appellants) applied for residency permits under the applicable legislation (Immigration Control Act). The Ministry of Home Affairs and Immigration ('the Ministry'), however, refused to recognise the couples as spouses in same-sex marriages contracted abroad for immigration purposes. The Appellants then sought, *inter alia*, a declaration that the Ministry should recognise their respective marriages and treat them as spouses under the applicable legislation.

IV. Issue and Arguments of the Parties

'*The central issue*' for the Court was to determine whether '*the refusal of the [Ministry] to recognise lawful same-sex marriage of foreign jurisdictions […] between a Namibian and a non-citizen [was] compatible with the [Namibian] Constitution*' (para. 20). In order to make such a determination, the Court had to consider whether or not the applicable domestic legislation could be interpreted to treat same-sex partners as 'spouses'.

The Ministry argued that, in the light of the Supreme Court's earlier precedent (the abovementioned *Frank* case), spouses in a same-sex marriage were excluded from the scope of the applicable legislation, irrespective of whether the marriage had been validly contracted abroad in accordance with the applicable foreign law (para. 58). The Ministry considered that the Supreme Court's precedent was binding (para. 57); and the position of the Supreme Court in that case (see II above) (para. 36) reflected the correct position of Namibian law (para. 59].

The appellants argued that the *Frank* case relied on by the Ministry was not a precedent, and should not be considered as binding (para. 54). They also argued that the approach taken by the Court in that case should not be followed (paras. 52, 55). The appellants also contended that the case should be distinguished, *inter alia*, on the basis that, unlike the *Frank* case were the partners were not *legally married* (i.e. in a situation of long-term cohabitation), the couples *in casu* had entered into lawful same-sex marriages contracted in foreign jurisdictions and that their marriages were valid *on the basis of general principles of common law* – the *lex loci celebrationis* (para. 50). Finally, the appellants argued that the Ministry's refusal to recognise their marriage was inconsistent with the Namibian

Constitution as it violated their rights (para. 51).

V. The Ruling

In dealing with the case, the Supreme Court focused mainly on the applicability of the doctrine of precedent in the Namibian context and the constitutional rights of the appellants. Interestingly, comparative law (with references to the law of some neighbouring African jurisdictions, English law, American law, Canadian law and even the case law of the European Court of Human Rights) was mobilised by the Court to reach its conclusion, i.e. that the Ministry's decision to interpret and apply the applicable legislation in a manner that excluded spouses in same-sex marriages validly entered into abroad violated the appellants' constitutional rights.

With regard to the validity of same-sex marriages contracted abroad, the Supreme Court ruled as follows:

[82] According to the well-established general principle of common law, if a marriage is duly concluded in accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia. […]

[83] […] The term marriage is likewise not defined in the [applicable legislation] and would contemplate valid marriages duly concluded and ordinarily recognised, including those validly contracted outside Namibia in accordance with the law applicable where the marriage is concluded in accordance with the general principle of common law already referred to. […].

[84] The Ministry has not raised any reason relating to public policy as to why the appellants' marriage should not be recognised in accordance with the general principle of common law. Nor did the Ministry question the validity of the appellants' respective marriages.

[85] On this basis alone, the appellants' respective marriages should have been recognised by the Ministry for the purpose of [the applicable legislation] and [the appellants] are to be regarded as spouse for the purpose of the [applicable legislation][…]

VI. The Dissent

The views of the majority in this case were challenged in a virulent dissent authored by one of the Supreme Court's Justices. With respect to the issue of the validity of same-sex marriages concluded abroad, the dissent considered that the majority judgment holding that *'in the present appeals, the parties concluded lawful marriages in jurisdictions recognising such marriages*' (145) failed to consider that '*the laws of Namibia (including the Constitution of the Republic) do not recognise same-sex relationships and marriages.*' (146). The dissent then listed many examples, including the criminalisation of sodomy and other legislation excluding same-sex relationships or providing that marriage shall be valid when two parties are of different sexes (para. 146).

More importantly, the dissent also criticised the recognition of the same-sex marriages based on their being valid under the law of the place where they were concluded by stating as follow:

[152] [the main finding of the majority judgment] has its basis on a well-established principle of common law, that if a marriage is duly concluded in accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it fall to be recognised in Namibia and that, that principle find its application to these matters. […].

[170] […] The common law principle relied on by the majority is sound in law but there are exceptions to the rule and Namibia is under no obligation to recognise a marriage inconsistent with its policies and laws for the reason that the said marriage is warranted by the municipal law of the country in which it was contracted. The marriages of the appellants offend the policies and laws of Namibia […]. (Emphasis in the original).

VII. Comments

The case presented here is interesting in many regards.

First, it introduces the Namibian approach to the question of the validity of marriages in general, including same-sex marriages. According to the majority judgment and the dissenting judgment, the validity of marriages is to be

determined in accordance with the 'well-established common law principle' that a marriage should be governed by the law of the place where it was contracted (i.e. *lex loci celebrationis*).

According to the Namibian Supreme Court judges, the rule arguably applies to marriages contracted within the jurisdiction as well as to marriages contracted abroad. The rule also appears to apply to both the formal and substantive (essential) validity of marriages. This is a particularly interesting point. In Richard F. Oppong's survey of approaches in Commonwealth Africa (but not including Namibia), the author concludes that '*most of the countries surveyed make a distinction between the substantive and formal validity of marriage*' (*op. cit.* 185). The former is generally determined by the *lex domicilii* (although there may be different approaches to this), while the latter is determined by the *lex loci celebrationis*. (*op. cit.*, pp. 183-186). The author goes on to affirm that '*the main exception appears to be South Africa, where it has been suggested that the sole test of validity [for both substantive and formal validity] is the law of the place of celebration*' (op. cit., p. 185). The case presented here shows that Namibia also follows the South African example. This is not surprising given that the majority opinion relied on South African jurisprudence for its findings and analysis (see paras. 82, 90, 108 for the majority judgment and paras. 152, 155-162 of the dissenting opinion).

Secondly, the majority judgment and the dissenting opinion show the divergent views of the Supreme Court judges as to whether the *lex loci celebrationis* rule should be subject to any limitation (*cf.* II above). For the majority, the rule is straightforward and does not appear to be subject to any exception or limitation. Indeed, in the words of the majority, '*if a marriage is duly solemnised in accordance with the legal requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia*' (emphasis added). No exception is allowed, including public policy. It is indeed interesting that the majority simply brushed aside public policy concerns by considering that that the Ministry had not raised any public policy ground (para. 84) (as if the intervention of public policy depended on its being invoked by the parties).

This aspect of the majority decision was criticised by the dissenting opinion. According to the dissenting opinion (para. 170), the application of the *lex loci celebrationis* is subject to the intervention of public policy. In other words, public policy should be invoked to refuse recognition of marriages validly celebrated

abroad (cf. Oppong, *op. cit*, p. 186) if the marriage is '*inconsistent with the policies and laws*' of Namibia.

Finally, and most importantly, it should be pointed out that although the majority generally reasoned about 'marriage' and 'spouses' in broad terms. Indeed, the majority repeatedly pointed out that the appellants 'had concluded valid marriages' that should be recognised in application of the *lex loci celebrationis*. Yet, when the the majority reached its final conclusions, it carefully indicated that the issue of the recognition of same-sex marriages was addressed *for immigration purposes only.* Indeed, the majority was eager to include the following paragraph at the end of its analyses:

[134] the legal consequences for marriages are manifold and multi-facetted and are addressed in a wide range of legislation. This judgment only addresses the recognition of spouses for the purpose of [the applicable legislation] and is to be confined to that issue. (Emphasis added).

The reason for the inclusion of this paragraph seems obvious: the Court cannot simply ignore the general legal framework in Namibia. Moreover, one can see in the inclusion of the said paragraph an attempt by the majority to limit the impact of its judgment in a rather conservative society and the intense debate it would provoke (see VIII below). In doing so, however, the majority placed itself in a rather obvious and insurmountable contradiction. In other words, if the Court recognises the validity of the marriage under the *lex loci celebrationis*, and (in the words of the dissenting opinion) 'conveniently overlooks' (para. 162) the intervention of public policy, nothing prevents the admission of the validity of same-sex marriages in other situations, such as inheritance disputes, maintenance claims or divorce. Otherwise, the principles of legal certainty would be seriously undermined if couples were considered legally 'married' for immigration purposes only. For example, would couples be considered as married if they later wished to divorce? Would one of the spouses be allowed to enter into a new heterosexual marriage without divorcing? Can the parties claim certain rights by virtue of their status as 'spouses' (e.g. inheritance rights)?

This issue is particularly important even for the case at hand. Indeed, in one of the consolidate cases, the appellants obtained before moving to Namibia an adoption order in South Africa declaring them joint care givers of a minor and granting them joint guardianship (para. 5). In a document prepared by the

Ministry of Gender Equality and Child Welfare (Guide to Namibia's Child Care and Protection act 3 of 2015 (2019)), it was clearly indicated that '*only "spouses in a marriage" can adopt a child jointly*' and that '*[i]f same-sex partner were legally married in another country, it depends on whether the marriage is recognised as a marriage under the laws of Namibia*' (p. 10). Therefore, in light of the decision at hand, it remains to be seen whether the South African adoption order will be or not recognised in Namibia. (On the adoption by same-sex couples in Namibia and the recognition of same-sex adoptions concluded in other countries, see the study undertaken the Legal Assistance Center on the *Namibian Laws on LGBT Issues* (2015) pp. 143-145).

VIII. The Aftermath of the Ruling: The Legislative Response

It is undeniable that Supreme Court decision could be considered as groundbreaking. It is no surprise that human rights and LGBT+ activists have welcomed the decision, despite the majority judgment's confined scope. On the other hand, legislative reaction was swift. In an official letter addressed to the Parliament, the Prime Minister expressed the intention its Government to bring a bill that would reverse the Supreme Court decision by modifying '*the relevant common law principle in order that same sex marriage even where solemnized in Countries that permit such marriages cannot be recognised in Namibia*'. Later, two bills (among many others) were introduced in order to define ?the term 'marriage' as to exclude same-sex marriages; and ?to define the term 'spouse'. Both bills intend to prohibit the conclusion and the recognition of same-sex marriage in Namibia. Last July, the bills were discussed and approved by the Namibian's Parliament Upper House (The National Assembly). The bills need now to be approved by the Lower House (The National Council) and promulgated by the President to come into force.

Cassirer on Remand: Considering the Laws of Other Interested States

This post is by Carlos Manuel Vázquez, a professor of law at Georgetown Law School. It is cross-posted at Transnational Litigation Blog.

Claude Cassirer brought suit in federal court in California eighteen years ago against the Thyssen Bornemisza Museum of Madrid, Spain, to recover a painting by Camille Pissarro that was stolen from his grandmother by the Nazis during World War II. After a reversal and remand from the U.S. Supreme Court last summer, the case is now before the Ninth Circuit for decision of the legal question that is likely to be decisive: which law governs?

The district court and the court of appeals have so far framed the issue as a binary choice: the governing law on the merits is either that of Spain or that of California. I suggest here that the issue is better framed as a choice between the law of Spain, on the one hand, and the laws of all the other states or countries with connections to the dispute, on the other. (Disclosure: I submitted expert declarations in support of the plaintiffs on issues of public international law during earlier phases of this case.)

The U.S. Court of Appeals for the Ninth Circuit has affirmed the district court's holding that, under the law of Spain, the plaintiff loses because the museum acquired title to the painting through adverse possession (otherwise known as acquisitive prescription). It is equally clear that, under the law of California, the plaintiff would prevail because California does not recognize the acquisition of title to moveable property through adverse possession. What has so far not featured prominently in the courts' analyses of the choice-of-law issue is that the plaintiff would also prevail under the laws of all the other jurisdictions that have relevant connections to the dispute. Under governmental interest analysis, this should be central to the analysis.

The Painting's Journey

It is undisputed that the painting was looted from Lilly Cassirer by the Nazis. After it was taken in Germany, the painting spent some time in California and Missouri and was subsequently sold to Baron Von Thyssen-Bornemisza by a Gallery in New York. The painting then stayed at the Baron's home in Switzerland for twelve years before it was loaned to the museum in 1988 and then sold to Spain in 1993.

The district court decided in this case that the Baron did not have valid title to the painting during the period in which he possessed it. The Baron did not purchase the painting from someone with good title, and he did not obtain good title through adverse possession because he did not possess the painting in good faith, as required by Swiss law. The court held that there were many red flags that should have alerted the Baron to the possibility that the painting had been stolen by the Nazis.

Accordingly, the museum did not acquire good title to the painting when it purchased it from the Baron in 1993. But, the court held, the question whether *the museum* acquired title to the painting through adverse possession is governed by the law of Spain, and the law of Spain, unlike the law of Switzerland, allows acquisitive prescription if the painting is possessed for six years even without good faith. The time period is longer if the possessor is an accessory to the theft, but someone who possesses the item without good faith is not for that reason alone deemed an accessory. Because the museum was not an accessory to the theft, the court held, the museum has acquired good title to the painting under the law of Spain because it had possessed it for just over six years before Claude Cassirer learned of its location and asked for it back.

California's Approach to Choice of Law

The U.S. Supreme Court held in this case that, even in suits against foreign state instrumentalities under the Foreign Sovereign Immunities Act, a federal court must apply the choice-of-law rules of the state in which it sits. The district court had applied California's choice-of-law rules, but the Ninth Circuit did not review its analysis, having erroneously concuded that a federal choice-of-law rule applied. The appellate court must now review the district court's application of

California's choice-of-law rules.

Under traditional choice-of-law rules, the issue of title to moveable property is governed by the law of the place where the property is located. But California, like most U.S. states, long ago rejected the traditional choice-of-law approach and adopted in its place a form of governmental interest analysis. This approach asks the courts, in cases in which the substantive laws of the relevant states differ, to determine whether the relevant states have an interest in having their laws applied. If only one state has such an interest, then there is a false conflict, and the court applies the law of the only interested state. If more than one state has an interest, there is a true conflict. To resolve true conflicts, California has adopted the "comparative impairment" approach, under which the court applies the law of the state whose policies would be most impaired if not applied.

The district court in the *Cassirer* case focused on the interests of California and Spain. The court first concluded that the laws of those two states differed because Spain recognizes acquisitive prescription of moveable property after six years even if the possession was not in good faith, whereas California does not recognize acquisitive prescription of moveable property. The court then concluded that both California and Spain have an interest in having their laws applied. Spain's law prioritizes the interests of the possessor of the property and, more generally, the interest in certainty of title. Spain's interest is implicated in this case because the possessor is a Spanish entity and the painting is in Spain. California's law prioritizes the interest of the original owner of stolen property, and this policy is implicated in the case because the original owner's heirs are domiciled in California. Because both Spain and California have an interest in having their laws applied, the case presents a true conflict.

To this point, the district court's analysis was sound. The same cannot be said of its analysis of the next step—determining which state's law would be more impaired if not applied. The court concluded that Spain's policies would be significantly impaired if not applied but California's policies would be only minimally impaired. Why? Because California's interest in having its law applied depended largely on the plaintiff's fortuitous, unilateral decision to move to California in 1980, long after the painting had been stolen from his grandmother by the Nazis.

What the court overlooked, however, is that Spain's interest in the case is equally

fortuitous. The painting was stolen in Germany and was located in California, Missouri, New York, and Switzerland before it made its way to Spain as a result of the Baron's decision to establish a museum in Spain bearing his name. If California's interest is to be discounted because it resulted from the plaintiff's fortuitous decision, then Spain's interest should similarly discounted because it resulted from the fortuitous decision of the museum's predecessor in interest.

Spain's Law on Acquisitive Prescription

Actually, it may not be fortuitous that stolen property will make is way to Spain, but the reason for this is one that should make a court wary to apply Spanish law. Spain's law of acquisitive prescription is unusually friendly to possessors of stolen property. Common law jurisdictions generally do not recognize acquisitive prescription of moveable property. They do not disregard the interests of possessors of property or the general interest in certainty of title, but they give effect to those interests through statutes of limitations, which limit the time the original owners have to initiate lawsuits to recover the property and in this way deter the original owners from sleeping on their rights. But statutes of limitations often begin to run when the original owner discovers the location of the stolen property. That is, indeed, the law in all states of the United States by virture of a federal law establishing a six-year statute of limitations for suits to recover Nazi-looted art, which begins to run upon discovery. Other jurisdictions do recognize the acquisition of title by adverse possession, but (as discussed below) they generally require that the possessor have acquired the property in good faith, meaning without sufficient reason to believe that the property was stolen. Jurisdictions that allow the acquisition of title by adverse possession without good faith generally require a far longer period of possession than Spain's six years (for example, twenty years under Italian law).

Spain's law is unusually friendly towards possessors of stolen property in allowing the acquisition of title through bad faith adverse possession after a mere six years. Spain is thus, relatively speaking, a haven for stolen property, and it would not be surprising to find that stolen property winds up there. For this reason among others, scholars have advocated replacing the traditional situs rule for stolen cultural property with a *lex originis* rule, under which the law to be applied would presumptively be the law of the place where the property was stolen, coupled with a disciovery rule for triggering the running of the prescription

period. As noted, California has replaced the traditional rule with governmental interest analysis, but, in applying interest analysis, the same concern should lead California courts to resist applying the law of the place to which the stolen property was taken. (Alternatively, the courts of California could refuse to apply the law the situs, if unusually friendly towards possessors of stolen property, on ground that the law contravenes California's strong public policy.)

The museum might argue that there is no evidence that the painting was brought to Spain to take advantage of its unusually friendly law. It may well be true that the Baron did not sell the painting to the museum in Spain in order to launder his stolen painting. The museum's web site indicates that, in 1988, the Baron had offers for his collection from the United Kingdom, California (Getty Foundation) and Germany, but chose to establish the museum in Spain because his fifth wife, a Spanish beauty queen, wanted to establish an art museum in her home country. Be that as it may, it is equally true that the plaintiff's decision to move to California was not driven by his desire to take advantage of California's more protective law. Indeed, when he decided to move to California, he assumed that the painting had been lost or destroyed during the war.

In sum, if the fact that the Baron's decision to sell the painting to a museum in Spain was not taken for opportunistic reasons is not a reason to discount Spain's interest, then the fact that Claude Cassirer's decision to move to California was not made for opportunistic reasons is equally a reason not to discount California's interest. The painting's presence in Spain, in the hands of a Spanish museum, is (at best) just as fortuitous as Claude Cassirer's decision to move to California.

Other Interested Jurisdictions

If so, then how does one break the tie? One answer might be to apply the law of the forum, and indeed there is California case-law placing the burden on the party arguing against applying forum law.

But, on closer inspection, the relevant interests are not in equipoise. California and Spain are not the only jurisdictions with connections to this dispute. Both the painting and Lilly Cassirer were initially located in Germany. Germany's law allows acquisitive prescription in ten years, but only if the property was possessed in good faith. (A statute of limitations cuts off the original owner's power to bring an action to recover the property after thirty years, but it does not vest title in the

possessor.) As the district court held in this case, the Baron did not acquire title to the property under Swiss law of acquisitive prescription by virtue of his possession of the painting because he did not possess the painting in good faith. Application of the German law of acquisitive prescription leads to the same conclusion. The court did not address whether *the museum* possessed the painting in good faith because that issue was not relevant under Spanish law. But surely the Baron's lack of good faith should be attributed to the museum that he co-founded and bears his name. In any event, as the district court found, the red flags that alerted the Baron to the possibility that the painting was stolen by the Nazis were equally apparent to the museum.

As noted, the painting later spent time in California, Missouri, and New York. The laws of Missouri and New York on acquisitive prescription are in all relevant respects the same as California's. The painting then spent some time in Switzerland, and, as we have seen, the plaintiff should prevail under Swiss law as well.

As for Lilly Cassirer, after escaping from Germany, she lived for some time in England. English law, like the law of California, does not technically recognize acquisitive prescription, but its statute of limitations limits the time in which to bring an action for conversion. The limitations period has the same effect as acquisitive prescription because § 3(2) of the Limitations Act provides that, after the expiry of the limitations period for bringing an action for conversion, the original owner's title to the movable property is extinguished. The limitations period is generally six years, but in the case of theft, the limitations period begins to run from the date of the first "innocent" conversion. "As regards the original thief, or . . . any party acquiring the movable from him who is not in good faith," Faber & Lurger note, "it would appear that there is no limitation period for the bringing of an action in coversion."

From England, Lilly moved to Ohio, which has the same law regarding adverse possession as California. Neither Lilly's moves to England and Ohio nor Claude's move to California were driven by a desire to take advantage of those states' protective law of acquisitive prescription. Indeed, if Lilly had wanted to take advantage of a jurisdiction's law of acquisitive prescription, she could have moved to practically any jurisdiction other than Spain. As we have seen, Spain's law of acquisitive prescription (as interpreted by the district court and court of appeals in this case) is an outlier in recognizing a change of title as a result of possession

of stolen property without good faith in a mere six years.

Should the court broaden its focus and consider the laws and interests of these other jurisdictions? The district court's own analysis suggests so. After all, if the interest of the plaintiff's current place of domicile is discounted because it resulted from his fortuitous decision, then surely the law and interest of the place from which he moved should be considered instead. Courts that discount a party's domicile if acquired after the start of the dispute generally consider instead the interest of the jurisdiction from which the party moved. And if the interest of the place to which the stolen painting was taken is discounted because it resulted from the fortuitous (or non-fortuitous) decision of the possessor's predecessor, then surely the interest of the place from which painting was taken should be considered instead. The district court additionally discounted California's interest because the original taking did not occur in California and because the Baron did not purchase the painting in California. These reasons for discounting California's interest suggest that the court should consider instead the laws of the place where the original taking occurred (Germany) and the place where the Baron bought the painting (New York).

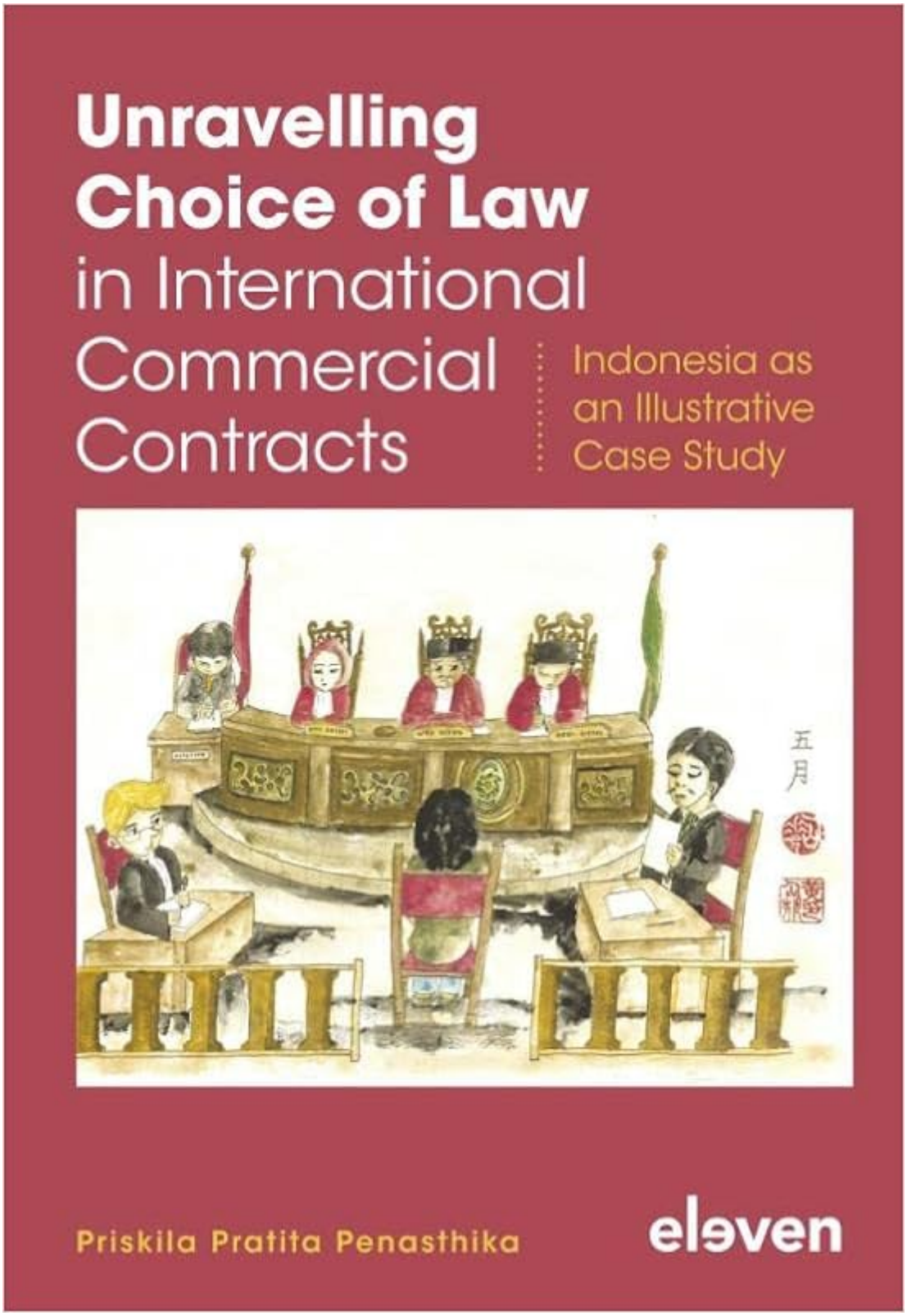
There is, indeed, substantial authority for the proposition that the interests of jurisdictions with connections to the dispute should be aggregated when these laws have the same content. The Restatement (Second) of Conflict of Laws makes this point explicitly. A comment to § 145 on torts explains that "when certain contacts involving a tort are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped in a single state." The same comment appears in numerous other provisions of the Second Restatement, including the provision on real property (§ 222) and the provision on chattels (§ 244). The laws of the jurisdictions discussed above are not identical in all respects, but they are identical in the relevant respect: under each of these laws, the plaintiff should prevail.

Although California has not adopted the Restatement (Second) as its choice-of-law rule, the Restatement's approach to aggregation is in principle equally relevant to governmental interest analysis in general. A contrary rule would allow circumvention of the relevant states' interests in a dispute through a divide-and-conquer strategy. The district court in this case appears to have fallen into this trap.

Conclusion

On remand from the Supreme Court, the Ninth Circuit certified the choice-of-law question under California law to the California Supreme Court, but that court denied the request. It is now up to the Ninth Circuit to review and correct the district court's application of California's choice-of-law rules. In doing so, the court of appeals should consider not just the interests of California and Spain but also those of Germany, New York, Missouri, Switzerland, England, and Ohio. The fact that all those jurisdictions would reach the same result as California is a strong reason to rule in favor of the plaintiff in this case.

Review of: PP Penasthika, Unravelling Choice of Law in International Commercial Contracts: Indonesia as an Illustrative Case Study (The Hague: Eleven Publishers 2022)



Very recently, Indonesian private international law has attracted significant scholarship in the English language.[1] Dr Penasthika's monograph ('the monograph')[2] is one such work that deserves attention for its compelling and comprehensive account of choice of law in international commercial contracts in Indonesia. My review attempts to capture the methodology, summarise the contents, and give a verdict on the quality of this monograph.

Penasthika has based this work on her PhD thesis, undertaken at Erasmus University in Rotterdam. The monograph contains six chapters over 233 pages, excluding the acknowledgments, table of contents, lists of tables and figures, abbreviations, bibliography, and annex. A robust and clearly expressed methodology of doctrinal and empirical research is applied. The monograph predominantly examines 19 Indonesian court decisions on choice of law in international commercial contracts during the period, 2000-2020. It is mainly written from a civil law perspective, which is unsurprising, given that the author is Indonesian and wrote her thesis in the Netherlands – both Indonesia and the Netherlands are civil law countries. One positive aspect of the methodology that is especially worth mentioning is Penasthika's very transparent and thorough account of the state of previous academic research in Indonesia, and the gap she has endeavoured to fill with her monograph.

The first chapter provides an introduction to the book, the central theme of which is the reluctance to give effect to choice of law (especially foreign law) in international commercial contracts in Indonesia, compared with global developments. Consequently, Penasthika states that some of the core benefits of giving effect to choice of law in international commercial contracts would contribute to Indonesia's *VISI 2045* to rank among the world's most developed countries; improve the practice of international dispute settlement in Indonesia; promote the harmonisation project on private international law in Asia and global initiatives, and lead to the legal reform of outdated rules on choice of law in Indonesia.

Conversely, Chapter One also acknowledges the book's limitations, namely, that it only covers the express choice of law in international commercial contracts. Therefore, implied or tacit choice of law, law in the absence of choice, and contracts for the protection of weaker parties have not been included. Moreover, no new choice of law theories have been advanced, and the issue of forum selection clauses has not been addressed. However, a further limitation that Penasthika could have considered is whether 19 judicial decisions represent an adequate sample size for empirical research in a monograph.

Chapter Two of this work proceeds to discuss choice of law in international commercial contracts in a global context. The key contribution of this chapter is that it provides a theoretical framework for discussing choice of law in further chapters of the monograph. First, the history of choice of law theory and debate is traced and summarised, dating back to 120-118 BC and extending into the 20th century. Second, the chapter traces the wide acceptance of choice of law in the 20th century across a large number of countries and regions. Nevertheless, Penasthika also highlights that a few countries remain reluctant or hostile to choice of law, despite widespread acceptance of the principle in the 21st century. She is of the view that this resistance is due to concerns over territoriality and sovereignty in the countries involved. Fourth, the chapter discusses the regional and international harmonisation of choice of law.

In addition, Chapter Two contains an interesting theoretical debate on choice of law, which may be encapsulated in the question: is choice of law based on the perspective of state or party sovereignty? Alternatively, who has the authority to permit parties to make a choice of law: the state or the parties themselves?

Chapter Two then examines the way in which choice of law functions, including the international character of the contract, types of contracts (such as weaker party or commercial, and immovable property), the validity of the choice of law agreement, the chosen law, and the choice invalidating the contract. Finally, this second chapter discusses the limits on choice of law, such as public policy and mandatory rules.

In Chapter Three, Penasthika looks at Indonesia’s civil law and private international law regime. The key contribution of this chapter is that it gives the reader an understanding of the sources of Indonesia’s private international law regime, which helps clarify the chapters that follow. Chapter Three also contains a thorough and enlightening evaluation of Indonesian scholarly views on choice of law in contract. Essentially, this chapter lays the foundation for discussing

Indonesian choice of law rules on commercial contracts in subsequent chapters. Like other Asian and African countries, Indonesia experiences legal pluralism, due to its history of Dutch colonialism and a form of apartheid. Thus, in the Indonesian legal system, there is an interplay of civil law, which is inherited from the Dutch East Indies, *adat* (customary law), and Islamic law. It was especially fascinating to me to discover here that the Indonesian language is usually a legal requirement for drafting contracts involving Indonesians. This may be aimed at protecting Indonesians in transactions and preserving their indigenous language.

Next, Chapter Four contains what I would describe as the real 'meat' of the monograph, looking at how Indonesian practitioners (judges and lawyers) handle choice of law in international commercial matters, particularly regarding issues of foreign law. This fourth chapter summarises and analyses 19 Indonesian decisions from 2000 to 2020. The discussion is divided into three parts: (i) refusing jurisdiction based on foreign forum, illustrated by four cases; (ii) refusing jurisdiction on the basis of foreign law, illustrated by seven cases, and (iii) disregarding choice of forum and choice of law, illustrated by eight cases. The latter two approaches are dominant in Indonesian practice.

As the reader, one thing I found striking about Indonesian practice is that a choice of foreign law alone can oust the jurisdiction of the Indonesian courts. Penasthika rightly observes that this signifies confusion between jurisdiction and choice of law, because what the Indonesian courts should apply is substantive and not procedural law. Procedural law matters are reserved for the forum, and some Indonesian judges only appear to see the procedural aspects of choice of law. I would also add that the Indonesian approach ignores the global reality of applying foreign law, which is at the heart of private international law. This confusion results in a loss of dispute resolution business for practitioners in Indonesia, which is not good for Indonesia's economy. The big question is, why do many Indonesian judges refrain from applying choice of law, especially foreign law? This interesting question is mainly addressed in Chapter Five, which contains the empirical research.

In Chapter Five, Penasthika presents the results of her interviews with practitioners (including Indonesian judges and lawyers, and foreign consultants who are familiar with the Indonesian legal system), a legal scholar (with expertise in private international law), and an expert attached to the court (with expertise in choice of law issues in Indonesia). These interviews especially explore the problem of applying foreign law in Indonesia.

The central cause of the problem is identified as the Indonesian Supreme Court decision in *Bernhard Josef Rifeel v PT Merck Indonesia*,[3] which ousted the jurisdiction of the Indonesian courts based on foreign law. This decision has since been followed by many Indonesian judges. However, Penasthika and several other scholars question the accuracy of the decision and the cases in which it has been applied.

Drawing upon the interview data, Penasthika states the reasons for foreign law not being applied in the Indonesian courts, as follows:

'(i) it is difficult to delve into a foreign law; (ii) it is hard to apply a foreign law correctly; (iii) Indonesian judges are not trained to settle disputes governed by foreign law; (iv) the law of civil procedure in Indonesia does not provide clear rules regarding disputes involving foreign elements, such as foreign party or foreign law; (v) the judges consider that foreign law contradicts Indonesian law; and (vi) Indonesian judges espouse legal positivism.'[4]

Additionally, some judges, citing Article 1338 BW in Indonesia, regard the choice of foreign law as a contractual agreement not to resolve a dispute in the Indonesian courts, and many lawyers present a contract claim as tort. This practice is seriously criticised by Penasthika, in the first instance because it confuses substantive contract law with choice of law, and in the second, because it is tantamount to abusive litigation tactics.

Chapter Six then concludes the monograph, summarising the research findings

and making proposals and suggestions for future research. First, Penasthika states that Indonesia could indeed fulfil its vision for 2045 to become a highly developed country, provided that its courts give effect to choice of law rules, as opposed to Indonesia isolating itself from global trends in the choice of law for commercial contracts. Second, knowledge of choice of law needs to be expanded in Indonesia. Third, the regulatory framework for choice of law in Indonesia requires development, and fourth, judicial practice should be improved in the context.

The author closes with the prediction that choice of law will become a topical and fascinating field in Indonesia.

My verdict is that this monograph is an indispensable research work on choice of law in international commercial contracts in Indonesia. I highly commend it as a work of quality, researched and written to a high standard. Anyone interested in choice of law will therefore be fascinated by this book.

[1] YU Oppusunggu, 'Indonesia' in A Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (Asia Business Law Institute, Singapore, 2017) 91 – 104; A Kusumadara, 'Indonesia' in A Reyes (ed), *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Hart, 2019) 243 – 258; A Kusumadara, *Indonesian Private International Law* (Hart, 2021); A Kusumadara, 'Indonesia' in A Reyes and W Lui (eds), *Direct Jurisdiction: Asian Perspectives* (Hart, 2021) 249 – 273; A Kusumadara, "Jurisdiction of courts chosen in the parties' choice of court agreements: an unsettled issue in Indonesian private international law and the way-out" (2022) 18 *Journal of Private International Law* 424 – 449; J Lumbantobing and BS Hardjowahono**,** 'Indonesia: Indonesian Perspectives on the Hague Principles' in D Girsberger et al (eds) *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (Oxford: Oxford University Press 2021) paras 25.01 – 25.43; PP Penasthika, *Unravelling Choice of Law in International Commercial Contracts: Indonesia as*

an Illustrative Case Study (The Hague: Eleven Publishers 2022).

[2] Penasthika (ibid).

[3] Judgment of the Supreme Court 1537K/PDT/1989, 21 January 1991.

[4] Penasthika (n 1), 179.

Mbatha v. Cutting: Implications for Litigants of Indian Origin

Guest Post by Chytanya S. Agarwal*

I. Introduction

Rising cross-border migration of people and concomitant increase in lawsuits relating to matrimonial disputes between couples brings to the forefront the issue of conflict of jurisdictional laws (219th Law Commission Report, ¶1.1-¶1.2). *Mbatha* v. *Cutting* is one such recent case that grapples with conflict of laws pertaining to divorce and division of matrimonial property when the spouses are domiciled in separate jurisdictions. In this case, the Georgian Court of Appeal dealt with competing claims from a couple who married in New York and had their matrimonial domicile in South Africa. The wife, domiciled in Georgia, USA, argued for the application of the matrimonial property regime of South Africa – their only (though temporary) common matrimonial domicile. In determining the applicable law, the Court upheld the traditional approach, which favours *lex situs* for real property and *lex domicilii* for personal property.

In this article, I contextualise *Mbatha* in the context of Indian litigants, particularly foreign-domiciled Non-Resident Indians (**'NRIs'**) married under Indian personal laws and having their property located both within India and in

foreign territory. ***Firstly***, I analyse *Mbatha* by comparing it with the prevalent approaches in private international law. ***Secondly***, I examine the Indian jurisprudence on the applicability of foreign judgements concerning matrimonial disputes. ***Thirdly***, I submit that *Mbatha* complies with the Indian *lex situs* rule insofar as real property is concerned. However, by determining its subject-matter jurisdiction by solely considering Georgian law, *Mbatha* sets itself on a collision course with the Indian approach on the subject-matter jurisdiction of foreign courts. ***Lastly***, I analyse the implications of this uncertainty regarding enforceability of foreign judgements on matrimonial property. In conclusion, I propose a solution that draws on public international law to resolve the challenge presented by conflicting rules on choice of law.

II. Traditional Approach vs. Modern Approaches to Conflict of Laws

The primary source of private international law are municipal laws of nations. Their divergence in the face of potential applicability is the root cause of conflict of laws. In this section, I examine the approaches to conflict of laws from the perspective of mutability i.e., change in applicable personal laws of spouses during their marriage. It has three main approaches under private international law – the doctrines of immutability, mutability, and the partial mutability. The *lex situs* approach upheld in *Mbatha* falls under the "partial mutability" rule.

Under the "doctrine of immutability", the personal law during marriage governs the property relations of spouses forever (Schuz, p.12). Once determined, this law stands 'immutable'/unalterable. Strict immutability approach is favoured for predictability of applicable laws (p.45). It is also supported on the ground of legitimate expectations of the parties. In short, the parties can expect the personal law of their marriage to govern their relations unless they determine their choice of law through a separate agreement (p.29-30).

In "doctrine of mutability," the applicable law never remains fixed. It can change depending on changes in forum, changes in religion, nationality, domicile, etc. For instance, under the *lex fori* approach followed in American states, the courts partition the entire matrimonial property by applying the law of the forum, regardless of where and when the said property was acquired (Wasserman, p.23). This approach is justified on the grounds of state interest because the greatest

interest of the forum state in matrimonial cases is to ensure the application of its laws (Schuz, p.38). However, this approach poses the risk of "forum shopping" or the practice of filing claims in jurisdictions where *lex fori* favours the petitioner's case.

The third approach is the "partial mutability" approach which finds an echo in *Mbatha*. As mentioned, the traditional approach in *Mbatha* favoured *lex situs* (i.e., the law of the jurisdiction where the real property is located) and *lex domicilii* (i.e., the law of the owner's domicile at the time the personal property was acquired). In the doctrine of "partial mutability", a change in matrimonial domicile would trigger a change in the governing laws without having any retroactive effect on already acquired property (Schuz, p.12). For instance, if a married couple buys property in Country X, then the laws of country X alone would govern this property. However, this does not prevent them from applying the laws of Country Y to a property situated in Country Y. Thus, the applicable matrimonial property law changes depending upon the location in which the spouses buy the matrimonial property without prejudicing vested rights. Its underlying rationale is protecting both state interests and legitimate expectations of the parties. This is because the state where the relevant property is situated has the greatest interest in ensuring that it is governed by its own laws. Additionally, parties have the reasonable expectation that the law governing the property should always be that at the time of the acquisition of that asset (Schuz, p.32).

III. Indian Jurisprudence on Foreign Judgements Concerning Personal Laws

While private international law has undeveloped jurisprudence in India, it has a growing trend due to the import of foreign laws and foreign judgements by NRIs who have emigrated from India (219th Law Commission Report, ¶2.1-¶2.2). In this section, I analyse the Indian judgements dealing under three issues concerning foreign verdicts on matrimonial relations recognised by the 65th Law Commission Report (¶3.2). These issues, equally pertinent in the context of matrimonial property relations, are (i) grounds for jurisdiction, (ii) choice of law, and (iii) law on recognition.

1. Jurisdiction

Indian law has generally opposed the application of foreign judgements on the ground that the foreign forum did not possess sufficient jurisdiction under the personal law governing the parties. A plain reading of the text of the Indian Succession Act and the Hindu Succession Act shows that they only govern the devolution of immovable property *situated in India* irrespective of the domicile of the person who owned the property. The Acts extend only to the Indian territory and do not have extra-territorial application. As per the Code of Civil Procedure (**'CPC'**), any suit for the partition of immovable property must be filed in the court within whose local jurisdiction the property is located.

Case laws have also supported this position consistently. In *Duggamma v. Ganesha Keshayya* (¶5-¶7, ¶14), it was held that the decision of a foreign court concerning title to Indian property would be devoid of legal effects. *Harmindar Singh v. Balbir Singh* held that disputes concerning any immovable property have to be decided not just by the *laws* of the country where the land is situated, "*but also by the courts of that country*." Even if the parties had submitted to the jurisdiction of the foreign court, the foreign verdict is enforceable only to the extent it applies to property situated outside India. Conversely, Indian courts have upheld the disposition of overseas family property by foreign courts. Even in cases concerning other matrimonial disputes such as divorce, the Supreme court has held that the forum must have jurisdiction as per the law under which the parties married. For instance, foreign courts have been barred from annulling marriages between Indians. To summarise, Indian courts have generally disfavoured the adjudication of matrimonial disputes by foreign courts on the ground of lack of jurisdiction.

2. Application of Indian Law

In the absence of legislative guidance, this sphere of private international law is heavily reliant on case laws (219th Law Commission Report, ¶3.2). A perusal of judgements (*see* here and here) shows that real property located in India can be governed only by Indian law (i.e., *lex situs*). At the same time, Indian courts have ruled that Indian law is inapplicable in foreign jurisdictions. In *Ratanshaw v. Dhanjibhai*, the Bombay High court upheld the English rule of *lex situs* for the succession of property situated in India. At the same time, Indian courts recognising *lex situs* have respected foreign judgements concerning overseas

property, and have observed that foreign forums should also reciprocate by recognising Indian judgements concerning immovable property in India. In *Y. Narasimha Rao v. Y. Venkata Lakshmi*, the Supreme Court ruled that per Section 13(c) of the CPC, even if the parties submit to the jurisdiction of the foreign forum, the only law applicable in matrimonial disputes is the one under which the parties married. However, in *Nachiappa Chettiar v. Muthukaruppan Chettiar*, the Indian law was held inapplicable in the case of properties situated outside India. Per *Nachiappa Chettiar*, the family property cannot be deemed partible under the Hindu Succession Act since it was located outside the jurisdiction of Indian courts. In *Dhanalakshmi v. Gonzaga* (¶34-¶43), the Hindu joint family system was held inapplicable in Pondicherry due to the invalidity of the Hindu Succession Act's extraterritorial application. So, Indian courts have also respected foreign *lex situs* with respect to foreign property.

3. Recognition: Other preconditions

In addition to satisfying the requirements of jurisdiction and *lex situs*, there also exist procedural safeguards under CPC that must be satisfied for the foreign verdict to have a conclusive effect. Respect for principles of natural justice is one such prerequisite, entailing that judgements passed by forum *non-conveniens* are unenforceable in India. Additionally, fraud by one of the parties can also be a vitiating factor. For instance, in *Satya*, the husband "successfully tricked" a Nevada court to grant a divorce decree on the ground that hehad obtained the domicile of Nevada due to residence of 6 months. Here, the Chandrachud, J. held that the husband had no intention of permanently residing in Nevada and, this, the foreign verdict was unenforceable due to fraud. The need for procedural safeguards for the protection of the weaker party was also emphasised in *Neeraja Saraph v. Jayant V. Saraph*.

IV. *Mbatha*'s Implications on NRIs

The *Mbatha* approach of *lex* situs is compatible with Indian law. However, I argue that by determining its overall jurisdiction based on the domicile of one of the spouses,[1] *Mbatha* erroneously conflated the jurisdiction to determine divorce with the jurisdiction to determine the partition of matrimonial property. As per Georgian law, the court had both the subject-matter jurisdiction and personal jurisdiction to decide the divorce petition since one of the spouses had resided in Georgia for more than 6 months.[2] However, the court cited no authority

regarding the validity of its jurisdiction to adjudicate on the division of overseas matrimonial property. The effect of *Mbatha* is that the court would apply the domestic law of the place where the property is situated, even if such a place is beyond the court's local limits. For example, the Court in Georgia may apply the laws of a foreign jurisdiction to partition the foreign matrimonial property. This principle, called *renvoi* in private international law, has limited application in the Indian context (the only case where it was invoked yet not applied is *Jose Paul Coutinho v. Maria Luiza Valentina Pereira*).

Additionally, the Court determined its subject-matter jurisdiction based on Georgian law. However, as mentioned earlier, the forum should have competent jurisdiction as per the law governing the parties. A foreign forum applying Indian law on Indian property lacks the jurisdiction to do so as per Indian law. Hypothetically, if a Georgian court were to apply the Indian Succession Act to properties situated in India, it lacks the jurisdiction to do so since neither the Act nor CPC confers any jurisdiction on foreign forums to partition Indian property. However, *Mbatha* nevertheless compels it to apply foreign law even if the foreign law does not grant it requisite jurisdiction.

Another issue is created by the absence of any matrimonial property regime in Indian personal laws. This might lead to rejection of Indian law in the foreign forum since it might consider the lack of rights in the matrimonial property as opposed to their public policy since it is discriminatory towards women. By combining *renvoi* with this public policy argument, courts can effectively nullify Indian lex situs. Such instances have happened in Israel, where courts have abstained from applying Islamic law on couples migrating from Islamic countries on the ground that the Islamic matrimonial property regime violates gender equality and is thus opposed to Israeli public policy.[3]

V. A Public International Law Solution to Conflict of Laws?

As explained, while *Mbatha*'s *lex situs* rule protects state interests, it has the potential of frustrating parties' legitimate expectations by subjecting NRIs to matrimonial property regimes of foreign forums, even when Indian personal laws do not contain the concept of matrimonial property. In this regard, public international law gives the solution of making the rules on choice of laws uniform

through an overarching treaty like the Hague Conventions (*see* here and here). The enactment of a composite legislation on private international law along the lines of the 1978 Hague Convention on Matrimonial property regimes to prevent the misapplication of foreign law (219th Law Commission Report, ¶5.2) can go a long way in preventing future conflicts between matrimonial legal systems. This harmonising principles on choice of laws is also more feasible, and has less costs than the alternative of uniformising matrimonial property regimes altogether since such family law regimes are intrinsic to the cultural backdrop of specific legal systems. As shown by Mills (pp.7-10), private disputes are becoming increasingly enmeshed with public international law considerations. The adoption of such treaty is also consistent with the growing view on the intersection of public and private international law to resolve pitfalls in existing legal systems (Maier, pp.303-316).

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[1] Restatement of the Law, Conflict of Laws (2nd), ss70-72.

[2] *Mbatha*, pp.746-747.

[3] Also see *Nafisi v Nafisi* ACH (1996) PD 50(3) 573; *Azugi v Azugi* (1979) (III) 33 PD 1. Here, despite the "doctrine of immutability" endorsed by Israeli law, the court applied *lex fori* on an Iranian couple on the grounds, inter alia, of public policy and gender parity.

Views and News from the 9th

Journal of Private International Law Conference 2023 in Singapore

Four years after the 8th JPIL conference in Munich, the global community of PIL scholars finally got another opportunity to exchange thoughts and ideas, this time at Singapore Management University on the kind invitation of our co-editor Adeline Chong.



The conference was kicked off by a keynote speech by Justice *Philip Jeyaretnam* (Singapore International Commercial Court), providing an in-depth analysis of the Court of Appeal's decision in *Anupam Mittal v Westbridge Ventures II [2023] SGCA 1* (discussed in more detail here).

The keynote was followed by a total of 23 panels and four plenary sessions, a selection of which is summarised below by our editors.

Arbitration (Day 1, Panel 1)

Saloni Khanderia

The panel discussed various aspects of arbitration ranging from arbitration clauses to the recognition and enforcement of arbitral awards.

The session commenced with Dr. *Ardavan Arzendeh* of the National University of Singapore present his paper on 'Jurisdiction and Arbitration Clauses in the Same Contract', evaluating the treatment of jurisdiction and arbitration clauses in the same contract through the law of England and Wales. The speaker stated that there are 2 categories of such cases: 1) the clauses are naturally reconcilable through importance given either to the wording of the clauses or the intention of the parties; and 2) the clauses are not naturally reconcilable as the parties have included an exclusive jurisdiction and a mandatory arbitration clause in the agreement. The courts in these instances have typically given importance to the arbitration clause. The presentation suggested a more defensible course of action in such a situation: Courts should approve both the clauses and give a choice to the parties to pursue the matter either through litigation or arbitration. Hence, giving equal weight to the choices of the parties.

The second speaker, Ms. *Ana Coimba Trigo* of the NOVA School of law presented her paper on 'Deference or Distrust? Recognizing Foreign Commercial Arbitration Awards in the US Against Procedural Fairness Concerns'. The presentation focused on Article V(1)(b) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, that allows parties to oppose the recognition and enforcement of arbitral awards on very selected grounds. Frequently referred to as "procedural fairness". However, the Convention is silent on the interpretation and application of this ground. Additionally, there is no indication of what law is appliable to this ground. This leads to uncertainty as to what standards the US courts apply in interpreting and applying Article V(1)(b) of the Convention. A reading of the existing empirical data allows us to understand whether the US courts cite other foreign courts and if they follow a comparative approach and what are the diverse standards (lex fori or another lenient approach) applied when distrust of foreign arbitrators is raised by the parties.

Following this, Dr. *Priskila Pratita Penasthika* from The Universitas Indonesia presented her paper on 'CAS Arbitration Award: Its Jurisdictional and Enforcement Issues in Indonesia'. The Court of Arbitration for Sport (CAS) does not always require a specific arbitration agreement between the parties for

conferring jurisdiction on it. Instead, the CAS may accept a sports related dispute if the statutes or regulations designate that it has jurisdiction. The presentation analysed whether sports- related arbitration would be covered under the ambit of commercial awards for them to be recognised and enforced in Indonesia under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

The final speakers, Mr. *Gautam Mohanty* from Kozminski University and Dr. Wasiq Abass Dar from O.P. Jindal Global University presented their paper on 'Strategic Leveraging of Party Autonomy in Private International Law: Determining the Limits in International Commercial Arbitration'. The presentation focused on demarcating the outer limits of party autonomy in private international law. It particularly focused on mandatory rules and public policy as they are limitations to party autonomy. It highlighted the impact of new dimensions of mandatory rules and public policy on party autonomy. The presentation analyses the conflict of laws situation when tribunals are faced with a situation of having to disregard the applicable law chosen by the parties on account of overriding mandatory norms. It also analyses the role and application of international and transnational public policy. The presentation analysed the theoretical approaches taken by tribunals in relation to mandatory norms such as contractual, jurisdictional and the hybrid approach.

Foreign Judgments (Day 1, Panel 2)

Tobias Lutzi

The first panel dedicated to foreign judgments began with *Aygun Mammadzada* (Swansea Law School) making the case for the UK and Singapore ratifying the 2019 HCCH Judgments Convention. Compared to the common-law rules on recognition & enforcement (to which many European judgments will also be subject in the UK post-Brexit), she argued the Convention offers an acceptable, more streamlined framework, e.g. because it does not require a judgment creditor to seek a domestic decision based on the judgment debt.

Anna Wysocka-Bar (Jagiellonian University) then looked in more detail at the exclusion of contracts of carriage from the 2019 Convention (Art 2(1)(f), putting it into the context of the specific treatment those contracts also receive in other contexts. According to the speaker, this peculiar treatment appears to be primarily driven by the existence of other, potentially conflicting conventions such

as the CMR Convention. Looking at the specific provisions in those Conventions pertaining to foreign judgments, though, Anna convincingly demonstrated that the potential for conflict is actually very small, making it difficult to justify the exclusion.

Jim Yang Teo (Singapore Management University) finally discussed the problem of res judicata within the framework of the *Belt & Road Initiative*, contrasting the approach advocated by China (based on a triple-identity test and limited to claim preclusion, at the exclusion of issue exclusion) with the transnational approach of the Singaporean courts emerging from *Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14. According to the speaker, this latter approach, which notably includes consideration of comity, may be particularly relevant interesting in the context of an inherently transnational project like the *Belt & Road Initiative*.

Plenary Session 2

Michael Douglas

The second plenary session, chaired by *Ardavan Arzandeh* (NUS), explored some interesting issues of direct and indirect jurisdiction. *Stephen GA Pitel* (Western University) kicked things off with a presentation that was right up my ally: 'The Extraterritorial Impact of Statutory Jurisdiction Provisions'. He considered the example of a jurisdictional provision of a privacy statute of British Columbia in matters with a foreign element. The specific example provoked consideration of a broader question: how should a forum deal with an applicable foreign statute which includes a provision that actions under the statute must be heard in a certain court of that foreign statute's local jurisdiction? See *Douez v Facebook, Inc* [2017] 1 SCR 751. The Canadian approach seems sensible; I wonder if it can neatly transpose to my native Australia, which includes an explicit US-style full faith and credit provision in the Constitution. (Over coffee, my compatriots wondered whether our messy Cross-vesting Scheme would have a role to play.)

The other three presentations of the plenary were also compelling. *Junhyok Jang* (Sungkyunkwan University) spoke on 'Jurisdiction over the Infringement of Personality Rights via the Internet from a Korean Perspective – Effects Test as an Alternative to the Quantitative Dépeçage of *Shevill*'. The Korean perspective was comparative; the presentation compared the South Korean approach to those of the EU and the US. While the presentation offered a view on how approaches to

the topic were converging between jurisdictions, diversity remains. Eg in Australia, the mere occurrence of some of the damage in the jurisdiction—which in the case of defamation, could involve hurt feelings in the forum when present there—could justify exercise of long-arm jurisdiction, no matter how many elements the matter otherwise features. The speech was another reminder of the ongoing challenges that digital subject matter pose for the traditional territorialism of private international law.

Yeo Tiong Min (SMU), a home-town hero whose monograph on choice of law for equity is must-read material for common (private international) lawyers, looked at the *res judicata* effects of foreign judgments for issue estoppel in a presentation on 'Challenging Foreign Judgments for Errors of Law and the Common Law'. (I will have to go away and read *Merck Sharp & Dohme Corp v Merck KGaA* (2021) 1 SLR 1102 properly.) *Louise Ellen Teitz* (Roger Williams University) rounded out the plenary with her speech on 'Judgment Recognition and Parallel Litigation: The Carrot and Stick'. The presentation informed me of how the issue has been playing out in the USA, comparing the situation there to the work done in international fora like the HCCH. All the talk of *lis pendens* got me *lis peckish* for some lunch. Fortunately, it was lunchtime after this plenary.

Choice of Law (Day 3, Panel 3)

Zheng Sophia Tang

The panel focuses on choice of law, chaired by Prof *Sophia Tang*. Assoc Prof Dr *Philippine Blajan* at Sorbonne School of Law, University Paris 1 presented 'The Combination of Party Autonomies in the Private International Law of Contracts: Security, Virtuosity, Tyranny?' She proposed that, in civil and commercial practices, parties of a contract should attach importance to the interactions between choice of jurisdiction and choice of law. Firstly, the effect of choice of law is uncertain until the lex fori is identified. Secondly, even if there is a choice of court clause, one party could still bring a suit in another court in breach of the jurisdiction clause, and evade the mandatory provisions of the forum state. Through combining their choices, the parties enhance their freedom of contract because they escape a mandatory provision. Thirdly, Prof Blajan listed various types of combination between choice of law and choice of court clauses, including choice of state law and choice of state court, choice of state law and choice of non-state court, choice of non-state law and choice of non-state court and so on.

The second speaker is Prof *Saloni Khanderia* at OP Jindal University, who presented 'The Law Applicable to Documentary Letters of Credit in India: A Riddle Wrapped in an Enigma?' Prof Khanderia points out that letters of credit has received negligible attention from Indian lawmakers, regardless of their significance in fostering international trade in India. As there is no specific legislation for letter of credit in India, the UCP might be the only choice for the parties and the court. But there are several exceptions to the application of the UCP, including the agreements that are expressly excluded from the application of the UCP, claims containing allegations of fraud and so on. In such a case, the Indian court would apply lex fori. On the other hand, in lack of any supreme principles of the interpretation of application of law, courts are given great discretion to the application of the UCP and other laws. Prof Khanderia proposed limiting the application of the lex fori to adjudicate claims on fraud, and replacing the lex fori with the lex loci solutions to identify the country with which the contract has the closest and most real connection.

The third speaker Asst Prof *Migliorini* at the Uni of Macau presented 'Contracts for the Transfer of Personal Data in Private International Law — A European Perspective'. In data transactions where the seller established in the EU and the buyer a non-EU jurisdiction, the GDPR would be applied extraterritorially. The GDPR would be applied as overriding mandatory rules under the context of cross-border transaction, which would lead to the conflict with the proper law of the transaction contract. However, could data be treated as 'property' and subject to a commercial contract? Would status of a fundamental right hamper the commercial transfer of personal data? Prof Migliorini suggests that contracts for transfer of personal data should be qualified as transfer of license to use the personal data, so that the complicated issues of personal data trading and human rights shall not arise and mandatory provisions of the law governing the initial license (i.e. the GDPR) should apply.

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Overall, the conference highlighted the range and wealth of current research on PIL. It is no surprise that participants are already looking forward to the next JPIL conference, which will take place at University College London in September 2025.

The EU Sustainability Directive and Jurisdiction

The Draft for a Corporate Sustainable Due Diligence Directive currently contains no rules on jurisdiction. This creates inconsistencies between the scope of application of the Draft Directive and existing jurisdictional law, both on the EU level and on the domestic level, and can lead to an enforcement gap: EU companies may be able to escape the existing EU jurisdiction; non-EU companies may even not be subject to such jurisdiction. Effectivity requires closing that gap, and we propose ways in which this could be achieved.

(authored by Ralf Michaels and Antonia. Sommerfeld and crossposted at https://eapil.org/)

1. **The Proposal for a Directive on Corporate Sustainability Due Diligence**

The process towards an EU Corporate Sustainability Due Diligence Directive is gaining momentum. The EU Commission published a long awaited Proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD), COM(2022) 71 final, on 23 February 2022; the EU Council adopted its negotiation position on 1 December 2022; and now, the EU Parliament has suggested amendments to this Draft Directive on 1 June 2023. The EU Parliament has thereby backed the compromise textreached by its legal affairs committee on 25 April 2023. This sets off the trilogue between representatives of the Parliament, the Council and the Commission.

The current state of the CSDDD already represents a milestone. It not only introduces corporate responsibility for human rights violations and environmental damage – as already found in some national laws (e.g. in France; Germany;

Netherlands; Norway; Switzerland; United Kingdom) – but also and in contrast (with the exception of French law – for more details see *Camy*) introduces civil liability. Art. 22 (1) CSDDD entitles persons who suffer injuries as result of a failure of a company to comply with the obligations set forth in the Directive to claim compensation. It thereby intends to increase the protection of those affected within the value chain, who will now have the prospect of compensation; it also intends to create a deterrent effect by having plaintiffs take over the enforcement of the law as "private attorney generals". Moreover, the Directive requires that Member States implement this civil liability with an overriding mandatory application to ensure its application, Art. 22 (5) CSDDD. This is not unproblematic: the European Union undertakes here the same unilateralism that it used to criticize when previously done by the United States, with the Helms/Burton Act as the most prominent example.

That is not our concern here. Nor do we want to add to the lively discussion on the choice-of-law- aspects regarding civil liability (see, amongst others, *van Calster*, *Ho-Dac*, *Dias* and, before the Proposal, *Rühl*). Instead, we address a gap in the Draft Directive, namely the lack of any provisions on jurisdiction. After all, mandatory application in EU courts is largely irrelevant if courts do not have jurisdiction in the first place. If the remaining alternative is to bring an action in a court outside the EU, the application of the CSDDD civil liability regime is not, however, guaranteed. It will then depend on the foreign court's conflict-of-law rules and whether these consider the CSDDD provisions applicable – an uncertain path.

Nonetheless, no mirroring provisions on international jurisdiction were included in the CSDDD, although such inclusion had been discussed. Suggestions for the inclusion of a new jurisdictional rule establishing a *forum necessitatis* in the Brussels I Regulation Recast existed (see the Study by the European Parliament Policy Department for External Relations from February 2019, the Draft Report of the European Parliament Committee on Legal Affairs with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL) as well as the Recommendation of the European Groupe of Private International Law (GEDIP) communicated to the Commission on 8 October 2021). Further, the creation of a *forum connexitatis* in addition to a *forum necessitatis* had been recommended by both the Policy Department Study and the GEDIP. Nevertheless, the report of the European Parliament finally adopted,

together with the Draft Directive of 10 March 2021, no longer contained such rule on international jurisdiction, without explanation. Likewise, the Commission's CSDDD draft and the Parliament's recent amendments lack such a provision.

2. Enforcement Gap for Actions against Defendants Domiciled within the EU

To assess the enforcement gap, it is useful to distinguish EU companies from non-EU companies as defendants. For EU companies, the Directive applies to companies of a certain size which are formed in accordance with the legislation of a Member State according to Art. 2 (1) CSDDD – the threshold numbers in the Commission's draft and the Parliament amendments differ, ranging between 250–500 employees and EUR 40–150 million annual net worldwide turnover, with questions of special treatment for high-risk sectors.

At first sight, no enforcement gap seems to exist here. The general jurisdiction rule anchored in Art. 4 (1) Brussels I Regulation Recast allows for suits in the defendant's domicile. Art. 63 (1) further specifies this domicile for companies as the statutory seat, the central administration or the principal place of business. (EU-based companies can also be sued at the place where the harmful event occurred according to Art. 7 (2) Brussels I Regulation Recast, but this will provide for access to an EU court only if this harmful event occurred within the EU.) The objection of *forum non conveniens* does not apply in the Brussels I Regulation system (as clarified in the CJEU's *Owusu* decision). Consequently, in cases where jurisdiction within the EU is given, the CSDDD applies, including the civil liability provision with its mandatory application pursuant to Art. 22 (1), (5).

Yet there is potential leeway for EU domiciled companies to escape EU jurisdiction and thus avoid the application of the CSDDD's civil liability. One way to avoid EU jurisdiction is to use an exclusive jurisdiction agreement in favour of a third country, or an arbitration clause. Such agreements concluded in advance of any occurred damage are conceivable between individual links of the value chain, such as between employees and subcontractors (in employment contracts) or between different suppliers along the chain (in purchase and supply agreements). EU law does not expressly prohibit such derogation. Precedent for how such exclusive jurisdiction agreements can be treated can be found in the

case law following the *Ingmar* decision of the CJEU. In *Ingmar*, the CJEU had decided that a commercial agent's compensation claim according to Arts. 17 and 18 of the Commercial Agents Directive (86/653/EEC) could not be avoided through a choice of law in favour of the law of a non-EU country, even though the Directive said nothing about an internationally mandatory nature for the purpose of private international law – as Art. 22 (5) CSDDD in contrast now does. The German Federal Court of Justice (BGH) extended this choice-of-law argument to the law of jurisdiction and held that jurisdiction clauses which could undermine the application of mandatory provisions are invalid, too, as only such a rule would safeguard the internationally mandatory scope of application of the provisions. Other EU Member State courts have shown a similar understanding not only with regard to exclusive jurisdiction agreements but also with regard to arbitration agreements (Austrian Supreme Court of Justice; High Court of Justice Queen's Bench Division).

Common to Arts. 17 and 18 Commercial Agents Directive and Art. 22 CSDDD is their mandatory nature for the purpose of private international law, which established by the ECJ for the former and is legally prescribed for the latter in Art. 22 (5) CSDDD. This suggests a possible transfer of the jurisdictional argument regarding jurisdiction. To extend the internationally mandatory nature of a provision into the law of jurisdiction is not obvious; choice of law and jurisdiction are different areas of law. It also means that the already questionable unilateral nature of the EU regulation is given even more force. Nonetheless, to do so appears justified. Allowing parties to avoid application of the CSDDD would run counter to its effective enforcement and therefore to the *effet utile*. This means that an exclusive jurisdiction agreement in favour of a third country or an arbitration clause will have to be deemed invalid unless it is clear that the CSDDD remains applicable or the applicable law provides for similar protection.

3. Enforcement Gap for Actions against Defendants Domiciled Outside the EU

While the enforcement gap with regard to EU companies can thus be solved under existing law, additional problems arise with regard to non-EU corporations. Notably, the Draft Directive applies also to certain non-EU companies formed in accordance with the legislation of a third country, Art. 2 (2) CSDDD. For these

companies, the scope of application depends upon the net turnover within the territory of the Union, this being the criterion creating a territorial connection between these companies and the EU (recital (24)). The Parliament's amendments lower this threshold and thereby sharpen the scope of application of the Directive.

While application of the CSDDD to these companies before Member State courts is guaranteed due to its mandatory character, jurisdiction over non-EU defendants within the EU is not. International jurisdiction for actions against third-country defendants as brought before EU Member State courts is – with only few exceptions – generally governed by the national provisions of the respective Member State whose courts are seized, Art. 6 (1) Brussels I Regulation Recast. If the relevant national rules do not establish jurisdiction, no access to court is given within the EU.

And most national rules do not establish such jurisdiction. General jurisdiction at the seat of the corporation will usually lie outside the European Union. And the territorial connection of intra-EU turnover used to justify the applicability of the CSDDD does not create a similar basis of general jurisdiction, because jurisdiction at the place of economic activity ("doing business jurisdiction") is alien to European legal systems. Even in the US, where this basis was first introduced, the US Supreme Court now limits general jurisdiction to the state that represents the "home" for the defendant company (*BNSF Railroad Co. v. Tyrrell*, 137 S.Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)); whether the recent decision in *Mallory v. Norfolk Southern Railway Co.,* 600 U.S. (2023) will re-open the door to doing business jurisdiction remains to be seen (see *Gardner*).

Specific jurisdiction will not exist in most cases, either. Specific jurisdiction in matters relating to tort will be of little use, as in value chain civil liability claims the place of the event giving rise to damages and the place of damage are usually outside the EU and within that third state. Some jurisdictional bases otherwise considered exorbitant may be available, such as the plaintiff's nationality (Art. 14 French Civil Code) or the defendant's assets (Section 23 German Code of Civil Procedure). Otherwise, the remaining option to seize a non-EU defendant in a Member State court is through submission by appearance according to Art. 26 Brussels I Regulation Recast.

Whether strategic joint litigation can be brought against an EU anchor defendant in order to drag along a non-EU defendant depends upon the national provisions of the EU Member States. Art. 8 (1) Brussels I Regulation Recast, which allows for connected claims to be heard and determined together, applies only to EU-defendants – for non-EU defendants the provision is inapplicable. In some Member States, the national civil procedure provisions enable jurisdiction over connected claims against co-defendants, e.g. in the Netherlands (Art. 7 (1) Wetboek van Burgerlijke Rechtsvordering), France (Art. 42 (2) Code de procédure civile) and Austria (§ 93 Jurisdiktionsnorm); conversely, such jurisdiction is not available in countries such as Germany.

Various Member State decisions have accepted claims against non-EU companies as co-defendants by means of joinder of parties. These cases have based their jurisdiction on national provisions which were applicable according to Art. 6 (1) Brussels I Recast Regulation: In *Milieudefensie* in December 2015, the Court of Appeal at the Hague held permissible an action against a Dutch anchor defendant that was joined with an action against a Nigerian company as co-defendant based on Dutch national procedural law, on the condition that claims against the anchor defendant were actually possible. The UK Supreme Court ruled similarly in its *Vedanta* decision in April 2019, wherein it found that English private international law, namely the principle of the *necessary or proper party gateway*, created a valid basis for invoking English jurisdiction over a defendant not domiciled in a Member State (with registered office in Zambia) who had been joined with an anchor defendant based in the UK. The claim was accepted on the condition that (i) the claims against the anchor defendant involve a real issue to be tried; (ii) it would be reasonable for the court to try that issue; (iii) the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) the claims against the foreign defendant have a real prospect of success; (v) either England is the proper place in which to bring the combined claims or there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place or the convenient or natural forum. The UK Supreme Court confirmed this approach in February 2021 in its *Okpabi* decision (for discussion of possible changes in UK decisions after Brexit, see *Hübner/Lieberknecht*).

In total, these decisions allow for strategic joint litigation against third-country companies together with an EU anchor defendant. Nonetheless, they do not

establish international jurisdiction within the EU for isolated actions against non-EU defendants.

4. How to Close the Enforcement Gap – *forum legis*

The demonstrated lack of access to court weakens the Directive's enforceability and creates an inconsistency between the mandatory nature of the civil liability and the lack of a firm jurisdictional basis. On a substantive level, the Directive stipulates civil liability for non-EU companies (Art. 22 CSDDD) if they are sufficiently economically active within the EU internal market (Art. 2 (2) CSDDD). Yet missing EU rules on international jurisdiction vis-à-vis third-country defendants often render procedural enforcement before an intra-EU forum impossible – even if these defendants generate significant turnover in the Union. Consequently, procedural enforcement of civil liability claims against these non-EU defendants is put at risk. The respective case law discussed does enable strategic joint litigation, but isolated actions against non-EU defendants cannot be based upon these decisions. At the same time, enforceability gaps exist with respect to EU defendants: It remains uncertain whether the courts of Member States will annul exclusive jurisdiction agreements and arbitration agreements if these undermine the application of the CSDDD.

This situation is unsatisfactory. It is inconsistent for the EU lawmaker to make civil liability mandatory in order to ensure civil enforcement but to then not address the access to court necessary for such enforcement. And it is inadequate that the (systemic) question of judicial enforceability of civil liability claims under the Directive is outsourced to the decision of the legal systems of the Member States. National civil procedural law is called upon to decide which third-country companies can be sued within the EU and how the *Ingmar* case law for EU domiciled companies will be further developed. This is a problem of uniformity – different national laws allow for different answers. And it is a problem of competence as Member State courts are asked to render decisions that properly belong to the EU level.

The CSDDD aims to effectively protect human rights and the environment in EU-related value chains and to create a level playing field for companies operating within the EU. This requires comparable enforcement possibilities for actions

based on civil liability claims that are brought pursuant to Art. 22 CSDDD against all corporations operating within the Union. The different regulatory options the EU legislature has to achieve this goal are discussed in what follows.

Doing Business Jurisdiction

A rather theoretical possibility would be to allow actions against third-country companies within the EU in accordance with the former (and perhaps revived) US case law on *doing business jurisdiction* in those cases where these companies are substantially economically active within the EU internal market. This would be consistent with the CSDDD's approach of stretching its scope of application based on the level of economic activity within the EU (Art. 2 (2) CSDDD). However, the fact that such jurisdiction has always been considered exorbitant in Europe and has even been largely abolished in the USA speaks against this development. Moreover, a *doing business jurisdiction* would also go too far: it would establish general jurisdiction, at least according to the US model, and thus also apply to claims that have nothing to do with the CSDDD.

Forum Necessitatis and Universal Jurisdiction

Another possible option would be the implementation of a *forum necessitatis* jurisdiction in order to provide access to justice, as proposed by the European Parliament Policy Department for External Relations, the European Parliament Committee on Legal Affairs and the GEDIP. However, such jurisdiction could create uncertainty because it would apply only exceptionally. Moreover, proving a "lack of access to justice" requires considerable effort in each individual case. Until now, EU law provides for a *forum necessitatis* only in special regulations; the Brussels I Regulation Recast does not contain any general rule for emergency jurisdiction. Member State provisions in this regard generally require a certain connection with the forum to establish such jurisdiction – the exact prerequisites differ, however, and will thus not be easily agreed upon on an EU level (see *Kübler-Wachendorff*).

The proposal to enforce claims under Art. 22 CSDDD by means of universal civil jurisdiction for human rights violations, which could be developed analogously to universal jurisdiction under criminal law, appears similarly unpromising; it would also go further than necessary.

Forum connexitatis

It seems more promising to implement a special case of a *forum connexitatis* so as to allow for litigation of closely connected actions brought against a parent company domiciled within the EU together with a subsidiary or supplier domiciled in a third country, as proposed by the European Parliament Policy Department for External Relations and the GEDIP. This could be implemented by means of a teleological reduction of the requirements of Art. 8 (1) Brussels I Regulation Recast with regard to third-country companies, which would be an approach more compatible with the Brussels Regulation system than the implementation of a *forum necessitatis* provision (such a solution has, for instance, been supported by *Mankowski*, in: Fleischer/Mankowski (Hrsg.), LkSG, Einl., para. 342 and the GEDIP). This would simultaneously foster harmonisation on the EU level given that joint proceedings currently depend upon procedural provisions in the national law of the Member States. Moreover, this could avoid "blame games" between the different players in the value chain (see *Kieninger*, RW 2022, 584, 589). For the implementation of such a *forum connexitatis*, existing Member State regulations and related case law (*Milieudefensie, Vedanta*, and *Okpabi*) can serve as guidance. Such a forum is not yet common practice in all Member States; thus, its political viability remains to be seen. It should also be borne in mind that the implementation of a *forum connexitatis* on its own would only enable harmonised joint actions that were brought against EU domiciled anchor defendants together with non-EU defendants; it would not enable isolated actions against third-country companies – even if they are economically active within the EU and fall within the scope of application of the CSDDD.

Forum legis

The best way to close the CSDDD enforcement gap would be introducing an international jurisdiction basis corresponding to the personal scope of application of the Directive. The EU legislature would need to implement a head of jurisdiction applicable to third-country companies that operate within the EU internal market at the level specified in Art. 2 (2) CSDDD. Effectively, special jurisdiction would be measured on the basis of net turnover achieved within the EU. This would procedurally protect the Directive's substantive regulatory objectives of human rights and environmental protection within EU-related value chains. Moreover, this would ensure a level playing field in the EU internal market.

Other than a forum premised on joint litigation, this solution would allow isolated

actions to be brought – in an EU internal forum – against non-EU companies operating within the EU. The advantage of this solution compared to a forum of necessity is that the connecting factor of net turnover is already defined by Art. 2 (2) CSDDD, thus reducing the burden of proof, legal uncertainty and any unpredictability for the parties. Moreover, this approach would interfere less with the regulatory interests of other states than a *forum necessitatis* rule, which for its part would reach beyond the EU's own regulatory space.

A *forum legis* should not be implemented only as a subsidiary option for cases in which there is a lack of access to justice, because this would create legal uncertainty. The clear-cut requirements of Art. 2 (2) CSDDD are an adequate criterion for jurisdiction via a *forum legis*. On the other hand, it should not serve as an exclusive basis of jurisdiction, because especially plaintiffs should not be barred from the ability to bring suit outside the EU. The risk of strategic declaratory actions brought by companies in a court outside the EU seems rather negligeable, and this can be avoided either by giving preference to actions for performance over negative declaratory actions, as is the law in Germany or through the requirement of recognisability of a foreign judgment, which would not be met by a foreign decision violating domestic public policy by not providing sufficient protection.

This leaves a problem, however: The CSDDD does not designate which Member State's court have jurisdiction. Since a *forum legis* normally establishes adjudicatory jurisdiction correlating with the applicable law, jurisdiction lies with the courts of the country whose law is applied. This is not possible as such for EU law because the EU does not have its own ordinary courts. The competent Member State court within the EU must be determined. Two options exist with regard to the CSDDD: to give jurisdiction to the courts in the country where the highest net turnover is reached, or to allow claimants to choose the relevant court. The first option involves difficult evidentiary issues, the second may give plaintiffs an excessive amount of choice. In either case, non-EU companies will be treated differently from EU companies on the question of the competent court – for non-EU companies, net turnover is decisive in establishing the forum, for EU-companies, the seat of the company is decisive. This difference is an unavoidable consequence resulting from extension of the scope of application of the Directive to third-country companies on the basis of net turnover.

5. Implementation

How could this *forum legis* be achieved? The most straightforward way would be to include a rule on jurisdiction in the CSDDD, which would then oblige the Member States to introduce harmonised rules of jurisdiction into national procedural law. This would be a novelty in the field of European international civil procedure law, but it would correspond to the character of the special provision on value chains as well as to the mechanism of the CSDDD's liability provision. An alternative would be to include in the Brussels I Regulation Recast a sub-category of a special type of jurisdiction under Art. 7 Brussels I Regulation Recast. This as well would be a novelty to the Brussels system, which in principle requires that the defendant be seated in a Member State (see also *Kieninger*, RW 2022, 584, 593, who favours reform of the Brussels I Regulation Recast for the sake of uniformity within the EU). This second option would certainly mesh with current efforts to extend the Brussels system to non-EU defendants (see *Lutzi/Piovesani/Zgrabljic Rotar*).

The implementation of such a *forum legis* is not without problems: It subjects companies, somewhat inconsistently with the EU legal scheme, to *de facto* jurisdiction merely because they generate significant turnover in the EU's internal market. Yet such a rule is a necessary consequence of the extraterritorial extension of the Directive to third-country companies. The unilateral character of the CSDDD is problematic. But if the CSDDD intends to implement such an extension on a substantive level, this must be reflected on a procedural level so as to enable access to court. The best way to do this is by implementing a *forum legis*. The CSDDD demonstrates the great importance of compensation of victims of human rights and environmental damage, by making the cicil liability rule internationally mandatory. Creating a corresponding head of jurisdiction for these substantive civil liability claims is then necessary and consistent in order to achieve access to court and, thus, procedural enforceability.

No Sunset of Retained EU Conflict of Laws in the UK, but Increased Risk of Sunburn

By Dr Johannes Ungerer, University of Oxford

The sunset of retained EU law in the UK has begun: the Retained EU Law (Revocation and Reform) Act 2023 received Royal Assent at the end of June. The Act will revoke many EU laws that have so far been retained in the UK by the end of 2023.

The good news for the conflict of laws is that the retained Rome I and II Regulations are not included in the long list of EU legal instruments which are affected by the mass-revocation. Both Regulations have been retained in the UK post-Brexit by section 3 of the European Union (Withdrawal) Act 2018 and were modified by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (as amended in 2020). The retained (modified) Rome I and II Regulations will thus be part of domestic law beyond the end of 2023. Yet this retained EU law must not be called by name anymore: it will be called "assimilated law" according to section 5 of the Retained EU Law (Revocation and Reform) Act 2023 (although the title of this enactment, like others, will strangely continue to contain the phrase "Retained EU Law" and will not be changed to "Assimilated Law", see section 5(5)).

Equally, the special conflict of laws provision in regulation 1(3) of the Commercial Agents (Council Directive) Regulations 1993 (as amended in 1998) is not revoked either. This is particularly interesting because these Regulations have not been updated since Brexit, which means they still refer, for instance, to "the law of the other member State".

Although international jurisdiction of UK courts is largely determined by domestic law these days, which replaced the Brussels I Recast Regulation, the Regulation's rules on jurisdiction in consumer and employment matters have been autonomously transposed into sections 15A–D of the Civil Jurisdiction and Judgments Act 1982 by the Civil Jurisdiction and Judgments (Amendment) (EU

Exit) Regulations 2019 (as amended in 2020). The mass-revocation will not affect them either, which means that they will continue to benefit consumers and employees in UK courts beyond the end of 2023.

However, a significant difference to the current situation will arise with regard to how strictly courts will continue to follow precedent on the interpretation of the "assimilated law". This matters for decisions by the Court of Justice of the EU (CJEU) as well as for UK court decisions on the interpretation of the Rome I and II Regulations (and the Commercial Agents Directive/Regulations). The concern is that continuing to apply the EU law which will not be sunsetted, but without continuing to strictly follow the established interpretations, has the potential of increasing the risk of uncertainty or, metaphorically speaking, sunburn.

So far, the risk of sunburn has been mitigated by section 6(3), (4)(a), and (5) of the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020: the existing body of CJEU decisions has remained binding post-Brexit on the Supreme Court to the same extent as the Supreme Court's own decisions. The Supreme Court can, like previously the House of Lords, depart from precedent in line with the Practice Statement [1966] 1 WLR 1234 (see *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, at [25]), but the Supreme Court is very hesitant to do so in order to maintain legal certainty and predictability. The Court of Appeal has been given a similar power to divert from CJEU case law, section 6(4)(b)(i) and (5A) of the amended European Union (Withdrawal) Act 2018. Decisions of the CJEU handed down after 2020 have in any event not been binding anymore on UK courts, section 6(1) of the amended European Union (Withdrawal) Act 2018, but it has been permitted to take them into account in the UK ("may have regard", section 6(2)).

The Retained EU Law (Revocation and Reform) Act 2023 will change how UK courts can deviate from CJEU case law and their own precedent. This will reduce the protection from uncertainty (or sunburn), which has been maintained so far.

- A UK court will in principle still be obliged to interpret "assimilated law" as established by the CJEU's "assimilated case law" (only the "retained general principles of EU law" have been omitted in the new section 6(3)(a)).
- However, the Supreme Court and the Court of Appeal will not anymore be

restricted by the ordinary domestic rules on deviation from precedent as mentioned above. Rather, according to the new section 6(5), CJEU case law will be treated like "decisions of a foreign court", which in principle are not binding. When deviating from "assimilated case law" by the CJEU, UK courts are solely instructed to have regard to "any changes of circumstances which are relevant to the retained EU case law, and the extent to which the retained EU case law restricts the proper development of domestic law."

- Furthermore, according to the newly inserted section 6(5ZA), a UK court will be permitted to depart from its own "assimilated domestic case law" (which means UK case law on "assimilated law" in contrast to "assimilated case law" by the CJEU) without the usual domestic restrictions on deviation from domestic precedent. Instead, when deviating from its own case law, the UK court will only have to consider "the extent to which the assimilated domestic case law is determined or influenced by assimilated EU case law from which the court has departed or would depart; any changes of circumstances which are relevant to the assimilated domestic case law; and the extent to which the assimilated domestic case law restricts the proper development of domestic law."

Departing from CJEU and UK case law on the Rome Regulations (and the Commercial Agents Directive) will thus become a lot easier, at the expense of "assimilated" legal certainty and predictability. The time at which the change by the Retained EU Law (Revocation and Reform) Act 2023 will become effective has yet to be determined in line with its section 22(3).

Interestingly, in the above-mentioned Civil Jurisdiction and Judgments Act 1982, section 15E(2) explicitly prescribes that the jurisdictional rules for consumers and employees in sections 15A–D are to be interpreted with regard to CJEU principles on consumer and employee jurisdiction under the Brussels regime. More precisely, "regard is to be had to any relevant principles laid down" before the end of 2020 by the CJEU in connection with the Brussels jurisdictional rules; by contrast, the phrases "retained EU law" or "retained case law" are not mentioned. Since the Retained EU Law (Revocation and Reform) Act 2023 does not revoke any rules of the Civil Jurisdiction and Judgments Act 1982 or the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, this specific mandate to have regard to CJEU principles when interpreting the retained jurisdictional rules

will be maintained in its own right beyond the end of 2023. And since the Civil Jurisdiction and Judgments Act 1982 does not use the technical language of retained EU law or retained case law, whose binding character would be affected by the Retained EU Law (Revocation and Reform) Act 2023, the retained jurisdictional rules should not suffer from uncertainty and sunburn. Yet, despite this reasoning, the interpretation of the consumer and employee jurisdictional rules might in practice be condemned to the same fate as the assimilated case law that will be up for grabs.

Many thanks to Professor Andrew Dickinson for his comments on an earlier draft.